

Restoring Devolution: Protecting All of our Human Rights.

Here's a blindingly obvious truth – people's lives are not divided up into what is 'reserved' to the UK Parliament or 'devolved' to the Scottish Parliament. Most people don't know the intricacies of what Westminster decides and what Holyrood decides – but they do care about their families having the basic essentials and freedoms that they need to live their lives well. They care about being treated with dignity and respect by people in authority, and when they are not, they want something done about it.

It's now over 3 years since the Scottish Government committed to [putting all of our rights into Scots law](#). The Bill is finally going to be introduced by June this year. This follows hot on the heels of incorporation of the UNCRC – the children and young people's rights convention. The Consortium, together with organisations from across civil society, strongly support the Scottish Human Rights Bill and want its implementation to be as strong as possible to drive change.

Law isn't the complete solution, but integrating human rights into the core of Scotland's legal, policy, and practice frameworks is crucial to empowering people to use their rights, and to making all of our rights a reality. People with lived experience have called loudly for this step to be taken – for example, read the [important advice](#) of the Bill's Lived Experience Boards.

It is with frustration then, that while we and our members have been campaigning hard for this vital law, the sands of devolution have shifted to narrow what the Scottish Parliament can do.

In this [excellent new paper](#) for the Consortium, Professor Aileen McHarg explains that UK Supreme Court decisions have very serious implications for the upcoming Scottish Human Rights Bill. She sets out that the Scotland Act includes the unconditional right of the UK Parliament to legislate for Scotland, and that:

'For many years this was understood simply as a symbolic restatement of the sovereignty of the UK Parliament...Since 2018, however, it has been fashioned by the Supreme Court, in response to arguments made by the UK Law Officers, into an additional – and wholly unexpected – limit on Holyrood's law-making power.'

It was always known of course, that Scottish Parliament Acts can't affect law and policy reserved to Westminster such as immigration or foreign policy. However, this new limitation goes far beyond this.

The Supreme Court has ruled that new duties to comply with children's rights in the UNCRC Bill could not be extended to any Westminster-passed legislation, because that would in some way mess with UK Parliamentary sovereignty. So, the UNCRC Act does not apply to any legislation passed at Westminster from before devolution began. To be clear: even if the legislation falls entirely within devolved competence, public bodies are not required to comply with the UNCRC when implementing it.

But it goes even further than this. Any Acts of the Scottish Parliament that weren't drafted from scratch but simply built on Westminster pre-devolution law are not covered either.

As Professor McHarg says:

'As a consequence, the scope of the [UNCRC] Bill had to be very considerably narrowed before it could become an Act, and its operation has become more complicated as a result. If the same approach is

taken to the Scottish Human Rights Bill, important pieces of legislation affecting the rights incorporated by the Bill will also be beyond the scope of its duties.'

Huge swathes of public services are largely untouchable by the UNCRC Act, and likely also by the upcoming Human Rights Bill too.

Take housing for example: the Housing (Scotland) Act 2001 made extensive reforms to local authorities' duties in respect of homeless people. Some of these reforms were freestanding obligations in the Scottish 2001 Act and are therefore within scope of the Scottish Human Rights Bill. This includes things like local authorities' duties to provide advice and information to people who are homeless. However, reforms to local authorities' core duties to rehouse homeless people were made as amendments to the Housing (Scotland) Act 1987, and therefore will be outwith the scope of the Scottish Human Rights Bill.

Or health: The NHS in Scotland is still governed by the National Health (Scotland) Act 1978. There was a health improvement duty in the NHS Reform (Scotland) Act 2004, but because this was inserted into the 1978 Act, it also falls outwith the scope of the Human Rights Bill. Only some aspects of healthcare law are in freestanding Holyrood legislation and so will be in scope, such as the Patients' Rights (Scotland) Act 2011.

It's complicated and confusing and incredibly frustrating. It means that one of the biggest barriers to progressing human rights law in Scotland is the very nature of devolution itself.

But it doesn't need to be this way. It is time to reverse the UK Supreme Court decisions and restore devolution to what it was pre-2018.

We are calling on the next UK Government to urgently amend the Scotland Act to do just that. **This is not very radical or very ambitious – we are simply calling for a sensible restoration of devolution so that it doesn't create unnecessary barriers to better Scottish human rights law.** As Professor McHarg explores in her paper, this can be done in a number of ways, but the simplest would be *'to amend Sch.4 para.4 of the Scotland Act to make clear that the prohibition on modification of s.28(7) does not prevent the Scottish Parliament from legislating to condition the meaning or effect of UK Acts.'*

Indeed, this sensible clarification and restoration of devolution would also very likely be of benefit to Wales and Northern Ireland, and would ensure that their legislatures can pursue their own agendas on areas in devolved competence.

The next UK Government has a real opportunity to be on the side of sensible devolution and protection of human rights. We're asking all the political parties to grasp this opportunity, include amendments to devolution statutes in their General Election manifestos, and make these changes a priority in their first weeks in power.

And they can be sure of this – if they do, we and many people in Scotland will thank them for it.

A summary of this blog:

- The Scottish Government plans to introduce a Human Rights Bill by June 2024, with strong support from the Consortium and civil society for its robust implementation.

- Recent UK Supreme Court decisions have unexpectedly limited Holyrood's law-making power, and this significantly narrows which law and public services come within the scope of the UNCRC Act, and of this upcoming Human Rights Bill.
- The Consortium urges the next UK Government to amend the Scotland Act to restore pre-2018 devolution, and reverse the impact of the Supreme Court ruling, so that new Scottish human rights law can be as broad as possible.
- This change could also benefit Wales and Northern Ireland, enabling their legislatures to pursue their own agendas in devolved areas.
- The next UK Government has an opportunity to support sensible devolution and human rights protection by prioritising these changes early in their term.

Mhairi Snowden

April 2024