

## **Briefing note: Scottish Government Debate on International Human Rights Days**

**8 December 2022**

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The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

The Commission is accredited as an “A Status” National Human Rights Institution within the United Nations (UN) system.

[www.scottishhumanrights.com](http://www.scottishhumanrights.com)

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## **EXECUTIVE SUMMARY**

1. We consider the UK Government's Bill of Rights Bill threatens to damage Scotland's progress in developing a human rights culture, by undermining the European Convention on Human Rights (ECHR) protections available under the Human Rights Act and the Scotland Act, unsettling Scottish devolution and introducing confusion and uncertainty for Scotland's public authorities;
2. The Bill of Rights and its supporting publications fail to acknowledge the complex implications of the proposed measures for Scotland;
3. The Bill of Rights threatens to undermine the UK's international reputation. We note previous comments from the Office of the High Commissioner for Human Rights that the UK risks going back on long-standing human rights commitments<sup>1</sup>;
4. Having largely ignored the findings of its own Independent Review, which concluded there was no case for widespread reform, the UK Government has still to produce persuasive evidence to support the claim that the HRA needs to be replaced;
5. The Bill of Rights will create additional hurdles for rights holders and restrict their access to justice. It will also designate some breaches of Convention rights as insignificant or undeserving, diluting protections and undermining the universality of human rights;
6. The overall objectives as set out by the UK Government are at odds with the UK's international obligations and domestic support for the HRA, particularly in Scotland;
7. The UK Government states it is committed to the UK remaining party to the ECHR but wants UK courts to depart from rulings of the European Court of Human Rights (ECtHR). This risks a situation in which rights holders will no longer be able to exercise their Convention rights in full in UK courts;

8. If national courts interpret Convention rights distinctly from the (ECtHR), this will create legal conflict, confusion and uncertainty, and a likely subsequent increase in referrals to Strasbourg.

## **Human Rights Day**

Human Rights Day marks the day the United Nations General Assembly adopted, in 1948, the Universal Declaration of Human Rights (UDHR).

This milestone document proclaims the inalienable rights that everyone is entitled to as a human being - regardless of race, colour, religion, sex, language, political or other opinion, national or social origin, property, birth or other status.

These same principles underpin the European Convention on Human Rights (ECHR), which became part of Scotland's own laws with the introduction of the Human Rights Act and the Scotland Act in 1998. The Convention protects vital human rights standards such as the right to life, freedom from torture, freedom of expression and the right to private and family life.

The Human Rights Act 1998 brought convention rights home, enabling people to raise human rights issues in Scottish courts. The Human Rights Act also places a duty on public bodies to comply with human rights in everything they do.

## **The Human Rights Act is under threat**

Current proposals by the UK Government to replace the Act with a new Bill of Rights would weaken the protections in the Human Rights Act and put the UK in breach of its international obligations.

We are clear in our view the HRA works well as it stands, and that no convincing case has been made for reform. This opinion is widely shared across UK and Scottish human rights organisations, civil society, the UK Joint Committee on Human Rights and the UK Government's

own Independent Human Rights Act Review, which concluded the Human Rights Act is well understood and used appropriately by UK courts and public bodies.

The devolved governments of Scotland and Wales both oppose the Bill.

## **How the Human Rights Act works**

The UK signed and ratified the European Convention on Human Rights over 50 years ago, having been instrumental in its creation. Under the Convention, European states agreed to recognise and protect the rights set down in the treaty and included access to a supranational monitoring body – now the European Court of Human Rights – to ensure that individuals could access justice.

The Human Rights Act was intended to bring that protection home for everyone in the UK and when it came into force in 2000, Convention rights finally became part of UK law.

Ensuring that people could enforce their rights in national courts has been transformative: landmark cases have ended unlawful detention in care homes<sup>2</sup>, brought an end to degrading conditions in Scottish prisons<sup>3</sup> and delivered improvements to criminal procedure including legal representation during police questioning<sup>4</sup>.

But the purpose and effect of the Act went far beyond individual court decisions. By making Convention rights directly enforceable at home, decisions on rights protection are issued by national courts, clarifying the scope of our rights and holding organisations carrying out public functions accountable. This in turn has promoted a human rights culture, increased awareness and supported a human rights based approach to policy and decision making.

While there is still much to be done to strengthen human rights based policy and practice, significant progress has been made as a consequence of the incorporation of Convention rights through the Act, particularly in Scotland.

## **The Scotland Act 1998 increases the level of protection**

The Human Rights Act is a pillar of the constitutional framework of devolution in Scotland, where the rights set down in the European Convention are protected under both the Human Rights Act and the Scotland Act 1998 (SA). Where a human rights issue arises in relation to devolved matters or acts of devolved bodies, claims may be taken under either or both Acts. Acts of the Scottish Parliament can be void if they are found to be incompatible with Convention rights (section 29(1) and section 29(2)(d)).

While the Scotland Act provides a greater degree of human rights protection for the people of Scotland, this is to a degree contingent on the Human Rights Act, which has been described as a 'dictionary' for certain phrases of the Scotland Act<sup>5</sup>.

Where the Bill of Rights proposals 'water down' the protections provided in the Human Rights Act<sup>6</sup>, this potentially changes the parameters of the competence of the Scottish Government and Scottish Parliament, significantly undermining rights protection for people in Scotland under the Scotland Act, as well as under the Human Rights Act.

The proposals from the UK Government do not give any clarity about how the replacement of the Human Rights Act with a new Bill of Rights will affect the interpretation of Convention rights in the context of claims under the Scotland Act.

## **Progressive incorporation of human rights culture**

The HRA has contributed significantly to fostering an ever-evolving human rights culture in Scottish public bodies over the last 20 years. For example, it has encouraged those bodies to mainstream human rights considerations throughout their decision making, in order to ensure fairer outcomes for people (see Annex 1).

The Scottish Parliament has acknowledged the requirement to embed human rights across its work. In 2018 the Equalities and Human Rights

Committee of the Scottish Parliament set out a ‘human rights roadmap’ for the Scottish Parliament.<sup>7</sup> Parliament has a vital role to play in ensuring that Scottish Government and other public bodies are upholding the protections of the European Convention and other international human rights standards.

Work is now well underway in Scotland to incorporate into law the human rights contained in a number of other international human rights treaties, covering: economic, social, cultural and environmental rights, and stronger protections for the rights of women, disabled people, black and ethnic minority people, older persons and children. Following detailed work by the First Minister’s Advisory Group on Human Rights Leadership and the Scottish National Taskforce on Human Rights Leadership, the Scottish Government has committed to introducing a Bill during this term of the Scottish Parliament, incorporating these rights into Scots law.<sup>8</sup>

There has been considerable progress in the development of a human rights culture in Scotland. The Human Rights Act and the Scotland Act have together played a key role in that progress.

It is critical that this progress is not undermined by proposals to reduce Convention rights protection, unsettling Scottish devolution and introducing confusion and uncertainty for Scotland’s public authorities.

**The Commission strongly encourages Parliament to support the human rights of all people in Scotland and ensure that access to justice and human rights based approaches are strengthened rather than weakened.**

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## ANNEX 1

- Her Majesty’s Inspectorate of Prisons for Scotland reports itself as taking a human rights based approach to the inspection and monitoring of prisons.<sup>9</sup>
- Scotland’s Health and Social Care Standards, implemented from April 2018, explicitly “seek to provide better outcomes for everyone, to ensure individuals are treated with respect and dignity and that the basic human rights we are all entitled to are upheld.”<sup>10</sup>
- NHS Health Scotland has tested improvement approaches to embedding human rights in its work and has produced a range of resources setting out how the right to health and a rights based approach can strengthen work to reduce health inequalities.<sup>11</sup>

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<sup>1</sup> [OL GBR \(12.2022\) \(ohchr.org\)](#)

<sup>2</sup> [‘Equality and Human Rights Commission reaches settlement on ending unlawful detention of adults with incapacity by NHS Greater Glasgow and Clyde’](#), Press release (20 Nov 2020).

<sup>3</sup> *Napier v. The Scottish Ministers* [2005] CSIH16.

<sup>4</sup> *Cadder v. Her Majesty’s Advocate* [2010] UKSC 43.

<sup>5</sup> [Somerville v The Scottish Ministers \[2007\] UKHL 44](#) per Lord Hope at paragraph 22

<sup>6</sup> For example, the provisions contained in Clause 3 concerning the *Interpretation of the Convention rights* are intended to make Convention rights a less stringent constraint on legislative or executive competence than under HRA.

<sup>7</sup> [‘Getting Rights Right: Human Rights and the Scottish Parliament’](#) (26 Nov 2018), SP Paper 341, 6<sup>th</sup> Report, 2018 (Session 5), The Equalities and Human Rights Committee, Scottish Parliament.

<sup>8</sup> See ‘A fairer, greener Scotland - Programme for Government 2021-22’ at page 35, available at [fairer-greener-scotland-programme-government-2021-22 \(3\).pdf](#)

<sup>9</sup> [‘What next for Prisons in Scotland? Reflections on five years as HM Chief Inspector of Prisons for Scotland’](#) (2018) David Strang, HIMPS, referenced in [‘Inquiry: 20 years of the HRA 1998 Written evidence to the Joint Committee on Human Rights’](#) (2018), Scottish Human Rights Commission.

<sup>10</sup> See: [New Care Standards | Review of Scotland’s National Care Standards](#)

<sup>11</sup> See: [Submission from NHS Health Scotland.pdf \(parliament.scot\)](#)