

## **The Law Society of Scotland – Written evidence HRA0004**

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Working Party on Human Rights. The working party is comprised of senior and specialist lawyers. The Society has been involved in debate on this topic for some time. Much of this response reflects the evidence we provided to the Commission on a Bill of Rights in 2011 and 2012. The UK Government has yet to publish the details of its plans for the repeal and replacement of the Human Rights Act. As a result, the Society's views on these issues may evolve as the proposal becomes clearer.

The working party welcomes the opportunity to respond to the call for evidence on the proposed repeal of the Human Rights Act and its replacement with a British Bill of Rights, and has the following comments to make:-

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 last year and the Scottish Parliament Elections in May 2016.

However, we also accept that there is room for improvement of the Act. We believe that the HRA can be improved by the following amendments:-

- a) by amending Section 10 to provide a more accountable parliamentary way to amend incompatible legislation in the light of a declaration of incompatibility by the courts;
- b) by including Article 13 - right to an effective remedy in Schedule 1; and
- c) by expanding and clarifying the application of the HRA to private bodies exercising public functions or providing public services.

We are of the opinion that any proposed Bill of Rights for the United Kingdom must build on and enhance the European Convention on Human Rights.

A Bill of Rights for the UK could also 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; however, arriving at consensus on this proposition may be difficult.

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.

A UK Bill of Rights could include:-

- a) rights which are contained in EU and other UK or devolved legislation;
- b) economic and social rights;
- 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) the EU Charter on Fundamental Rights.

On the question of whether the Bill of Rights should include identification of the citizens’ responsibilities the Society is of the view that the fundamental purpose of a Bill of Rights 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. We recognise the call to enhance the responsibilities of the citizen but do not hold to the view that a Bill of Rights is the correct place for such a statement. Many rights in e.g. ECHR have qualifications which provide a balance of the rights of the individual with competing interests. Including responsibilities is conceptually difficult in a Bill of Rights.

We would suggest that a stronger judicial role may be needed if a Bill of Rights for the United Kingdom were enacted. 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.

This also brings into view the issue of entrenchment of a Bill of Rights for the United Kingdom. Procedurally entrenching the Bill of Rights 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.

Without knowing the detail of the proposals, it is difficult to comment on what the practical impact would be. If, as we suggest, the basis of any proposal is to build upon the HRA and continue to incorporate the ECHR, the impact should be to clarify and extend the application of rights.

If additional rights are to be included, this could make it easier for individuals to enforce their rights and require greater consideration to be put on specific issues (depending on the nature of the additional rights) during policy development and decision making.

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 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.

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.

#### 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 Human Rights Act 1998.

The Human Rights Act 1998 was stated by the 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 Human Rights Act?'

Human Rights are not reserved; the Scottish Parliament can legislate, and has done in the area of Human Rights. The Human Rights Act 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.

Currently under the Sewel convention, as it applies in practice under Devolution Guidance Note 10 (DGN10), when UK legislation will alter the legislative competence of the Scottish Parliament or the Executive Competence of the Scottish Ministers the consent of the Scottish Parliament is needed. Clause 2 of the Scotland bill, which is awaiting Third Reading in the House of Lords purports to place the Sewel convention on 'a statutory footing' as required by the Smith Commission Agreement. However Clause 2 only applies to the UK Parliament legislating on devolved matters and does not apply to that part of the convention which relates to legislation which alters the legislative competence of the Parliament or the executive competence of Scottish Ministers. Therefore future UK legislation which deals with the repeal of the Human Rights Act and/or its replacement with a Bill of Rights Act would not be affected by the *statutory* formulation of the Sewel convention under Clause 2 unless that Clause is amended at Third Reading.

Repeal and replacement of the Human Rights Act 1998 would require the amendment of the Scotland Act 1998 in those respects which would affect the competences of both the Parliament and Scottish Ministers. The issue is that if the Sewel convention is being interpreted on the narrow basis set out currently in Clause 2 then such legislation - as a matter of law would not fall under the Sewel convention as provided for in the Scotland Bill. The Society has promoted amendments in the Committee and at Report Stage in the House of Lords to include all the aspects of the Sewel convention as it is set out in DGN 10. Any change to the Scotland Act concerning the Human Rights Act 1998 which affects the competence of the Parliament or the Scottish Ministers will in terms of DGN10 require the consent of the Scottish Parliament.

The separate constitutional and rights structures of England and Scotland prior to the Treaty of Union in 1707 create different strands of constitutionality. For example Magna Carta (1215) does not apply in Scotland nor does the Petition of Right of 1628 or the Bill of Rights of 1689. The corresponding Scottish Documents could be said to be the Declaration of Arbroath (1320) and the Claim of Right (1689). However, as these documents are limited to Scotland in their effect in much the same way as Magna Carta and the Bill of Rights are

limited to England, our contention is that analysing British rights emanates, at the very best, from the Treaty of Union in 1707 and probably more properly from 1801.

Even then there are rights which reach from before 1707 and apply in each jurisdiction separately, and there are rights which have been enacted since then which are limited to one jurisdiction of the other. For example, “the right to trial by jury” to which we have referred above.

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 Human Rights Act 1998 it can and does legislate positively in the field of Human Rights.

In one sense the current arrangements apply in different ways across the UK and in its constituent jurisdictions through the twin track approach of the Human Rights Act 1998 and the various devolution statutes applying to the devolved arrangements in Scotland, Wales and Northern Ireland.

These arrangements could suggest a model of core UK rights augmented by and different from rights which would only apply in Scotland, Wales and Northern Ireland. Another model could be to have one UK application from which derogations by the devolved jurisdictions would be possible.

Again, without the detail of the proposals, it is not possible to answer this question. If, however, the UK were to withdraw from or alter the nature of its adherence to the ECHR, this could impact on membership of the Council of Europe and on the UK’s standing and reputation in the international community.