Discussion Paper: Reflections on Implementation of the Human Rights Act 1998

On 20th November 2023, an online event hosted by the Human Rights Consortia in Scotland and Northern Ireland, WCVA and the Wales Governance Centre, gathered a number of expert speakers from across the UK to give their perspectives, experience and reflections around the impact of the Human Rights Act 1998. Chaired by Professor Nicole Busby from University of Glasgow, all of the speakers were asked three questions in separate panels, with a closing plenary that pulled themes together:

- From your experience, what are some of the positive impacts that the HRA has had?
- What are some of the challenges or limitations around its impact?
- What can we learn from this for future development and implementation of progressive human rights law?

This report is a high-level summary of key points raised at this event. There will be many important issues and conclusions that are relevant to implementation of the HRA that are not included here, nor does this report include all the many points raised by the speakers or necessarily reflect the views of the author organisations. However, the aim of this report is to capture some key themes in order to be a helpful contribution to the future development and implementation of human rights law at UK-wide and devolved levels.

Very positive influence on interpretation of rights by UK courts and tribunals

The HRA is relatively young legislation when compared to the Bills of Rights in other countries. Nonetheless, over the past 25 years, it has had a significant positive influence across UK law. This influence has not been dramatic or sudden but rather, incremental. The HRA has been gradually interwoven into the interpretation and application of a multiplicity of areas of law. The HRA has been a very effective channel for encouraging and enabling UK courts and tribunals to take on board European Court of Human Rights jurisprudence and, over time, developing UK case law that reflects implementation of human rights norms and standards. Across multiple areas of law, such as mental health law, social welfare law, disability law, criminal law and more, courts and tribunals have engaged with the HRA, and the ECHR that it incorporates, to improve and strengthen law. In particular, it has meant that blanket application of laws in a way that would have breached the rights of individuals or particular groups has been challenged and led to law or policy change. This impact has occurred through judicial interpretation in courts and tribunals. For example, decisions of the First Tier Tribunal have ensured that housing benefit regulations cannot be interpreted in a way that breaches Convention rights.

UK courts have also become entirely comfortable with application of the proportionality test where limitations on rights would be lawful only if necessary to achieve a legitimate aim in a proportionate way, restricting a right no more than is necessary. The application of proportionality in court rulings can be seen for example, in relation to courts' approaches to safe access zones around abortion facilities in

Northern Ireland, and COVID regulations on Scottish churches which were found to breach the right to freedom of religion and belief.

Significant impact on law and policy making

The impact of the HRA on law-making and interpretation has not only occurred through courts and case law, but also through its indirect effect by being a core element of the development and policy debate surrounding change to UK legislation or new laws and policies. The HRA has required human rights to be taken into account in the initial parameters and restrictions on government action or policy in any given area of law. It has prevented some rights-breaching proposals, that might otherwise have gained traction, from becoming law. It has introduced a major long-term constitutional change into all UK law and policy making structures and processes, including Parliament itself. Indeed, the recent Section 19 Declaration on the Illegal Migration Bill as it was going through Parliament where the Minister could not assure Parliament that the Bill complied with the ECHR, is highlighted as a matter of some concern. This is a potentially significant change in the centrality of the HRA, and more specifically compliance with the ECHR, as a fundamental check and test in the development of new legislation.

The HRA, or more specifically the ECHR that it incorporates, is a core pillar of devolved settlements, and is seen as part of the 'DNA of devolution'. The HRA is viewed as part of the very constitution of devolution settlements. In Northern Ireland, the incorporation of the ECHR is a cornerstone safeguard of the Good Friday Agreement. In Wales and Scotland it has had an enduring and direct impact on the conduct of government at both executive and legislative levels. Indeed, human rights are very often part of the policy ambitions and aspirations at devolved level, and governments and politicians are used to engaging human rights in policy discussions and debates. This has led to a somewhat heightened rights awareness and the 'popularisation' of a human rights-based approach forming a core part of policy development. One example is the Scottish Government's response to the public health emergency of very high numbers of drugs deaths. A Charter of Rights and implementation toolkit is being developed that is based on the HRA, along with the right to the highest attainable level of physical and mental health.

A vital defence against violations of human rights

Prior to the HRA passing, there was very little that common law could do to enable people to defend their civil and political rights and hold government to account. One of the significant successes of the HRA is that it has provided a powerful tool as a legal source for individuals to use to challenge and get remedy on breaches of their human rights in domestic courts. Indeed, the HRA has often been the *only* means of defending and enforcing human rights. There have been a large number of very significant cases that have led to substantive outcomes and human rights justice for individuals. For example, these include cases around protecting the right to protest, properly investigating and pursuing perpetrators of violence against women, safeguards around use of facial recognition technology, a second inquest into the Hillsborough Disaster, preventing the charging of members of the Windrush generation for their right to stay in the UK, independent investigation into conflict-related cases in Northern Ireland, and many more[1]. Several speakers noted that though there is ongoing significant concern about serious violations of human rights and in some areas, significant regression on rights

[1] A helpful summary by EachOther of 50 HRA cases 'that transformed Britain' can be found here.

protections, this would have been a far more serious situation with little that could be done to challenge these, if not for the HRA.

HRA cases have led to effective remedy for individual complainants but have also led to significant change in law and policy as a result. For example, a case supported by JustRight Scotland on non-discrimination and the right to education to challenge residency requirements for student support led to the Scottish Government changing eligibility rules that will benefit many young people; cases taken around covert policing in Northern Ireland led to new legislation on regulating criminal conduct of informants; HRA cases leading to changed law around policing and internment of terrorist suspects.

One of the key aims of the HRA was to 'bring rights home', so that rather than people having to go to Strasbourg to secure a remedy for rights breaches, they are able to do so within UK courts. This has been a significant success of the HRA, where the number of cases from the UK to the European Court has fallen by around 87% since the HRA came into force. The UK has the fewest applications to the European Court of all States that have ratified the ECHR.

An effective tool for improving public services

The impact of the HRA has not only been in courts and at a national level, but possibly even more so, in the shaping and operation of public services. There are many, many examples of the positive implementation of the HRA in public services. Every day, individuals use the HRA in their interactions with public services, to challenge rights-breaching practice or policies. Public bodies have to make decisions that are rights-respecting. Experience is that, when public service providers fully understand the HRA as a framework for decision-making, it is an incredibly helpful tool for their staff at all levels. In particular, it helps to make robust decisions about the restriction of rights in service provision, making sure that there is the least possible restriction on an individual's rights to achieve the desired outcome. Public service policies that are based on the HRA as a fundamental guide are coherent and better reflect service user experience and concerns.

However, evidence suggests that at least half, if not more, of staff working in public bodies have never had any training on human rights[2]. Many public service staff have very low knowledge of the HRA or how to use it, and they cannot properly protect rights if they do not know what they are. A limitation around the impact of the HRA for people who are accessing services has therefore been the distinct lack of attention and resourcing given to knowledge, understanding and implementation of the HRA within public services.

Public understanding and a broader culture of human rights

There were high expectations that the HRA would lead to a broader human rights culture and values that are infused across government, public authorities and the general public. However, it is noted that such culture change takes a long time and cannot be done by one law alone. Other factors such as political backing, economic factors and civil society actions are also needed for cultural change. The initial rollout of the HRA did not include any ambitious or strategic approach to public participation in the

[2] British Institute for Human Rights findings from their extensive work with public bodies around implementation of the Human Rights Act. More information at: https://www.bihr.org.uk/

development or early stages of implementation of the HRA. It was a 'very technical, minimalist sort of activity' and this lack of public participation is seen by some as a 'big mistake'[3].

25 years on since the HRA was passed, many, if not most, people in the UK still do not know what their human rights are or how to claim them, what the HRA is, or about how the HRA benefits them in their day- to-day lives. Whilst there is some evidence that support for human rights is growing, at least in some parts of the UK[4], often the HRA is perceived as only protecting the rights of certain groups, and this is a message often portrayed by those most hostile to it. There is even greater lack of public understanding of the ECHR specifically, often compounded by the technical and legal language used around this. There is recognition that established ways of civil society campaigning and communicating around human rights has not always been effective, particularly in reaching new audiences or the approx. 40% of the population who are 'conflicted' about human rights (that is, they agree with both regressive and progressive messages related to human rights).

However, it is notable that 81% of the UK public think that the government should protect all of our rights and freedoms equally[5]. The HRA has arguably succeeded in building public expectations of human rights protections in general. The concept of human rights is very powerful for people, and specifically, the idea that human rights may be taken sends an extremely powerful message to the public. This has meant that debate around the HRA's survival, even amongst those most hostile to it, has focused on what human rights protections would replace it, rather than whether to have them at all.

Recent experience surrounding the UK Bill of Rights that threatened to repeal the HRA was that a very broad range of civil society organisations, well beyond those identified as the 'human rights sector', engaged in debates on the Bill and became vocal defenders of the HRA. Civil society also worked together in new and more effective coalitions than has been seen since the HRA passed, including a broad coalition convened very successfully by Liberty. Civil society shared expertise and insights, and developed shared messaging and positive stories of the HRA's impact. Organisations, including Equally Ours, successfully amplified the voices of ordinary people on the HRA, to emphasise to politicians how important the rights are for families and communities.

Ongoing Westminster hostility towards human rights protections in law

Since the HRA was passed, the law has been controversial to a certain extent, has been subject to significant hostility from some UK politicians and has lacked vocal political defenders. One speaker suggested that the HRA is now 'under brutal attack'. Some politicians portray the HRA as being an unhelpful hurdle that stops Government from being able to do all that it wants to, as being misused and exploited by criminals and extremists, or being only for certain (often seen as 'less popular' or undesirable) groups. There is a pervasive narrative around the HRA being somehow dangerous.

This negative rhetoric influences and reduces public support and understanding of human rights, and in some cases, makes public bodies less willing to wholeheartedly adopt a human rights-based approach to their decision-making. This hostility, and more specifically, attempts to repeal or limit the HRA, are

[3] Direct quote from event speaker
[4] For example, Scottish Human Rights Commission, Attitudes to Human Rights in Scotland, December 2023; EachOther report of poll, December 2019: 88% Of UK Public Thinks 'Effective' Human Rights Should Protect Everyone, Poll Finds | EachOther
[5] Polling commissioned by Liberty in October 2023

also potentially made more possible because of the general weak public understanding and support for the HRA.

These debates are very much affected by political circumstances, and at the date of the event in November 2023, around the upcoming General Election. There is internal Conservative Party disagreement around principled objections and/or political battles around its positioning on the HRA and the ECHR, that could also be seen as being tied up with competing visions of what would best place the party to win the election. There is a sense that some in the Conservative Party are 'spoiling for a fight' on the ECHR and HRA. At the same time, the Labour Party has been resolute in its defence of remaining as a signatory to the ECHR but has been less clear around its willingness and interest in overturning legislation that reduces or undermines human rights protections. Labour has committed to repealing the Northern Ireland legacy legislation. One speaker emphasised the risk of right-wing politicians gaining increased traction and the impact that this might have on the rhetoric and protection of human rights in future years.

There is a sense that human rights protections, because they do restrict governments and challenge power, will always need to be defended. The survival of the HRA through very tumultuous events such as terror attacks, Brexit, and COVID-19 can be claimed as one of its successes. Indeed, because it is now so embedded and interwoven into multiple layers of UK law, as well as in the Good Friday Agreement and devolved settlements, it would be incredibly difficult to disentangle the HRA from the accepted norms and standards of UK law and related institutions. There is also, in general, a lack of any agreement on what would replace it. Whilst there are minority proponents of returning to common law rights only, these lack legal certainty, are very vague, and the ECHR jurisprudence was engaged in the courts well before the HRA was passed.

The nature of the challenge to the HRA has also changed so that it is more focused around hostility towards the ECHR itself, and more specifically to the role of the European Court of Human Rights. This gives rise to a significantly different debate from when it was passed, where the UK's relationship to the ECHR was largely accepted as being very positive, and the main question was whether to incorporate it into UK law.

Increasing political hostility in the UK to the HRA and ECHR is also taking place in the midst of more general attacks and challenges to the ECHR and the entire framework of international human rights law in many other countries. The hostility to international human rights is not something that is a UK-only phenomenon but instead human rights protections in law are becoming more contested across the world.

It should be noted that this political hostility to the HRA is less prevalent, or at least noticeable, at devolved levels. In Wales and Scotland in particular, there is a general absence of high-profile political calls for the dismantling of the HRA – instead, as outlined further below, the HRA is most often seen as a stepping stone to going further in incorporating more international human rights treaties into law. The Northern Ireland context is one where, any challenge and hostility to the HRA simultaneously threatens and raises significant issues relating to the Good Friday Agreement.

Dismantling or excluding human rights protections in law

Although the wholescale repeal of the HRA through a UK Bill of Rights is, at least for now, 'off of the table', the major risk to human rights protections comes from the new and growing tendency towards

limiting or excluding the HRA in legislation. This is seen by many as an even greater and more insidious challenge to human rights protections than the redundant Bill of Rights. There are provisions in the Illegal Migration Act that limit the application of Section 3 of the HRA, with similar provisions in the Victims and Prisoners Bill (England and Wales). There are discussions around new legislation that will require (most) people seeking asylum to be deported to Rwanda entirely excluding the HRA and any relevant aspect of international human rights law, from applying to any part of that legislation. This would render human rights protections as unavailable and to be discounted in the UK asylum system. The Supreme Court in its Rwanda ruling was at pains to emphasise that the ruling was not solely based on the ECHR or HRA, but the ongoing persistent and vociferous hostility towards the HRA and ECHR meant that this became the focus of the political reaction. Indeed, there is concern that some of the political reaction to the Rwanda ruling suggested a disregard for the rule of law in its entirety.

This strategy of 'death by a 1000 cuts' or 'salami-slicing' of the HRA could be very significant, both for those directly impacted by rights violations who will not be able to challenge these, and more broadly if this approach becomes increasingly normalised across the development of UK law. It is notably more difficult to engage the general public to push back against this 'salami-slicing' strategy because on the face of it, it only affects a smaller group of people who do not seem particularly 'close to home' for many people. Human rights organisations have an ongoing challenge to convince the public and politicians that you have to protect human rights in their entirety for everyone, or you undermine the system as a whole.

In Northern Ireland, the HRA is part of the Good Friday Agreement but there is an absence of a legally binding dispute resolution mechanism for breaches of the Agreement. The UK Government has 'just legislated to dismantle the HRA protections piece by piece.[6]' For example, in many court battles, the UK Government has used the legal technicality of temporal restriction to not comply with procedural obligations under Articles 2 and 3 to investigate human rights violations that took place during the Troubles and therefore before commencement of the HRA; the recent Legacy and Reconciliation Act has closed down the inquest system for police ombudsman investigations (though that legislation may be challenged in the Strasbourg Court by the Irish Government). One speaker said 'the limitation is that there is nothing stopping Westminster from interfering in the HRA and its application, and that's creating significant difficulties for us in Northern Ireland.'

The HRA and economic, social and cultural rights

The Universal Declaration on Human Rights includes civil, political, economic, social and cultural rights, all of which are needed to live lives of dignity, but the HRA mainly includes only civil and political rights. However, it has provided certain protections for economic and social rights, albeit through a somewhat arduous approach, through employing the right to non-discrimination and non-interference. In 2005, the European Court of Human Rights ruled that, whilst there is no right to social security per se within the ECHR (though this is part of our broader international human rights law through ICESCR), where States provide social security benefits, these must be provided without discrimination. This principle has been engaged and reflected in domestic case law, such as rulings around Disability Living Allowance whilst in hospital, disability premium for homeless disabled people, and cases related to the bedroom tax. Whilst the HRA does not directly provide economic and social rights, it has in some significant ways, allowed 'one foot in the door' with regards to their application in certain situations.

[6] Direct quote from event speaker

The lack of economic and social rights in the HRA has limited related case law by applying these only to certain groups or to very narrow provisions concerning non-discrimination. The HRA's narrow provision does not allow challenge based on the root issue on human rights grounds, but only carve outs for certain groups or people in very specific circumstances. For example, this resulted in an unsuccessful challenges to the two-child limit imposed on benefit claimants and on the benefits cap itself on the basis that such measures discriminated against lone parents given that they make up 70% of those affected.

Some of the significant issues affecting people in recent years, such as experiences of austerity policies and COVID-19 measures, and the economic and social inequalities that these exposed and heightened, are directly related to economic and social rights. This has exposed the limitations of the HRA in not adequately protecting these everyday rights, and not being a tool that can be use to challenge violations of these rights when people are most in need.

Paving the way for further incorporation of international human rights

The HRA has demonstrated that the incorporation of international human rights standards can work in our UK legal system. It is capable of applying these standards and infusing them across law and public administrations over time. The HRA has mapped the way forward for rights incorporation in the UK.

In Wales and Scotland, the HRA has been the stepping stone, pathfinder and given the impetus towards incorporation of economic, social, cultural and environmental rights (ESCER) in areas of devolved competence. The HRA has underpinned the confidence of devolved institutions to embrace, not only ECHR rights, but to look for alternative or complimentary rights beyond the ECHR as a framework for public policy. This broader conception of the full range of human rights is reflected across different devolved policy fields to varying degrees, including in relation to women's rights, disabled people's rights, and the rights of refugees and asylum seekers. The HRA freed one hand to defend human rights (that of civil and political rights) and the debate and trajectory in Scotland and Wales is now to free the other hand (economic, social, cultural and environmental rights) so that the whole range of our human rights are fully protected in law.

The UN Convention on the Rights of the Child (UNCRC) has been incorporated into law in both Wales and Scotland in different ways and to different degrees. In Scotland, legislation is also being developed that will incorporate the International Convention on Economic, Social and Cultural Rights (ICESCR), with most of these rights falling within devolved competence. Wales is moving towards incorporating the right to adequate housing, with the Welsh Government having undertaken a green paper consultation on this, albeit with a focus on affordability and fair rent specifically. There is government and civic society support for the broader incorporation of ICESRC rights in Wales, and work investigating options for strengthening human rights there via a potential Human Rights (Wales) Bill aims to consider this. While it is too early to know what may be in an eventual Wales Bill, both the Scottish and Welsh approaches are likely to include treaties on women's rights (CEDAW), disabled people's rights (CRPD). These feature in the Scottish proposals and are in the Welsh Government's programme for government commitments. The Scottish framework will go further however and include rights related to race (CERD), as well as the right to a healthy environment. Again, Wales is exploring options for these but there is currently no political commitment. The trajectories in Wales and Scotland are very similar, though notably also different.

In Northern Ireland, the commitment to a Bill of Rights as part of the Good Friday Agreement has also provided a different trajectory and a different debate around human rights than at Westminster. The NI Bill of Rights would further entrench the ECHR and could also include ESCER and other international standards. Despite a previous Labour Government helping negotiate the Belfast/Good Friday Agreement that contained this commitment to a Bill of Rights for Northern Ireland they failed to deliver this in Westminster legislation during their time in Government. A former Labour Secretary of State Shaun Woodward even went as far as rejecting proposals by the Northern Ireland Human Rights Commission to deliver additional rights in a NI Bill of Rights, because he felt it would 'give rise to unjustified inequalities across the UK'.

Following the ascendancy of the Conservative Party to lead the UK Government, there has been consistent refusal to take steps to deliver the NI Bill of Rights in legislation. A NI Assembly committee process (set up under the New Decade, New Approach Agreement) found in February 2022 that there was support for a Bill of Rights by the majority of political parties in Northern Ireland. However, the UK Government continued to insist on political consensus among Northern Ireland parties on the delivery of this commitment, despite this never being a condition of the Belfast/Good Friday Agreement. In turn, the focus on 'political consensus' has effectively created a political veto on this important protection.

While there have been several restatements of the importance of delivering this outstanding commitment by the British Labour Party in recent years, there have been no commitments made by them to move beyond the political consensus approach. The proposal for a Bill of Rights continues to enjoy broad civil society and public support and it is recognised that the development of an objective set of safeguards in such legislation could constrain executive and legislative power in a way that may help Stormont to function more effectively and sustainably.

Differing levels of human rights protection across the UK

Human rights protections in law are already very different across the UK – for example, the ECHR is a non-negotiable aspect of law-making at Holyrood and the Senedd, and is part of the very fabric of peace in Northern Ireland; the UNCRC is directly or indirectly incorporated in Scotland and Wales; the human right to social security is one of the principles of the Social Security (Scotland) Act 2018. As devolved legislatures pass further progressive law that enhances protection across the range of human rights, these differing levels of protection depending on where you live will only increase. This also means that people who live in Scotland, Wales and Northern Ireland will not have access to ESCER related to the activities of public authorities that are within reserved competence. This increased divergence may lead to increased demands for constitutional change or for enhanced protections at UK level, and has implications for how civil society across the UK defends and engages with human rights developments and messaging.

The HRA and parliamentary sovereignty

The HRA is 'just' an Act of the UK Parliament. It is not embedded into the constitution in the same way that human rights are in many other countries through written constitutions. It can be removed, disapplied or reformed by another simple Act of the UK Parliament, and there is no requirement for example, for a two-thirds majority in order to do so.

Courts cannot strike down any piece of law passed by the UK Parliament that is incompatible with the ECHR but they can issue a Declaration of Incompatibility - it is then up to Westminster to decide how to respond to that Declaration. This was fundamental to the design of the HRA, carefully crafted to accommodate the HRA in a system which provides for the absolute sovereignty of the UK Parliament. Many defenders of the HRA point to this as evidence that parliamentary sovereignty is upheld, particularly during recent debate around the UK Bill of Rights.

Most Declarations of Incompatibility have led to a change in the law and so these have had a strong practical function that grows in power, the more that they result in legal change. However, some emphasise that one weakness of the HRA is that such change can take a long time. For example, the European Court of Human Rights ruled that a blanket prohibition on prisoner voting unlawfully restricted the right to vote. This was followed two years later by a Declaration of Incompatibility from the Inner House of the Court of Session. These rulings were ignored for almost 30 years by successive administrations, until the law was finally changed.

Furthermore, there is concern that the extent to which Westminster responds positively and proactively to amend law or regulations in response to Declarations of Incompatibility comes out of convention, rather than requirement. The UK Parliament can simply choose to ignore these Declarations, and international human rights law is ultimately unable to assert itself.

In contrast, any Act passed by the devolved legislatures must comply with the ECHR. Such legislation that the courts rule does not comply with the ECHR can be struck down - that is, it is not law. There have been five distinct pieces of Scottish legislation that have been struck down by the courts, thereby providing a structural remedy in respect of law that would breach human rights. This 'strike down' power is also in the recent UNCRC Incorporation Scotland Act 2023, and is expected to be part of the upcoming Scottish Human Rights Bill.

In addition, there is some concern that in the context of ongoing hostility to the HRA, UK courts could be viewed as adopting a more deferential approach to reviewing Acts of the UK Parliament for compatibility with the HRA. Particularly around highly contested issues such as the Rwanda legislation, it is unclear as to whether the Supreme Court will apply objective standards or defer to Parliament.

Access to remedy on human rights violations

Enforceability of rights through the courts is a fundamental principle of the HRA. As outlined above, people use the HRA every day to access justice and to hold the government to account by claiming their human rights through the courts, and there have been a large number of significant HRA cases that have led to remedy for individuals and changes in law and policy. However, although the right to an effective remedy for breach of rights is part of the ECHR, the UK Parliament chose not to incorporate this in the HRA. The reduction in access to justice in recent years, or a lack of action to address barriers to access to justice, is viewed as one of the most successful attacks on the HRA itself. Legal Aid reforms in England and Wales, or lack of legal aid reform in Scotland, together with other legislative change such as in the Criminal Justice and Courts Act, have resulted in 'day to day practical gutting of the ability to actually use the HRA in large parts of our society'[7], and not only the HRA but also the wider apparatus of civil justice. This results to some extent, in defending the HRA more as a sort of

[7] Direct quote from event speaker

theoretical exercise, and though it is still doing a lot of good for people, it is much less effective than it could be.

In Scotland in particular, there appears to be relatively few successful human rights cases. During the first 12 years of the HRA, all Scottish cases related to criminal justice and prison conditions, though this has now broadened to other types of cases, for example relating to education and to freedom of religion. However, data on HRA cases in Scottish courts and tribunals is severely lacking – without better data both on how the HRA is being engaged in cases and the outcome of those, as well as how it is engaged in pre-action correspondence and non-judicial remedies, it is difficult to assess the impact of the HRA on access to justice. There are also many known barriers to accessing human rights justice in Scotland including inaccessible language in the Court of Session, complex and unclear court rules and procedures, a shortage of human rights lawyers, financial barriers, underdeveloped public interest litigation, a lack of human rights education and awareness, and the three month time limit on judicial review which is rarely extended with the discretion of the court.

'Standing' to take a case has a restrictive definition in the HRA. To take an HRA case, you have to either be the 'victim' of the human rights violation, or the Equality and Human Rights Commission which can take a case in their own name in England and Wales, and the Northern Ireland Human Rights Commission which can similarly take own name cases. No such power exists for the Scottish Human Rights Commission. This has meant that the use of the courts to address systemic and strategic human rights violations has been limited because the burden has largely been placed on individuals to take cases that have strategic, wider impact beyond the individual. This burden on individuals can be considerable, particularly given they are also coping with juggling everyday life challenges, and during the lifetime of the case, they may no longer be directly affected by the issue.

The recent UNCRC (Incorporation) (Scotland) Act has a no 'victim' test to take a case and so standing is broadened out to the 'sufficient interest' test. The SHRC and Children and Young People Commissioner for Scotland (CYPCS) have also been given new powers to take UNCRC cases in their own name. It is expected that this same broader approach to standing will be reflected in the upcoming Scottish Human Rights Bill. In Wales, research has shown that indirect incorporation of the UNCRC into Welsh law is viewed as a very positive step but also that there are increasing calls for stronger forms of accountability through the courts. Certain communities in Wales want there to be more opportunity for strategic litigation to enforce rights, or even the threat of such enforcement through the courts. Given that ESCER are more often related to systemic injustices beyond specific individuals, and environmental rights in particular are experienced by whole groups or communities rather than individuals, opening the door to NGOs and Human Rights Institutions being able to take strategic litigation on these rights is viewed as a potentially very effective route for addressing systemic rights violations in the longer term.

Looking ahead: some reflections on learning for future development and defence of human rights protections in law

This section draws on speakers' specific suggestions for learning for future human rights law, as well as drawing some conclusions from their responses around the limitations of HRA implementation.

Continual and pressing need to defend the HRA, the ECHR and the wider international human rights law framework

The level of hostility towards the ECHR and the European Court of Human Rights, together with proposals and actions that exclude its protections within certain pieces of legislation and therefore also for individuals in specific circumstances, is a significant concern for the future of human rights in the UK. The ECHR and international human rights law needs more, and effective, vocal defenders across civil society and across political parties. There needs to be increased focus on ensuring that the public better understand, and therefore give their support, to the UK remaining in the ECHR and to the UK playing its full part in the development, monitoring and shoring up of the international human rights law framework. Where there has been a reduction in human rights protections in recent legislation, political parties should commit to amending or repealing this law at the earliest possible opportunity, and civil society should press them to do so.

Incorporate all international human rights into law in the UK

People need to be able to enforce all of their human rights to live lives of dignity. Indeed, engaging with the public around ESCER is one of the best ways to strengthen active support for human rights protections in law more generally. The HRA needs to be built upon by incorporation of the full range of human rights into law, both at a UK level, and by devolved legislatures where the rights fall within devolved competence. Civil society across the UK therefore needs to get on 'the front foot' in not only defending the HRA but also in pressing for incorporation of ESCER and group rights treaties.

Government and community ownership of ESCER

Incorporation of ESCER in devolved nations and regions provides a fundamental reshaping of the landscape around these rights that needs collective ownership at every level. This 'ownership' is crucial to avoiding toxic rhetoric and any reduction in human rights protections in the coming years.

Devolved governments need to fully 'own' these rights so that they are prepared to be held to account on realisation of ESCER. They need to, most importantly, 'own' these rights by embedding them into how they make all law and policy, preventing human rights violations from happening.

Devolved incorporation law must not be owned only by lawyers, or indeed by policy makers, but owned by individuals and communities who can use and enforce resulting rights The people most affected by human rights breaches, including groups and civil society organisations who collectively express their experience, need to be directly engaged in developing, implementing and monitoring the impact of human rights incorporation law. There needs to be a focus on enabling and ensuring public ownership of human rights as a core part of the rollout of devolved incorporation law.

Rights incorporation at constitutional level

Plans for the incorporation of international human rights law in Scotland and Wales include the requirement for all law and policy to be compatible with the full range of human rights, and if it is not, it can be struck down by the courts. It is however currently anticipated that the enhanced human rights law will still be an ordinary Act of the Scottish or Welsh legislatures in the same way as any other Act,

and could therefore be relatively easily amended or repealed in the future. Consideration should be given to strengthening the constitutional role of human rights law through requiring for example, a two-thirds parliamentary majority to make any amendments to it.

Interweave human rights across law and policy

The HRA, and devolved incorporation laws, should not be left isolated as the only defence against human rights violations. Instead, human rights realisation should be centred and evident across legislation, across policy and regulations, and across the approaches that governments take to the development and monitoring of policy outcomes and aspirations. Civil society, government and politicians need to continue to advocate, and take action, for human rights to be made real in people's lives through other laws, policies and services, as well as being underpinned by human rights law itself.

The fullest impact of human rights law is not in fact, the law itself, but in how it then shapes all of the decisions and priorities of those in power. Enhanced human rights law needs to be set within a framework of basic processes for law, policy-making and public services, such as human rights impact assessments, human rights budgeting, and public consultation and participation around new policy. Implementation of new devolved human rights law needs to give sufficient attention and resourcing to practical, helpful guidance, training and rollout of these human rights-based processes.

Build public understanding of human rights

Passing human rights law does not in of itself lead to broad public understanding of human rights law, or of human rights more generally. A lack of public support for human rights law leaves it more vulnerable to dilution and reduction over time. Government, and civil society, need to target resource and attention to increasing public understanding of human rights. This includes: producing resources in accessible language; sharing examples of human rights law that are relevant to people's everyday lives; increased human rights education in schools; talking about the individual stories of the people impacted directly by any reduction in human rights law protections; engaging the public around ESCER.

Strategic communications methodologies concerning human rights need to become standard across civil society and government. This uses evidence-based techniques and a wealth of existing research and insights to understand what people think and feel about human rights, and what matters to them and their values, and then frame arguments and communications accordingly. As one speaker said, 'Strategic communications is about making conscious choices about what to leave in or out of our communications in order to build support and create positive social change.'

Collective civil society defence and promotion of human rights law

Civil society across the UK need to continue to work well, and better, together to defend existing human rights law, to increase public understanding of human rights, and to press politicians to go further on human rights protections. Civil society need to have a particular focus on building understanding of the ECHR and the international human rights law framework and pressing for incorporation of ESCER and group rights treaties. It is important that the huge movement of civil society organisations that went beyond the 'usual suspects' and campaigned together around the Bill of Rights, continues to be active

in advocating together around human rights in coming years, drawing on the vast experience and everyday examples from across diverse communities and issue-based charities.

Improve access to human rights justice

For human rights law to be a credible tool to enforce rights and hold the government to account, there needs to be significant improvement in people's ability to use our justice system – this is seen as crucial to the longer-term resilience of human rights law. Civil society who campaign around human rights therefore also need to campaign for better access to civil justice. There needs to be better collection of data related to accessing human rights justice to enable assessment and improvement to the system. Governments should reform legal aid systems in England and Wales, and in Scotland, to ensure that everyone can access a legal aid lawyer for any case that engages human rights. Other barriers to accessing justice such as short time limits should be addressed. The right to effective remedy should be part of UK law, and should be part of human rights law reform in devolved nations and regions.

Expanding the definition of standing from the 'victim' test in the HRA is essential. Other barriers to strategic litigation by NGOs and NHRIs should be addressed so that they can take the burden of cases that raise strategically important issues, rather this relying on individuals.

Increase legal expertise around human rights

Day to day legal advice and representation casework needs to continue to engage with the HRA and upcoming devolved human rights laws – this will not only bring positive outcomes for individuals but will also be an impactful long-term driver for the strengthening and survival of human rights law. There is a significant need for increased expertise within the legal sector around human rights - this is particularly the case in Scotland where there have been fewer human rights cases and should therefore be part of plans to implement new devolved human rights law.

Effective training and support for government and public bodies around human rights

Human rights law can be a very effective framework for government and public body decision-making at all levels – however, there is currently a huge dearth of any significant training and support for public bodies around human rights. Ensuring that there is mandatory, regular and directly-applicable training and ongoing support on human rights law and approaches, for all staff at all levels in government and public bodies is essential to human rights bringing the best possible improvement to people's lives. Learning from organisations such as the British Institute for Human Rights, and from the experiences of people at the sharp end of daily human rights violations, is important for informing how this training is shaped and rolled out.

February 2024