



FACT SHEET

HUMAN RIGHTS IN SCOTLAND

Human Rights Act 1998 ("HRA")

The HRA applies to Scotland in exactly the same way as it does to the rest of the UK. Scottish public authorities, Scottish courts and tribunals, and persons in Scotland certain of whose functions are of a public nature, must act in a way that is compatible with the human rights set out in Schedule 1 to the HRA ("**Convention rights**"). A failure to do so can result in the Scottish courts granting any relief or remedy that it considers just and appropriate, including an order requiring the public authority decision maker to retake their decision. The courts do have the power to award damages where necessary to ensure "just satisfaction", but financial compensation is not automatic and is unlikely to be awarded where there is an alternative option to remedy the human rights violation.

Scotland Act 1998

Human rights are given additional protection in Scotland through the Scotland Act 1998 ("**Scotland Act**"), the legislation which implements the devolution settlement for Scotland and established the Scottish Parliament. The ways in which the Scotland Act goes further than the HRA in guaranteeing and protecting Convention rights are outlined below.

No power to make laws which are incompatible with human rights

The Scottish Parliament has the power to create laws which apply in Scotland by passing an Act of the Scottish Parliament ("**SP Act**"). The Scottish Parliament has not been given the power to make laws that breach human rights. Section 29 of the Scotland Act ensures that any SP Act passed by the Scottish Parliament is not law to the extent it is incompatible with any of the Convention rights in the HRA. This is because passing such a law would be outside the legislative competence granted to the Scottish Parliament by the Scotland Act. In cases where the legality of a SP Act, or a particular provision of it, is challenged on this basis, the High Court of Justiciary, the Court of Session and the Supreme Court each have the power to strike down the relevant SP Act or provision on the grounds that is outside the competence of the Scottish Parliament.

Therefore, unlike laws passed by the UK Parliament, which continue to be legally enforceable even if declared by a court to breach human rights in accordance with section 4 of the HRA, a SP Act (or certain provisions of a SP Act) passed by the Scottish Parliament will no longer be considered to be law if a court decides that it breaches human rights.

In order to prevent this occurring, section 31(1) of the Scotland Act provides that the person in charge of the Bill (usually the relevant Minister) should make a statement that the Bill falls within the legislative competence of the Scottish Parliament and section 31(2) further provides that the



FACT SHEET

Presiding Officer must then take a decision that it does come within the Scottish Parliament's competence. This is, of course, a wider and more far-reaching provision than section 19 of the HRA which simply requires the Minister in charge of a Bill in either House of the Westminster Parliament to make a statement of compatibility that the provisions of the Bill are compatible with Convention rights (a statement which Parliament can choose to ignore).

In the same way that section 3 of the HRA requires the courts to interpret UK legislation as far as is possible to enable compatibility with the relevant Convention rights, section 101 of the Scotland Act requires courts to take a similar approach in relation to SP Acts and Scottish Government subordinate legislation. In circumstances where legislation or certain provisions could be read in such a way as to be incompatible with human rights, courts should interpret that legislation in such a way that it is instead compatible and therefore continues to be considered as law. The main difference between the provisions is that section 3(1) of the HRA requires an expansive and purposive interpretation - "so far as is possible to do so [...] must be read and given effect in a way which is compatible with the Convention rights" -, while section 101(2) of the Scotland Act states that the provision should be "read as narrowly as is required for it to be within competence".

No power for Scottish Ministers to act incompatibly with human rights

When the Scottish Parliament was established, the Scottish Ministers were given the ability to exercise powers within devolved competence. These powers were previously exercised by UK Government Ministers pre-devolution.

The Scottish Ministers cannot exercise these powers in a way which would breach human rights. Section 57(2) of the Scotland Act provides that a member of the Scottish Government does not have the power to make subordinate legislation or to do any other act in so far as the legislation or act is incompatible with the Convention rights. This is similar to the position under the HRA, albeit slightly more stringent, given that under the HRA a court can only strike down secondary legislation made by a Government Minister, provided that the secondary legislation was not required to be drafted in that way because of a provision of primary legislation.

Human rights claims

Section 100 of the Scotland Act sets out the procedural restrictions on bringing a human rights claim under the Act. As under the HRA, only individuals who would be considered to be victims of the alleged human rights breach will be able to bring a claim under the Scotland Act. In addition, where the breach complained of is an act of a Scottish Minister, the claimant is usually required to bring proceedings before the court within one year of the date on which the alleged breach took place.