

Why We Need to Amend the Scotland Act November 2024

Devolution is crucial for the Scottish Parliament as it empowers Scotland to govern its own affairs and address the specific needs and rights of its people. Labour has a proud history of establishing devolution, and it's time to straighten out a few quirks that have developed over the quarter-century since.

For the Scottish Parliament to **fully fulfil its function as a representative body**, it must have the legislative competence necessary to enact robust human rights protections.

The Labour Government has the opportunity to **distinguish itself from previous UK Governments** by taking a bold and proactive stance on devolution. Amending the Scotland Act to allow the Scottish Parliament to apply human rights protections across devolved areas would represent a significant shift in how the UK Government engages with Scotland.

Labour can take a **fresh approach** by addressing an unforeseen limitation on devolution and resetting it to function as originally intended. By doing so, Labour would position itself as the party that respects devolution and is committed to ensuring it operates effectively.

The proposed amendments to the Scotland Act are essential to ensure that the Parliament can effectively legislate for the rights outlined in the Scottish Human Rights Bill without undue and unintentional limitations imposed by Westminster.

By removing the restrictions of Section 28(7), we would enable the Scottish Parliament to act decisively in advancing human rights and addressing the unique challenges faced by communities across Scotland, ultimately reinforcing its role as a vital institution for democracy and justice.

Human Rights: What's the Goal?

The proposed **Scottish Human Rights Bill** aims to bring four important international human rights treaties into Scottish law. These treaties are:

1. **International Covenant on Economic, Social and Cultural Rights (ICESCR)**
2. **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**
3. **International Convention on the Elimination of All Forms of Racism (CERD)**
4. **Convention on the Rights of Persons with Disabilities (CRPD)**

The Bill also seeks to establish a **right to a healthy environment**. This is a significant move to strengthen human rights protections in Scotland, building on existing laws like the Human Rights Act 1998 and the recently passed UNCRC Act.

Constitutional laws like these protect people regardless of whatever party is in power as it elevates the policy intervention above the sovereignty of the governing party. This is a particularly important safeguard given the last fifteen years of austerity.

Why is the Scottish Human Rights Bill Important?

1. **Strengthening Human Rights:** Incorporating these treaties will clarify and expand the rights and protections for individuals in Scotland. This helps promote equality and justice, aligning Scotland with international human rights standards. It would also provide a higher level of human rights protections than is currently available in the UK and mitigate the risk of a future government rolling back on human rights.
2. **Legislative Competence:** The Scottish Parliament has the power to make laws regarding human rights, but it faces limitations due to the **Scotland Act 1998**. Specifically, **Section 28(7)** preserves the UK Parliament's authority to legislate for Scotland. This has been highlighted by recent Supreme Court decisions, which have indicated that these limitations could restrict the Human Rights Bill's effectiveness.
3. **Legal Clarity and Risk Mitigation:** If the restrictive interpretations applied to the UNCRC Act are also applied to the Human Rights Bill, this could lead to significant legal uncertainties. These uncertainties would limit the effectiveness of the rights protected under the Bill and potentially open the door for legal challenges, delaying or undermining its implementation.

What Needs to be Done?

To ensure the Scottish Human Rights Bill can effectively protect rights, we must:

- **Amend the Scotland Act:** Clarifying that Section 28(7) does not limit the Scottish Parliament's ability to legislate for human rights is crucial. This amendment would eliminate legal uncertainties and improve the Bill's effectiveness.
- **Drafting Considerations:** Look into options for drafting the Bill to include UK legislation affecting devolved areas, ensuring they are subject to the rights incorporated in the Bill.
- **Future Legislation:** Make sure that future laws in devolved areas align with the rights outlined in the Bill to ensure ongoing protection and accountability.

Understanding Section 28(7)

Section 28(7) states that, even though the Scottish Parliament can make laws about devolved matters, this “does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.” While this provision was originally intended to

reaffirm the UK Parliament's overarching authority, it was not expected to impose substantive limitations on the Scottish Parliament's ability to legislate in devolved areas.

However, in the 2018 Continuity Bill Reference, the Supreme Court stated that Section 28(7) imposed a substantive, unintended limitation on the Scottish Parliament's law-making powers. This marked a shift in interpretation of the original understanding of devolution, with the Court ruling that the Scottish Parliament cannot legislate in a way that modifies or interferes with UK law, even in devolved areas. This interpretation was further reinforced in the 2021 UNCRC Bill Reference, where the Court found that specific duties imposed by the UNCRC Bill would conflict with the UK Parliament's power to legislate for Scotland, even in devolved areas including elements of education and social work. It's a good time to sort out these issues and provide clarity to the judiciary, duty bearers and rights holders.

The Limited Scope of the UNCRC Act and Its Impact

The commencement of the UNCRC (Incorporation) (Scotland) Act 2024 is a landmark step for children's rights in Scotland, yet its practical impact has been limited due to the Supreme Court's ruling that restricts its application. The limitation imposed by Section 28(7) means that the 2024 Act only applies to Acts of the Scottish Parliament, leaving large areas of law governed by pre-devolution UK legislation outside its scope. This risks creating significant confusion for both duty bearers and rights holders as the legal landscape becomes fragmented. Public authorities are trying to navigate between pre- and post-devolution legislation to understand when the duties in the 2024 Act apply, while children and their advocates are left uncertain about when and how their rights can be enforced.

Real-World Examples: Housing and Social Security

Housing:

- The **right to adequate housing** is included in the ICESCR, which states that everyone should have access to safe and secure housing. While Housing is understood to be the responsibility of the Scottish Parliament, much of the existing legislation is a mix of laws passed before and after devolution. For example, the **Housing (Scotland) Act 2001** governs homelessness, but may not fully encompass obligations from earlier laws that still exist. If the Human Rights Bill does not amend these earlier laws or ensure they align with the right to adequate housing, many people may find themselves without the necessary protections when seeking housing assistance.

Social Security:

- The right to social security, which includes access to financial assistance in times of need, is mainly reserved to Westminster. However, some aspects are devolved under the **Scotland Act 2016** and governed by the **Social Security (Scotland) Act 2018**. The Human Rights Bill aims to bring these devolved benefits under its protective framework. If the Bill is limited by the current

interpretation of Section 28(7), essential social security protections might be at risk, leaving vulnerable populations without adequate support.

Inconsistent Protections of Children's Rights:

- Following the limitation imposed by Section 28(7) of the Scotland Act on the UNCRC Act, there are now fragmented protections for children's rights across key areas such as social work. The UNCRC Act applies to laws passed by the Scottish Parliament, such as the Children and Young People (Scotland) Act 2014, but does not apply to older UK Acts like the Children Act 1989, which continues to govern significant aspects of child protection and social work functions. As a result, children's rights can be inconsistently upheld depending on which legal framework social work powers are drawn from. This inconsistency can lead to confusion and leaves gaps in the protection of vulnerable children who rely on these services.

What's Next?

To maximise the Human Rights Bill's impact, we believe strongly that we must amend the Scotland Act to ensure that it can protect all individuals in Scotland effectively. This involves:

- **Revising Section 28(7):** This could be repealed this section or add new parts to clarify the extent of the Scottish Parliament's powers, allowing for a broader application of human rights.
- **Extending to UK Laws:** It could be possible for the Human Rights Bill to extend its reach to other UK laws affecting devolved areas, ensuring that all laws are subject to the rights included in this Bill.

What's in it for the UK Government?

1. **Building Alliances with Devolved Governments:** Supporting these changes can foster better relationships between the UK Government and the devolved administrations, potentially leading to cooperative governance and shared initiatives that benefit all parts of the UK.
2. **Strengthening Devolution as a Progressive Value:** By actively promoting and expanding devolution, the Labour Government would position itself as a champion of democratic engagement and local governance, aligning with progressive values that resonate with people across the UK.
3. **Aligning with Public Sentiment:** Polls have shown that there is significant public support for devolution and local governance. By taking bold action on this issue, aligning with the aspirations of many people, this would send a clear message about being responsive to the public's desire for greater autonomy and representation.

4. **Enhancing Children’s Access to Justice:** Amending the Scotland Act would enable the UNCRC Act to apply human rights protections across all devolved areas, ensuring consistent protections for children. By addressing gaps created by pre-devolution UK laws, this reform would simplify legal frameworks, making it easier for children to enforce their rights and hold public authorities accountable. This step would show Labour’s commitment to improving children’s access to justice and strengthening human rights protections, in line with its progressive values and support for devolution.

Conclusion

Amending the Scotland Act is essential for the Scottish Human Rights Bill to provide the comprehensive protection that individuals in Scotland need. By doing so, we can enhance rights and protections, ensure clarity in the law, and fulfill our commitment to human rights for all.

[Read Professor Aileen McHarg’s full paper here.](#)