



# Independent Human Rights Act Review

March 2021

## About Together (Scottish Alliance for Children's Rights)

Together (Scottish Alliance for Children's Rights) is an alliance that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) and other international human rights treaties across Scotland. We have over 450 members ranging from large international and national non-governmental organisations (NGOs) through to small volunteer-led after school clubs and interested professionals. The views expressed in this submission are based on wide consultation with our members but may not necessarily reflect the specific views of every one of our member organisations.

## Introduction

Together welcomes the opportunity to submit evidence to the Independent Human Rights Act Review. We support the submission made by the Human Rights Consortium Scotland and have drawn from this in preparing our response.

Over the 21 years that it has been in force, the Human Rights Act (HRA) has proved a powerful and essential mechanism in upholding children's human rights. The HRA has:

- Supported the realisation of children's human rights under the UN Convention on the Rights of the Child (UNCRC). The HRA does not cover the full range of UNCRC rights but has incorporated certain equivalent ECHR rights by placing duties on courts and public authorities. This has significantly strengthened the realisation of children's human rights in the absence of UNCRC incorporation at UK level. Full protection of children's human rights should be achieved through a combination of the HRA and UNCRC incorporation.
- Significantly improved the way children and families can challenge violations of their rights, providing vital protection for individuals, particularly those who are most marginalised;
- Led to better law and policy making by the Scottish Government and Scottish Parliament by embedding the HRA into the devolution agreement;
- Improved public services by encouraging rights-based approaches and challenging violations;
- Laid the foundations for the continued development of a progressive human rights culture in Scotland, including the incorporation of the UNCRC into Scots law.

We welcome that the Review will not consider withdrawal from the European Convention on Human Rights (ECHR) nor any changes to substantive rights within the HRA. However, by looking at the *machinery* through which these rights are protected, respected and fulfilled, the Review could negatively impact the realisation of human rights across the UK. Even seemingly minor amendments could disrupt the devolution frameworks into which the HRA is embedded and/or disturb the ongoing development of a human rights culture within Scotland.<sup>1</sup> It is crucial that the HRA is protected from any amendments which may diminish its effectiveness.

The UN Committee on the Rights of the Child is closely scrutinising developments ahead of the UK's upcoming review in 2022. Last month, the UN Committee requested information from the UK

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<sup>1</sup> Busby, N (2020). [Human Rights and Devolution: The Independent Review of the Human Rights Act: Implications for Scotland](#), p9.

Government as to how proposals to review the HRA were being assessed from a child rights perspective.<sup>2</sup> Members of the UN Committee have previously expressed concerns over plans to repeal the Human Rights Act and sought assurances that child rights impact assessments would be used to inform any proposed changes.<sup>3</sup>

We note the current Review is narrowly focused on the HRA's application by the courts. Whilst important, court challenges are only one way in which the HRA protects people's rights, including the rights of children. The Act is also a powerful tool for advocacy, planning, developing rights-respecting services and calling for change. We are concerned that the Review's scope limits the opportunity to rebut negative rhetoric which has been levelled at the HRA and human rights for many years.

#### **We urge the Independent Review Panel to:**

- **Recommend all substantive and procedural protections in the HRA are retained, emphasising the need to guard against amendments which may weaken the HRA.**
- **Recommend that UK Government ensures any new proposals are developed through a consultative and democratic process in which children's human rights are fully respected and the devolved nations are fully involved.**
- **Call on UK Government to commit to progressing children's human rights – including through strengthening implementation of the HRA in its current form, ratification of the UNCRC's Third Optional Protocol and direct incorporation of the UNCRC into domestic law.**

### **Theme One – the relationship between domestic courts and the European Court of Human Rights**

Section 2 HRA says that a court “*must take into account*” any judgement, decision, declaration or advisory opinion of the European Court of Human Rights (ECtHR) insofar as the court considers it relevant. Prior to this, UK courts would only consider the ECHR when faced with an ambiguity in legislation. It has been noted that Section 2 HRA “undeniably strengthened the protection of individual rights in domestic law” by removing this need for ambiguity and placing a general requirement on courts to consider ECtHR jurisprudence.<sup>4</sup>

Section 2 does not mean UK courts are *bound* to follow ECtHR judgements – instead it affords them a degree of flexibility. While UK courts “must” consider ECtHR caselaw, this is only a duty to “take into account...so far as, in the opinion of the court or tribunal, it is relevant to the proceedings”. Flexibility is also enshrined in the ECtHR's ‘margin of appreciation’ doctrine which gives governments a degree of discretion. The UK courts’ approach to section 2 has developed over time, with UK courts diverging from ECtHR jurisprudence where they consider appropriate.<sup>5</sup>

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<sup>2</sup> CRC/C/GBR/QPR/6-7: Para: 5(d).

<sup>3</sup> CRC/C/SR.2114: Para: 6.

<sup>4</sup> Busby, N (2020). [Human Rights and Devolution: The Independent Review of the Human Rights Act: Implications for Scotland](#), p5.

<sup>5</sup> See the development over time from the “mirror approach” in R (Ullah) v Special Adjudicator [2004] UKHL 26; to the “dialogue” approach in R v Horncastle & Others [2009] UKSC 14 and Manchester CC v Pinnock [2010] UKSC 45; to current approach in Poshteh v Royal Borough of Kensington and Chelsea [2017] UKSC 36 and R (Nealon & Hallam) v Secretary of State for Justice [2019] UKSC 2.

We see the strengths of the current relationship between UK courts and the ECtHR under Section 2 as:

### 1. UK courts benefit from a clearer understanding of ECHR rights

Section 2 allows UK courts to benefit from the rich body of case law developed by the ECtHR. This helps them achieve a better understanding of Convention rights by considering how the ECtHR has interpreted and applied them. ECtHR jurisprudence helps UK courts clarify the content of Convention rights and supports their understanding of how these rights have developed and interpreted over time. This relationship has supported UK courts' interpretation of children's rights in numerous cases, for example:

- **Helping unmarried parents and their children have equal access to bereavement benefits:** an unmarried mother relied on the Human Rights Act to challenge discriminatory rules which prevented her and her children from accessing bereavement benefits. The UK Supreme Court used ECtHR case law to better understand Article 14 (non-discrimination) and consider how the ECtHR had applied the article in similar cases.<sup>6</sup>
- **Upholding the rights of siblings in care:** a 14-year-old wanted to be involved in decisions made about his brother at children's hearings. The UK Supreme Court drew upon ECtHR jurisprudence on Article 8 (private and family life) and explicitly recognised the rights of siblings for the first time.<sup>7</sup>
- **Protecting children's right to privacy:** the UK Supreme Court used ECtHR jurisprudence to better understand the content of Article 8 (right to private and family life), ultimately finding that certain provisions of the Children and Young People (Scotland) Act 2014 were unlawful under the Scotland Act;<sup>8</sup>

We are concerned that any UK distancing from ECtHR jurisprudence could risk unhelpful divergence and a reduction in rights standards for children in the UK. Given the current global challenges of COVID-19 and climate change, the importance of a consistent and coordinated approach between countries is clear.

### 2. Supporting development of a rights-based culture in Scottish courts

On the 20<sup>th</sup> anniversary of the HRA, the Scottish Human Rights Commission noted that decisions of Scottish courts under section 2 "show that they are engaging much more consistently and in-depth with ECtHR jurisprudence" across a wide range of cases. The Commission noted that "the HRA has had a significant impact upon the use of Strasbourg-style language and jurisprudence in Scots law."<sup>9</sup>

More broadly, the Commission noted this had driven a more rights-based approach in the case law of the Scottish courts.

### 3. Supporting better policymaking

ECtHR case law is increasingly used by Together and other civil society organisations in policy influencing work. Section 2 gives added weight to these efforts, by helping public bodies recognise

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<sup>6</sup> Application by Siobhan McLaughlin for Judicial Review [2018] UKSC 48.

<sup>7</sup> AB v Principal Reporter and another; In the matter of XY [2020] UKSC 26.

<sup>8</sup> Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51.

<sup>9</sup> Scottish Human Rights Commission (2018). [Inquiry: 20 years of the Human Rights Act. Written evidence to the Joint Committee on Human Rights](#). Para 10.

these decisions as a predictor of how a similar issue may be dealt with by UK courts should litigation arise.

*Example: Equal protection of children*

*For several years there was considerable debate in Scotland around whether the law that allowed physical punishment of children by their parents should be changed. Eventually legislation was passed to give children equal protection from assault.<sup>10</sup> The discussions that led to the change focused on the UNCRC but also highlighted case law from the ECtHR.<sup>11</sup> This case law showed an evolution in the ECtHR's approach to the issue over time and was a helpful reference point to guide decisions and learn from positive changes in other European countries.*

#### 4. Positive benefits of mutual understanding of human rights across Europe

The requirements on courts to take into account ECtHR case law means we have a shared understanding of ECHR rights across Europe. This means we are able to work with and learn from the expertise and experience of similar organisations and networks abroad – including through our membership of the [Eurochild](#) network. These international links and cooperation are even more crucial as we respond to global challenges facing children's human rights - such as COVID-19 and climate change.

**In our view, Section 2 strikes an appropriate balance between the powers of the UK courts and ECtHR and does not need amended.**

**We urge the Independent Review Panel to:**

- **Recommend no change to Section 2.**
- **Endorse the approach of the UNCRC (Incorporation) (Scotland) Bill and First Minister's Advisory Group on Human Rights Leadership, to include an interpretative clause enabling courts to draw from a wide range of international sources to aid their interpretation and implementation of rights under the HRA.**

## **Theme Two – the impact of HRA on the relationship between the judiciary, executive and legislature**

The introduction of the HRA increased the powers of UK courts to protect human rights and scrutinise policies, but the central role of the courts has been one of interpretation rather than law-making.<sup>12</sup> The Scottish Human Rights Commission notes the courts “have been mindful to preserve the doctrine of parliamentary sovereignty”.<sup>13</sup>

Section 3 HRA requires that legislation is read and given effect in a manner which complies with ECHR rights as far as possible. Where such a reading is not possible, Section 4 allows higher courts to make a declaration of incompatibility (DOI) in relation to the relevant provisions. Sections 3 and 4 are an *expression* of parliamentary sovereignty rather than a challenge to it. Crucially, the HRA does not grant courts the power to ‘strike down’ UK Parliament legislation which they view as

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<sup>10</sup> [Children \(Equal Protection from Assault\) \(Scotland\) Act 2019](#).

<sup>11</sup> For example, see Janys Scott, legal opinion for Children's Strategic Litigation Group, Scottish Child Law Centre evidence.

<sup>12</sup> BIHR (2018). [Joint submission to the JCHR: 20 years of the Human Rights Act Inquiry](#).

<sup>13</sup> Scottish Human Rights Commission (2018). [Inquiry: 20 years of the Human Rights Act. Written evidence to the Joint Committee on Human Rights](#). Para 5.

incompatible with the ECHR.<sup>14</sup> DOIs do not change or overturn the law nor compel the UK Parliament to act; it is up to the UK Parliament to decide to amend the law. The UK Government's own review of the HRA found it had not threatened parliamentary sovereignty nor overburdened the courts.<sup>15</sup>

In practice, UK courts have been reserved in their use of DOIs. Only 43 were issued between 2000-20. Of these, eight were corrected by remedial order and 15 corrected by primary or secondary legislation. Nonetheless, DOIs are an important tool and ultimate 'emergency stop' on legislation which could gravely impact children's human rights.

The situation is different in Scotland as the HRA is built into the devolution settlement. Scottish courts *can* strike down Scottish legislation which is incompatible with Convention rights.<sup>16</sup> The use of the strike down power has been limited but has led to positive outcomes, including for children's right to privacy.<sup>17</sup> Additionally, the power encourages better consideration of human rights in law and policy-making in order to avoid its use.

The strengths of the current approach include:

1. [Children can challenge violations of their rights directly](#)

Children say they need a range of 'tools' to challenge breaches of their rights – from child-friendly complaints mechanisms through to a supportive adult with the time, expertise and patience to help them assert their rights. Whilst taking proactive steps to prevent breaches is key, the courts are a fundamental route to ensure accountability in serious cases.

2. [Better implementation of law](#)

In applying Section 3, the courts make our law better by cautiously testing and clarifying the laws Parliament has drafted. They apply measured, careful consideration of the impact on individuals or particular groups, within a well-tested framework. This allows courts to guard against unintended consequences which may never have been the intention of the legislature but otherwise risk infringing on children's rights. In this sense, the courts have a very positive role which complements that of the legislature.

3. [Improving public services](#)

Sections 3 and 4 focus minds and encourage public bodies to take proactive steps to ensure ECHR compliance. As the UK Government noted in its 2006 review of the HRA:

*“As the principles have become more embedded – and in some cases in response to the fear of litigation – policies and practices have been adjusted to ensure compliance with Convention rights and they are a more explicitly recognised part of the decision making process”<sup>18</sup>*

We are concerned that amendments to Sections 3 and 4 HRA could have a negative impact on public bodies' approaches.

**From the above, we believe there has not been a shift of power from the legislature to the judiciary, and the principle of separation of powers has not been undermined.**

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<sup>14</sup> Contrast the position under Section 29, Scotland Act 1998.

<sup>15</sup> Department for Constitutional Affairs (2006). [Review of the Implementation of the Human Rights Act](#).

<sup>16</sup> Section 29, Scotland Act 1998.

<sup>17</sup> Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51.

<sup>18</sup> Department for Constitutional Affairs (2006). [Review of the Implementation of the Human Rights Act](#). Page 25

**We urge the Independent Review Panel to:**

- **Recommend no change to how the roles of the courts, UK Government and UK Parliament are balanced.**
- **Recommend no change to Articles 3 and 4 HRA.**
- **Recommend broadening the test for standing under the HRA to one of “sufficient interest”.**