



**A CHILDREN'S RIGHTS
PERSPECTIVE: REPEAL
OF THE HUMAN
RIGHTS ACT
EXECUTIVE SUMMARY**

NOVEMBER 2022

BACKGROUND

In their 2019 manifesto, the UK Government set out a commitment to 'update' the Human Rights Act 1998, which directly incorporates the [European Convention on Human Rights](#) (ECHR) into law.¹ The UK Government then published a consultation setting out their proposals to reform the Human Rights Act, which would significantly and fundamentally undermine how the rights contained in the ECHR are interpreted and given effect.² Following this consultation, the UK Government published the Bill of Rights Bill (the Bill). The former Prime Minister Liz Truss decided to pause progress of the Bill.³ We remain concerned that the UK Government will seek to find new routes to achieve the Bill's objectives and thus undermine the protections in the Human Rights Act.⁴

The Human Rights Act is now over 20 years old and has had a significant impact on the growing culture and understanding of human rights in Scotland. The ECHR that it incorporates is embedded as a key pillar of devolution. ECHR rights are part of the fabric of Scotland's legislation, rich body of case law and, crucially, of the legislative competence and the law-making process of the Scottish Parliament.

While containing few express references to children, the rights contained in the ECHR have special relevance for children. The way that the European Court of Human Rights has interpreted these rights in cases involving children has demonstrated the potential of the ECHR to protect the rights of children. The Human Rights Act links the interpretation of these rights to national law, by requiring courts and public authorities to interpret and apply legislation in a way that complies with ECHR rights.

The Human Rights Act has helped to integrate human rights into the development of services for children. Where those representing the interests of children have resorted to litigation, the Human Rights Act enables enforcement of rights through the national courts and tribunals, thereby aiding access to justice and increasing the right to an effective remedy.

Children's rights protections are in grave danger of being eroded by the UK Government's proposals. The proposals are at odds with the Scottish Government's agenda for human rights development. The UNCRC (Incorporation) (Scotland) Bill, once brought into force, will make it unlawful for public authorities to act incompatibly with the incorporated UNCRC rights, giving children, young people, and their representatives the power to go to court to enforce their rights.

The UK Government's proposals risk creating a two-tier system in Scotland for protection of children's rights, whereby ECHR rights will be subject to weaker enforcement mechanisms than UNCRC rights.

¹ Page 48, available here: <https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>

² Human Rights Act Reform: A Modern Bill of Rights – consultation. Available here: <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>

³ The Guardian, 'Liz Truss halts Dominic Raab's bill of rights plan', 7 September 2022. Available here: <https://www.theguardian.com/law/2022/sep/07/liz-truss-halts-dominic-raab-bill-of-rights-plan>

⁴ The Independent, 'Suella Braverman sparks new government row after calling for UK to quit ECHR', 5 October 2022. Available here: <https://www.independent.co.uk/news/uk/politics/suella-braverman-european-convention-human-rights-b2195809.html>

OUR CONCERNS

1. **Under the UK Government's proposals, courts and public authorities would no longer have a duty to interpret and apply legislation in a way which respects ECHR rights.** The 'interpretive obligation' under Section 3, read in conjunction with public authorities' duty to respect ECHR rights under Section 6, is central to ensuring that human rights protection is real and effective for children. It has helped to integrate human rights into the delivery of public services in Scotland.
2. **The extent and application of the State's positive obligations would be limited.** The Human Rights Act gives effect to positive obligations under the ECHR, meaning it is not enough for public authorities to just not breach children's rights – they must take proactive reasonable steps to protect their rights. Positive obligations have therefore played an instrumental role in expanding rights protections for children. The proposals would limit the extent and application of existing positive obligations and there is a risk that future European Court of Human Rights' case law clarifying or developing positive obligations would not apply in Scotland.
3. **Courts would no longer need to take into account Strasbourg case law.** The Human Rights Act requires our national courts and tribunals to "take into account" relevant decisions of the European Court of Human Rights when deciding a case concerning an ECHR right. The requirement is essential to ensure that children and those acting on their behalf can enforce the full extent of their ECHR rights through our national courts. However, the UK Government's proposals would remove this requirement. This means that children would no longer be able to rely on the European Court of Human Rights' evolving case law and new interpretations of existing ECHR rights. This will put Scotland out of sync with the interpretation of children's rights across Europe.
4. **Balancing of rights would be weighted in favour of the State.** The Human Rights Act contains qualified human rights, like the Right to Private and Family Life (Article 8) and Freedom of Expression (Article 10). Any interference in such rights is only permitted when:
 - o (1) allowed by law;
 - o (2) legitimate (good reason);
 - o and (3) proportionate.

Proportionality, the third part of the test, is a key part of these rights. It requires public body decision-makers to consider the individual's circumstances; choose the least restrictive option; and make a reasoned decision, including why they consider the restriction on human rights to be justifiable. The proposals would set out rules for how courts decide if a restriction on someone's human rights by the Government or a public body is proportionate. Rules would apply in relation to specific scenarios, including where Article 8 is relied on in deportation

proceedings, and in a case concerning Article 10 – freedom of expression. This change is not needed, as national courts have already demonstrated that they are able to carry out these often-sensitive balancing exercises without the need for rules. These rules would skew the balancing approach in favour of the State, thereby restricting the scope of protection of rights.

5. **Scottish courts and tribunals may be required to adopt an interpretation of ECHR rights which will put it out of step with the European Court of Human Rights and potentially in breach of the ECHR.** The proposals would generally apply equally to courts and tribunals in Scotland. In these circumstances, and following incorporation of the UNCRC, Scottish courts may find themselves in a situation where they risk acting incompatibly with the rights of children under the UNCRC.
6. **The UK Government's proposals would impact on devolved decision-making.** Because the Scotland Act directly references the Human Rights Act, the UK Government's changes to how ECHR rights are interpreted under the Human Rights Act will have a knock-on effect on how courts will approach challenges against the Scottish Government and Scottish legislation based on ECHR rights. The proposals not only make the UK Government less accountable for breaches of the fundamental rights of children under the ECHR; by extension they will weaken accountability of the Scottish Parliament and actions of the Scottish Government.

RECOMMENDATIONS

The Human Rights Act should be retained in its current form.

- ▶ We call on the **Scottish Parliament** in its role as a human rights guarantor to do all it can to ensure that children's rights in Scotland are protected, respected and fulfilled. In particular, we call on the Scottish Parliament to pass a motion refusing legislative consent for any current or future Bill which seeks to weaken or repeal the Human Rights Act; and to re-affirm Scotland's commitment to the ECHR and to the Council of Europe.
- ▶ We repeat our joint call to the Scottish Parliament's **Europe, External Affairs and Culture Committee** to conduct an Inquiry into the devolution impacts of the UK Government's proposals to reform the Human Rights Act.⁵
- ▶ We call on the **Scottish Government** to ensure that the consultation for their forthcoming [Human Rights Bill](#) addresses the question of how, in light of the UK Government's proposals, protection for civil and political rights in Scotland can be strengthened within devolved competence. The Scottish Government should explore the option of incorporating the ECHR into Scots law alongside UN treaties.

⁵ Joint Statement: Human Rights Act reform will erode children's rights protections. Available here: <https://www.cypcs.org.uk/news-and-stories/statement-human-rights-act-reform-will-erode-childrens-rights-protections/>



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