

UK INDEPENDENT REVIEW OF THE HUMAN RIGHTS ACT

SUMMARY OF SCOTTISH GOVERNMENT RESPONSE

1. The UK must remain a signatory to the Convention and a member of the Council of Europe. Any attempt to erode or undermine existing human rights safeguards would be robustly opposed by the Scottish Government.
2. In Scotland, the clear direction of travel is to extend and enhance human rights protections. Action is being taken to embed human rights at the heart of public policy, including through Scotland's National Performance Framework, and to incorporate further international human rights treaties into domestic law. A bill to incorporate the UN Convention on the Rights of the Child is currently under consideration in the Scottish Parliament. Key elements of that bill intentionally reflect the drafting of the HRA. Further proposals will be published in the near future by the National Taskforce for Human Rights Leadership.
3. It is welcome that the Review is not seeking to re-examine or diverge from the substantive rights in the Convention. However, the UK Government has a long-standing record of hostility to the Convention and to the HRA. The questions which the Panel has been asked to address are informed by that underlying agenda. The Scottish Government strongly disagrees, for example, with the proposition that the courts "have been drawn unduly into matters of policy". Judgments cannot be regarded as "political", or as an interference in policy matters, just because they happen to inconvenience the government of the day.
4. The Review's terms of reference contain almost no reference to devolution, but it is essential to bear in mind that the Convention rights defined in the HRA are also an integral part of the current constitutional settlement. As a result, human rights in Scotland are protected by a robust and sophisticated legislative framework which extends beyond the HRA. The Scottish Government is clear that no changes affecting Scotland should be made to the HRA without the explicit consent of the Scottish Parliament.
5. In relation to the specific questions posed by the Review, the view of the Scottish Government's is that:
 - the relationship between domestic courts in the UK and the European Court of Human Rights ("ECtHR") functions successfully and as originally intended by the UK Parliament.
 - the courts must be trusted to exercise their powers, independently and objectively and in a manner that ensures the law is interpreted and applied coherently, consistently and reliably.
 - it remains entirely proper, and necessary, for the UK courts to take ECtHR jurisprudence into account when hearing human rights cases . Nothing is to be gained, and much stands to be lost, from embarking on any change to the current wording of section 2 of the HRA.
 - the existence of a national margin of appreciation, and the scope for judicial dialogue between the UK courts and the ECtHR, continue to be necessary and valuable features of the Convention system.

- the ECtHR itself is known to attach considerable weight to the reasoning of national courts, and in particular the high quality judgments delivered by UK courts.
- no changes to sections 3 or 4 of the HRA should be made where these might have the effect of weakening or removing existing safeguards. Changes should only be made where these extend or enhance human rights protections.
- it is entirely proper that sections 3 and 4 of the HRA enable the UK courts to proceed on the basis that legislation should be read, wherever possible, in a way that is compatible with the, essentially constitutional, rights derived from the Convention.
- in doing so, the courts are explicitly acting in accordance with the will of Parliament. The effect which is in practice achieved by the HRA is in fact the effect which the UK Parliament wished to achieve when it passed the Act.
- only legislation which conflicts with human rights in some irreconcilable manner will be incapable of being interpreted in an appropriate manner by the courts. That is a comparatively rare occurrence. The appropriate government response is to remedy the defect in the legislation, not to criticise the HRA or the courts. Remedial orders continue to provide an appropriate mechanism for addressing issues of this kind.
- declarations of incompatibility provide a practical and effective means of identifying such defects in Westminster primary legislation, in a way that is consistent with Westminster's doctrine of "parliamentary sovereignty".
- in relation to Scotland, the Scottish Government is entirely happy that the courts can in fact go further as regards Acts of the Scottish Parliament, by virtue of the Scotland Act, and hold incompatible legislation to be outside legislative competence and therefore "not law". The Scottish model is consistent with wider, mainstream international constitutional practice.
- existing HRA judgments form part of a complex and sophisticated body of law and it would be unacceptable for the UK Government to attempt to retrospectively unpick or reverse the effects of past judgments "by the back door", by means of changes to section 3.
- the power to derogate from the requirements of the Convention must be exercised in strict accordance with Article 15 ECHR. Any such decision must be open to challenge in both the domestic courts and the ECtHR.
- The circumstances in which the Convention and the HRA have extraterritorial effect have been carefully and comprehensively addressed by the courts. The UK is not entitled to exceptional status or to some form of "unilateral opt out".
- The UK has consistently been amongst the top performing members of the Council of Europe in relation to human rights compliance. It is essential that the UK remains fully committed to leading by example and to ensuring that its actions, including its contribution to the Convention system, continue to support and promote the international rules-based order which the UK was instrumental in establishing after 1945.