

## **Written evidence from the Human Rights Consortium (HRA0051)**

The Human Rights Consortium Scotland is a civil society network of 110 member organisations who work together to protect human rights in Scotland. Our members span a very wide range of types of organisations from smaller local charities to national or issue-based organisations, and across a range of issue areas such as mental health, environment, disability, health and advocacy. Many of them are not the ‘usual suspects’ in human rights debates, but all of them recognise the importance of human rights being realised for all.

**Much of the main body of this evidence was also submitted to the Independent Human Rights Act Review (IHRAR).** It therefore focuses on the panel’s consultation questions, drawing on civil society’s experience and expertise of providing services, interacting with policy and law in Scotland, and working with and advocating for marginalised individuals and groups in Scottish society. Member organisations who directly support this submission are:

Health and Social Care Alliance Scotland (the ALLIANCE)

Engender

Humanist Society Scotland

Deaf Scotland

Close the Gap

Welfare Scotland

Scottish Commission for People with Learning Disabilities (SCLD)

Scottish Refugee Council

Howard League Scotland

British Institute for Human Rights

Article 12 in Scotland

Forth Valley Migrant Support Network

Together (Scottish Alliance for Children’s Rights)

Alcohol Focus Scotland

Nourish Scotland

Equality Network

Scottish Trans

Inclusion Scotland

JustRight Scotland

Civil society in Scotland is overwhelmingly committed to the progression and advancement of human rights in society, in law and in practice. Over 200 organisations are signatories to the Scotland Declaration on Human Rights<sup>1</sup>, a civil society statement that says that they ‘share profound concerns ... about the persistent negative rhetoric around the protection and promotion of rights in the UK.’ They call for four principles to apply in all decisions that affect human rights:

- **No going back:** Human rights and equalities protections in law, policy and practice must not be reduced or regressed for any individual, group, community or sector of the population.
- **Progression:** Human rights standards should be continually strengthened over time. Scotland must help to shape and adopt the highest international human rights and equalities standards.
- **Transparency:** Any changes to existing rights protections should be undertaken only with a fully transparent consultation process and the appropriate degree of parliamentary scrutiny at all levels.
- **Participation:** The people of Scotland must be engaged in a process of understanding what their rights are, how they are protected and what more can be done to protect their rights. Any significant change in the protection of rights must be based on this meaningful engagement.

We consider that these four principles should apply to decision-making on human rights. We welcome that the IHRAR is not considering withdrawal from the European Convention on Human Rights (ECHR) nor changes to the substantive rights within the Human Rights Act. However, we also recognise that this review comes after several years of negative rhetoric surrounding the Human Rights Act – and human rights protections in general – and the removal of the legal protections of the EU Charter of Fundamental Rights. We highlight that there is little-to-no appetite in Scottish civil society to see *any* weakening of how the HRA can be used to ensure government accountability. As discussed in more detail below, this is because 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.

**We strongly recommend that IHRAR makes no recommendations that would lead to the HRA having any less ‘teeth’, impact and effectiveness in protecting individuals, on law and policy, and on improving our public services.**

**We also highlight that there must be utmost caution around the impact of any recommendations within the context of devolution in Scotland.** This is because firstly, the HRA is embedded into, and interwoven throughout devolution, both in its basis within the

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<sup>1</sup> Full Declaration and list of signatories available at [www.humanrightsdeclaration.scot](http://www.humanrightsdeclaration.scot)

Scotland Act 1998 and the particularities of the ‘strike down’ power, but also in the ways in which devolution has developed. As Scottish courts have increasingly become used to considerations around HRA implications and implementation, so has the Parliament increasingly becoming used to discussion on law and policy based on the underpinning of the HRA and what it looks like in practice through clarity in domestic and European Court of Human Rights (ECtHR) case law.

Secondly, and most importantly, Scotland is embarking on major human rights law reform. In recent days, a Bill to incorporate the UN Convention on the Rights of the Child (UNCRC) into Scots law has been passed by the Scottish Parliament. Taking a maximalist approach within the devolved settlement, this Bill is world-leading and will bring significant improvement in children and young people’s experience of rights. We highlight that this Bill was very widely supported across civil society and across all political parties.

In parallel, a National Taskforce on Human Rights Leadership has published recommendations for a broader new human rights statutory framework for Scotland. The Taskforce recommended incorporation of four international rights treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR), 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). In addition, it recommended putting the right to a healthy environment in Scots law for the first time, as well as rights for LGBTi people and older people. The Taskforce also proposed new duties on public authorities, and further exploration of how we can ensure that routes to remedy are accessible, affordable, timely and effective. The Scottish Government has committed to implementing all of these recommendations (if re-elected in May).

We further highlight that to inform the work of the Taskforce, the Consortium together with the Scottish Human Rights Commission facilitated the All Our Rights In Law project that gathered the views of over 400 people about new human rights law. The project particularly spoke to those groups most at risk of infringements of their rights or who are seldom-heard in human rights developments. The findings of this project are specific to the new human rights statutory framework in Scotland - however, they are also extremely valuable for understanding what is important to people about human rights laws in general. A summary of the project’s findings are provided in Annex A.

**Taken together, these developments point to a radical and ambitious new human rights landscape in Scotland, one that will mean that human rights law will only have more significant impact than ever before on culture, policy and practice for both communities and public authorities.**

It is in this context that **any amendments to the HRA and how it operates could have highly regrettable, detrimental impacts on these very positive and welcome human rights advances in Scotland.** Professor Nicole Busby, in a briefing paper for the Civil Society Brexit Project,<sup>2</sup> 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*

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<sup>2</sup> Busby, N. Human Rights and Devolution: The Independent Review of the Human Rights Act: Implications for Scotland, for the Civil Society Brexit Project 2020, available at: [Layout 1 \(hrcscotland.org\)](https://www.hrcscotland.org)

*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 relationship between UK courts and the European Court of Human Rights (ECtHR)**

We see the strengths of the current relationship between UK courts and the ECtHR as set out in Section 2 of the HRA as:

- **Policy development is better able to take into account human rights through use of Strasbourg case law**

Policy discussion and development in Scotland is increasingly marked by use, reference to and interaction with ECtHR case law. As civil society organisations who are often involved in policy influencing, many Consortium member organisations refer to ECtHR cases in consultation responses, in evidence to parliamentary committees and in research policy briefings. The case law has enabled those engaged in policy discussion to tease out the details of how the HRA applies, so that this can actually have impact upon the policy and laws being developed. Whilst this reference to Strasbourg case law may still happen if ECtHR case law was not taken into account under Section 2 of the HRA, it is the value of this case law, to a certain extent, as a predictor and guide to how issues will be dealt with by UK courts, as well as a body of case law that provides rich, varied and evolving judgments, which is of particular value to civil society in their policy role.

### **Example: Equal protection of children**

For several years there was considerable debate in Scottish society and parliament around whether the law that allowed physical punishment of children by their parents should be changed. Eventually in 2019, the law was changed to give children equal protection from assault. It is notable that within discussions that led to this law change, alongside clear advocacy for application of the UNCRC, there was also discussion around the application of case law from the ECtHR. This case law was not always clear or straightforward – indeed, over several years the ECtHR evolved its case law in this area. However, it was a point of helpful reference and evidence

to guide decisions based on human rights compliance as well as Europe-wide standards to aspire to.

### **Example from Howard League Scotland**

The HRA has had a significant impact on the advancement of prisoners' rights, where domestic law would not otherwise have provided adequate remedies. Even with the benefit of human rights-based protections, however, progress is often limited and slow. It is, therefore, vital to guard against any indirect dilution of existing rights, which may arise as a consequence of procedural barriers to enforcement. This is a particularly anxious concern in the sphere of prisoners' residual liberty, which is acutely vulnerable to corrosion by the state.

A notorious example is the persistent failure by the UK to remove a 'blanket ban' on prisoner voting, despite repeated rulings by the ECtHR that the policy breached Article 3 of Protocol 1 ECHR (right to free elections). Following the case of *Hirst v United Kingdom* in 2005, it has taken some 15 years to effect positive change. In 2020, limited enfranchisement, of prisoners serving sentences of 12 months or less, was finally provided in respect of local government elections in Scotland. Around the same time, England and Wales saw only administrative (rather than legislative) change, and to a lesser degree. The influence of international human rights has, therefore, been crucial to effect domestic policy change in this area.

- **Positive benefits of mutual understanding of human rights across Europe**

The requirement on courts to take into account case law from the ECtHR has helped to provide greater legal certainty which has enabled greater clarity in how ECHR rights apply to individual circumstances and to the services that we deliver. In particular, this means that we are able to work with, and learn from the expertise and resources, of similar organisations and networks across Europe. We share mutual understanding of ECHR rights and what they mean in practice, including in evolving circumstances, because of our common relationship to the ECtHR and its case law. At a time when we have never been more aware of our shared regional and global challenges such as COVID-19 and climate change, it would be anachronistic to cut ourselves off from being fully part of the European human rights framework.

- **ECtHR case law has progressed human rights in Scotland**

The ECtHR has been a very positive force for good on the progression of human rights in Scotland. The Section 2 requirement on courts means that we can draw on this significant body of case law and benefit from best practice drawn from across Europe to ensure that we continue to protect and advance human rights to the greatest extent. We are concerned that any UK distancing from ECtHR jurisprudence could risk unhelpful divergence and reduction in rights standards for people in the UK. We risk being left behind in the evolution and

progression of human rights understandings, because we would fail to gain as much from this considerable body of case law. In a post-COVID context where we are all very aware of the importance of human rights protections such as for our right to life, to health, or to family life, no steps should be taken that might curtail our advancements to make human rights a reality for all. As well as there being no good reason to distance our courts from the ECtHR, there are many good reasons to remain fully engaged with it.

### **Example from Equality Network and Scottish Trans Alliance**

Equality Network and the Scottish Trans Alliance believes the HRA and its requirement to take case law from ECtHR into account is extremely important to ensuring Scotland, and the rest of the UK, keeps step with the rest of the world with regards to human rights for LGBTI people.

In 2002 the case of Christine Goodwin v UK was decided by the ECtHR, the application having been made in 1995. Christine Goodwin, a trans woman, claimed she had faced sexual harassment at work following her gender reassignment. She also stated that the fact that her NI number remained the same meant her employer was able to see her previous name and gender, outing her as trans without her permission. The ECtHR found this to be a violation of the ECHR both with regards to right to a private life as well as with regards to the right marry and start a family. As a result of this case and the related case of I v UK, the Gender Recognition Act 2004 was introduced in the UK.

For all of the reasons above, **there should be no change to Section 2 of the HRA.**

Instead, we recommend endorsement of the approach taken by the UNCRC Incorporation (Scotland) Act 2021 to include an interpretive clause in the new Scotland human rights framework that will enable explicit links to the widest range of international interpretive human rights tools for all of those charged with its implementation and ongoing interpretation.

### **Impact of the HRA on the relationship between the judiciary, the executive and the legislature**

The strengths of the current approach include:

- **Individuals have a route to effective remedy**

Consortium member organisations work with some of the most marginalised people in Scotland, made very vulnerable by circumstances that are often outwith their control. Often their sense of agency and dignity are in tatters. They are often in minority groups whose particular interests would not show up in manifestos or be major issues at the ballot box – indeed, sometimes their interests are those which become political footballs. The role of the courts is vital as an avenue for them as individuals to ensure that the implications for their human rights of any law or policy are taken into account. The courts are a fundamental route

for these individuals to access accountability and to have a voice – without judicial review, their rights would be infringed upon, often very seriously, and their lives negatively impacted without any way to challenge this. Judicial review with the current (working) HRA framework gives people hope, dignity and ultimately protection of their basic rights.

### **Example from Scottish Refugee Council**

The HRA has provided significant protection to people seeking asylum and those recognised as refugees in the UK. Whilst the rights afforded by 1951 Refugee Convention primarily only apply to those fall within its definition of who is and who is not a 'refugee' (and have never been formally incorporated into domestic law), the protections of the ECHR, and by extension those of the HRA, encompass everyone within the UK. As such, people who seek safety in the UK who do not meet the threshold of the 1951 Convention or are seeking protection for reasons outwith the Convention have enjoyed the protections of the HRA - chiefly afforded by Article 3 (ECHR) or Article 8 (ECHR) alone or in tandem with Article 14 (ECHR).

Since March last year, Scottish Refugee Council and other NGOs have sought to ensure that asylum seekers, already in vulnerable situations before the pandemic, have been able to be safe and comply with Covid-19 restrictions to protect everyone, often having to employ human rights arguments to do so. In October 2020 as England moved into a second phase of tighter Covid-19 restrictions, the First Tier of the Asylum Support Tribunal allowed an appeal against the Home Office's decision to end accommodation and basic financial support to two refused asylum seekers (PA/MA)<sup>[1]</sup>. The decision concluded that making people destitute who reside in an area under Tier 3 restrictions, and are unwilling to leave the UK, may not only breach their Convention rights but those of the general public and the risk to their health and wellbeing.

- **Better implementation of law**

Parliament makes laws for everyone, but how the law will be applied, particularly across such a wide range of services and changing circumstances, is necessarily uncertain and shifts over time. Courts can therefore ensure accountability for any ways in which the law as applied falls short and thus impacts fundamental human rights. This impact could be for example, on individuals who are particularly vulnerable, or who are facing multiple and overlapping forms of discrimination or disadvantage. The impact on the individuals may never have been the intention of the legislature, but how the law has been implemented has had the effect of infringing upon an individual's fundamental rights. We consider that in these **details of implementation**, the courts can often have a very positive role that sits alongside that of the legislature – the courts do not veer off from the legislature's overall intention but they can ensure that unintended and unexpected impacts on individuals can be properly taken into account.

### **Example: the bedroom tax**

The blanket application of the bedroom tax led to disadvantage for many disabled people. In a unanimous judgment delivered by Lady Hale in *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, the Supreme Court ruled that applying a 14% housing benefit reduction to a man was a breach of his right to home under the

Human Rights Act. The man's partner was severely disabled and the couple needed an extra bedroom for her medical equipment. The ruling restored full housing benefit to at least 155 partners of disabled people who were also subjected to the bedroom tax before rules changed in 2017.

Notably, one case can avoid many people having to experience the same rights infringement – in this case there were at least 130 “lookalike cases” in England and Wales, approximately 25 more in Scotland and many more that were never taken to tribunal.

- **Better public services**

Holding government to account cannot be left to elections only, but there needs to be avenues of accountability throughout our system of public decision-making. Sometimes where human rights infringements have been raised with government and with the legislature but no actual action has been taken to address these rights infringement, it is right and proper that the courts step in to insist on remedy and to be a guarantor of human rights.

**Example: improved prison conditions**

“Slopping out” required the need to manually empty human waste when prison cells were unlocked in the morning because inmates were not provided with access to a flush toilet overnight. This practice had been banned almost a decade earlier in England and Wales but persisted in Scottish prisons even though there was widespread acceptance that it needed to change. As a result of the case *Napier v The Scottish Ministers* [2005] CSIH 16 which was brought by a Scottish prisoner, the practice of ‘slopping out’ was banned in Scottish prisons. Robert Napier successfully claimed that the conditions in which he was held contravened Article 3 of the ECHR as they were inhuman and degrading. As a result of the *Napier* judgment prisoners who had been subject to slopping out practices were entitled to compensation and the Scottish Prison Service was required to invest in updated toilet facilities.

- **Increased legal certainty**

The impact of courts within the human rights framework is not only to be found within individual court decisions, but also in the legal certainty and clarity that this brings to policy and practice. Many across civil society are directly involved in service design and delivery, whether through working with or influencing public authorities, or sometimes, in direct contracts with public authorities to deliver services. ECHR rights on their own, are necessarily broad and high level. The HRA case law makes the implications much clearer so that they directly impact service provision. For example, clarity on application of the HRA has led to: the right to family life shaping care home visiting policies and arrangements for double rooms for spouses/partners; the right to a fair trial has led to improved employer disciplinary hearing processes; the right to vote has led to campaigning for more voter booths that are accessible to people who use a wheelchair. We note that, relevant to Theme 1, this legal certainty is also only enhanced by referral to the greater body of ECtHR case law.



- **‘Strike down’ power has been used sparingly and with positive impact**

There is a stronger compatibility check within the Scottish human rights framework, where courts can ‘strike down’ parts or all of Scottish Parliament Acts that are outwith their legislative competence with virtue of the fact that they do not comply with Convention rights. We consider that this compatibility check has been a positive and important part of the HRA’s operation in Scottish law and policy making - it has only been used rarely but has been used effectively. Courts have been cautious and slow to make any decisions of incompatibility, but it has nonetheless been an important tool and ultimate ‘emergency stop’ on legislation which will gravely impact people’s human rights. Whilst it has on occasion forced Government to have to change and amend law and policy and priorities, a mature executive and legislature recognises the value of having this ultimate check on serious rights infringements.

We note that, far from questioning whether this should continue, the Scottish Government during consultation on the UNCRC Bill, and the First Minister’s Advisory Group on Human Rights Leadership, considered if there was any way that they could introduce this also for the new human rights statutory framework in Scotland. Although it was ultimately deemed to be outwith the Scottish Parliament legislative competence, nonetheless it is of note that extending the ‘strike down’ power was strongly supported by most of Scottish civil society and generally seen as a positive aspect of the HRA framework that should be replicated if possible.

We also consider from our involvement in policy and law consultations and discussions with government, that this ‘strike down’ power has helped to ensure that the upstream measures to consider human rights within development of law and policy are taken sufficiently seriously. For example, in many pre-legislative consultations, the Scottish Government asks for responses to determine any potential human rights impacts, ensuring that these are considered before the law is even written. The Statement of Competence from the Parliament’s Presiding Officer and those in charge of any Bill, ensures that Convention rights are brought into the heart of law making. Therefore, the impact of the ‘strike down’ power is not only when it is actually used, but in its part in the overall system of building in human rights considerations at every stage, with the courts as the final guarantor of rights protections.

#### **Example: ‘named person’ case**

When the Named Person Scheme was proposed in the Children and Young People (Scotland) Bill, many organisations raised their concerns about the risk of sharing information about a child without their consent. There was concern that such law might make children and young people reluctant to access confidential services, worried that their personal information would be shared widely without their consent.

These concerns were not listened to during the Bill pre-legislative or parliamentary stages, despite them raising significant human rights issues. The law was challenged in the Supreme Court, and the information sharing provisions of the Children and Young People (Scotland) Act 2014 were found to be incompatible with the right to privacy in article 8 of the European Convention on Human Rights. This means the information sharing part of the Named Person scheme cannot be implemented. There will now not be a mandatory named person scheme. Instead, the Government

will produce tools and resources to help all understand the current law around information sharing.

**For all of the reasons above, we recommend that no change is made to how the roles of the courts, Government and Parliament are balanced, and to Articles 3 and 4 of the HRA.**

Section 7 of the HRA states that only a victim of an alleged violation of the European Convention on Human Rights, or the Equality and Human Rights Commission in their own name, can bring an HRA case before the UK courts. We are concerned that this restriction unnecessarily leads to too many individuals in vulnerable circumstances having to go through all the strains of the judicial process to bring strategic change. Bringing clarity and advancement of human rights law should not rely upon individuals. **We recommend broadening of standing under the HRA to be defined in the same way as under other areas of law, allowing any person or group with ‘sufficient interest’ to raise an HRA case.**

*19/03/2021*