



European and External Relations Committee call for evidence

Human Rights Inquiry

18 November 2015

Introduction

This paper is to inform the European and External Relations Committee's call for evidence for its inquiry into the UK Government's proposed repeal of the Human Rights Act 1998 (HRA) and its replacement with a British Bill of Rights. In the absence of detailed proposals from the UK Government, this response gives an overarching picture of the extent to which the existing HRA succeeds in protecting, respecting and fulfilling children's human rights in Scotland. We would be happy to provide further input and comment once further proposals have been published.

It is important to note that the UN Committee on the Rights of the Child (the UN Committee) has recently written to the UK Government to request how the proposed Bill of Rights will affect the protection of the rights of the child in line with the UN Convention on the Rights of the Child (UNCRC).¹ The UK Government should provide a written response by 1st March 2016. Together would be keen to draw from learning from the European and External Relations Committee's Human Rights inquiry to scrutinise the response given by the UK Government to the UN Committee.

About Together

Together (Scottish Alliance for Children's Rights) is an alliance of children's charities that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) in Scotland. We have nearly 300 members ranging from large international and national non-governmental organisations through to small volunteer-led after school clubs. Our activities include promoting and monitoring the implementation of the UNCRC in Scotland. This includes providing in depth scrutiny of the steps taken to implement the UNCRC in Scotland to inform the UN Committee's periodic review of the UK.

The views expressed in this submission are based on the general principles of the UNCRC and do not necessarily reflect the specific views of every one of our member organisations.

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¹ UN Committee on the Rights of the Child (11th November) List of issues in relation to the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland see: tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/GBR/CRC_C_GBR_Q_5_22065_E.docx

1. What is your general view on the UK Government's proposal to introduce a British Bill of Rights to replace the Human Rights Act 1998? Do you think changes need to be made to the current human rights regime in the UK?

The UK Government's proposal to introduce a British Bill of Rights is incredibly vague, resting solely on a commitment in the Queen's Speech to '*bring forward proposals for a British Bill of Rights*'.² Regardless of any proposals that may be forthcoming, Together does not believe there is a need to repeal the Human Rights Act 1998 (HRA).

Together is concerned that any replacement of the HRA could lower existing human rights protections. The Conservative's proposals for changing Britain's human rights law launched in October 2014 contained extremely worrying proposals such as limiting the use of human rights law to '*the most serious cases*' such as those that '*involve criminal law and the liberty of an individual, the right to property and similar serious matters*'.³ This raises anxiety that matters of real importance to children could be seen as 'trivial matters' and outwith the scope of a British Bill of Rights. This may include matters currently covered by the HRA such as ensuring contact between siblings who are looked after, and taking into the account the views of children in custody decisions and child protection matters.

The HRA already provides an effective means through which the rights enshrined in the European Convention on Human Rights (ECHR) can be realised. In bringing the ECHR into domestic law, the HRA has made a substantial contribution to the advancement of children's human rights and has played a vital role in the development of UK and Scots law and policy.⁴ It has been applied in a wide range of legal cases affecting children and young people, a growing number of which place considerable emphasis on articles in the UNCRC.⁵

The ECHR influenced Scotland's Children's Hearings System long before the HRA was passed. *McMichael v United Kingdom*⁶ found the practice of withholding reports sent to hearing members from the parents of the child concerned to be in breach of ECHR Articles 6 (the right to a fair trial) and 8 (the right to private and family life) and led to practice change. However, after the passing of the HRA, *S v Miller*⁷ challenged the legality of the children's hearings system on the ground of children's human's rights. Prior to this case, legal aid was available for children to obtain advice from a lawyer before a hearing, but children were not entitled to free legal representation in the hearing itself. In *S v Miller*, the Court of Session ruled that the children's absence of access to free, independent legal representation in children's hearings was a breach of ECHR Article 6. In

² Queen's Speech 2015 (see: <https://www.gov.uk/government/speeches/queens-speech-2015>)

³ Protecting Human Rights in the UK – the Conservatives' proposals for changing Britain's human rights laws. (October 2014) Conservative Party (see: https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf)

⁴ See Sutherland, E. E. & Cleland, A., 'Children's Rights in Scotland -- Where are we Now?'. In Cleland & Sutherland, 2009.

⁵ Many of these cases are detailed in: Human Rights Futures Project, 2011. Protection of children's rights under the Human Rights Act 1998: legal briefing, London: London School of Economics.

⁶ *McMichael v United Kingdom* [1995] 20 E.H.R.R. 205

⁷ *S v Miller* [2001] S.L.T. 531

response, the Scottish Government introduced the *Children's Hearings (Legal Representation) (Scotland) Rules 2002* to allow hearings to appoint safeguarders or curators ad litem to represent children. This went on to be replaced by Part 19 of the *Children's Hearings (Scotland) Act 2011* and the *Children's Legal Assistance (Scotland) Regulations 2013* that allow the child (and relevant person and some others) to access legal aid funds (in appropriate circumstances) to pay for a solicitor.

This is just one of many examples of where the HRA has led to improved protections of children's human rights. And yet every right and every mechanism within the HRA is needed to ensure practical and effective implementation and enforcement of children's ECHR rights across Scotland and the UK. This was clearly articulated by the Joint Committee on Human Rights (JCHR) in 2008 when it stated that *'there must be no question of weakening the existing machinery in the HRA for the protection of Convention rights.'*⁸

It is concerning that debate at a UK level has become increasingly politicised and fuelled by inaccurate and misleading information from the media, as well as from some Government ministers. There is a significant risk that the replacement of the HRA with a British Bill of Rights will result in a reduction in the legal protection of human rights, adversely impacting on the most vulnerable children and young people. Rather than replacing the current regime, more needs to be done to raise awareness and understanding of the protections provided by the HRA and promote increased public ownership.

2. What rights, if any, would a British Bill of Rights have to contain? How would a British Bill of Rights interact with Scotland's separate legal system?

Together does not believe that there is a need to replace the HRA with a British Bill of Rights. In order to fully respect, protect and fulfil children's rights, there is a need to build and expand upon the protections of the HRA. This should include the incorporation of the UNCRC into UK and Scots law, as recommended by the UN Committee in both 2002 and 2008.⁹

3. Arguments have been made that the current system does not sufficiently respect the sovereignty of the UK Parliament. What are your views on this?

The HRA is carefully crafted to ensure that the sovereignty of the UK Parliament is respected. Section 2 obliges domestic courts to 'take into account' judgments of the European Court of Human Rights. This allows domestic courts to consider relevant European case law in a domestic context

⁸ Joint Committee on Human Rights. (2008). A Bill of Rights for the UK - Twenty-ninth Report of Session 2007-08. London: HM Government. Para. 53

⁹ UN Committee on the Rights of the Child (2008). Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: United Kingdom of Great Britain and Northern Ireland

rather than be bound by it. Section 4 ensures that only the UK Parliament can make changes to primary legislation: it remains intact and unaffected by a declaration of incompatibility.

Article 46(1) of the ECHR obliges the UK to respond to final judgments of the European Court that relate to the UK. As signatory to the ECHR, repealing the HRA would have no effect whatsoever on the UK's obligations under Article 46. This was acknowledged by the Bill of Rights Commission who stated that *'by virtue of the UK's participation in the ECHR system, domestic legislation cannot prevent the Convention's impact on Parliamentary sovereignty by imposing obligations to abide by the final judgements of the European Court of Human Rights and to provide effective remedies for breaches of the Convention rights.'*¹⁰

4. In addition, it has been suggested that the European Court of Human Rights has developed "mission creep" expanding the European Convention on Human Rights into areas which it should not cover. What views do you have on this argument?

The European Court of Human Rights (ECtHR) recognition of the 'living instrument' doctrine has been essential in developing case law that reflects current legal and social conditions.

In terms of changing legal conditions, the UNCRC was first adopted thirty-nine years after the ECHR, reflecting a growing recognition of children as rights-holders. As the most widely ratified international human rights treaty, it has provided a crucial tool in developing and informing ECtHR case law. The ECtHR has described the UNCRC as setting out *'the human rights of children and the standards to which all governments must aspire in realising these rights for all children'*¹¹ and uses it as an aid to interpret the ECHR.¹² This interpretation has been conducted within the scope of the ECHR and has ensured fair balance between the competing interests of parents, children and wider society.¹³ It has specifically protected children from being discriminated against in relation to age, with ECHR Article 14 being found to place a positive obligation to secure ECHR rights without discrimination.¹⁴

In terms of changing social conditions, the ECtHR has had to respond to developments in technology, such as surrogacy and DNA testing. Quite correctly, and within the scope of the ECHR, the ECtHR has played a leading role in ensuring that children born as a result of surrogacy treatment have the right

¹⁰ Ministry of Justice. (2012). Commission on a Bill of Rights. A UK Bill of Rights? The Choice Before Us. London. Pg. 142

¹¹ Sommerfeld v Germany [2004] 38 EHRR 35, at 37.

¹² This was reinforced in Sahin v. Germany [2003] 36 EHRR 43: 'The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child'. para.39.

¹³ Art.8(1), see: Hokkanen v. Finland (1994) 19 EHRR 139. Art8(2), see: Maumousseau and Washington v. France no. 39388/05 (ECtHR, 6 December 2007).

¹⁴ See Belgian Linguistic case (No. 2) (1968) 1 EHRR 252 in which it was found that there was no obligation to provide a particular education system, but when it was chosen to do so, access could not be restricted a discriminatory manner.

to a nationality.¹⁵ It has also established the extent to which children have the right to know their origins through DNA testing.¹⁶

5. What do you think the practical impact of the proposals will be in individual cases, for example as regards immigration policy, criminal law, or decisions made by public authorities?

Repeal of the HRA is likely to have a chilling effect on the UK's human rights culture. It would remove the principle embedded in section 6 HRA that makes it unlawful for a public body to act in a way that is incompatible with the ECHR. This duty is currently contributing towards building a human rights culture across public services that have a significant impact on children's lives, such as education and health. It plays a preventative role in ensuring that children's rights are not breached, ensuring that human rights are not just about individual courts cases but rather about making them happen in every practice in schools, hospitals and everyday life.

6. What impact do you think any changes will have on Scotland more generally? Would the Scottish Parliament have to consent to any changes under the Sewel Convention? Could the UK Government act without the consent of the Scottish Parliament?

Any proposal to introduce a British Bill of Rights that lessens human rights protections and deprives people of their rights would be a grossly disproportionate reaction to one or two adverse rulings from Strasbourg. It would cut across the basic fairness, dignity and equality that all nations committed to 65 years ago and would jeopardise the fragile union of the UK.

A new Bill of Rights would presumably, like the HRA, apply to both reserved and devolved matters and would therefore trigger the Sewel Convention. There has not been the same political or public hostility to human rights or the ECHR in Scotland as there has been in England. Indeed, the Scottish Government made a commitment in its White Paper for Independence that it would consider enshrining UNCRC rights into any future constitution.¹⁷ Any attempt to water down human rights protection through a British Bill of Rights is likely to be resisted.

The Scottish Government has a crucial leadership role to play in championing the HRA and international human rights protections more widely. In using its devolved powers to further rights protections in Scotland, the Scottish Parliament could demonstrate that Scotland aspires to and is committed to the realisation of human rights for its people. This would support civil society in other parts of the UK to speak out and question why its government has not taken the same stance to protect and promote their rights.

¹⁵ *Mennesson and Others v. France and Labassee v. France* [2014]

¹⁶ *Godelli v. Italy* [2012] and *Canonne v France* [2015]

¹⁷ Scottish Government, 2013. 'Scotland's Future: Your Guide to an Independent Future'. p.357

7. Do you think it would be possible to have different human rights regimes within the United Kingdom?

The principle of universality of human rights is the cornerstone of international human rights law, first emphasised in the Universal Declaration on Human Rights in 1948.¹⁸ This is reiterated in ECHR Article 1. Any attempt to replace the HRA with a British Bill of Rights only in relation to 'reserved' powers and allow the status quo of human rights protection to continue in relation to the devolved powers in Scotland would fundamentally undermine the principle of the universality of human rights as well as the 'union' being sought by the Westminster government. Furthermore, it would also be unworkable, creating a complex and highly differentiated mosaic of legal regimes of human rights protection.

8. What impact do you think the UK Government's proposals will have on the UK and Scotland at an EU and international level, for example within the Council of Europe?

The UK was one of the first signatories to the ECHR in 1950. Withdrawal would mean the UK is turning its back on those nations committed to upholding universal human rights and would hugely diminish our reputation abroad. Indeed, Prince Zied Ra'ad Al Hussein, the UN High Commissioner for Human Rights, recently expressed concern that plan to repeal the HRA were '*profoundly regrettable*' and '*may have a very significant impact on access to remedy for victims of human rights violations within the jurisdiction of the UK*'.

The UK is a key member of the UN's Human Rights Council and a permanent member of the UN Security Council. Any proposal that may weaken the UK's commitment to uphold universal human rights will be damaging to the UK's reputation on the international stage and is likely to inspire similar government intervention on human rights protections elsewhere. Indeed, a Russian Minister has already stated that Russia could disregard a ruling from the ECtHR, given that the UK '*does not execute quite a few decisions by the European Court*'.¹⁹

Any proposal that diminishes human rights protections will be detrimental to both Scotland and the UK's reputation at a Council of Europe, EU and international level. It is also likely to seriously undermine the union of the UK.

¹⁸ UDHR Article 2 states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty".

¹⁹ <http://www.telegraph.co.uk/news/politics/conservative/11840747/Camersons-plan-to-leave-ECHR-encourages-Putin-says-EU-chief.html>