

The Human Rights Act: A Review from an LGBTI Policy Perspective

26th February 2021

Equality Network 30 Bernard St, Edinburgh, EH6 6PR

Tel: 0131 467 6039 [REDACTED]

www.equality-network.org & www.scottishtrans.org

I. Introduction

1. The Equality Network is a Scottish national lesbian, gay, bisexual, trans and intersex (LGBTI) equality organisation in Scotland existing since 1997. The Scottish Trans Alliance, based within the Equality Network since 2007, focusses specifically on trans equality. This submission is on behalf of both the Equality Network and Scottish Trans Alliance.
2. The Equality Network is policy-based organisation and therefore we respond on the basis of international best practice and equality and human rights considerations in Scottish law and legislation.
3. In our response we will focus on the benefits we feel are provided by the HRA, and the relationship it helps provide between domestic courts and the jurisprudence of the ECtHR. We will also examine the important role we believe judicial review holds in the area of law and policy. Finally, we will discuss the positive and central place the HRA has in Scotland current Human Rights development, and how important it is that it is protected.

II. Relationship between the domestic courts and the European Court of Human Rights

This section deals with the relationship between domestic courts and the European Court of Human Rights (ECtHR). With reference to the duty and ECtHR jurisprudence, the IHRAR asks;

a) How has the duty to “take into account” ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

4. Case law from the ECtHR has helped to clarify the meaning of the European Convention of Human Rights (ECHR) rights in practice and has aided courts, policy makers, and those taking part in policy discussions to apply the principles of the ECHR to Scottish and wider UK law and policy. This in turn has helped ensure that we are not left behind in terms of human rights globally. The ECtHR jurisprudence strengthens and improves our human rights system, both in bringing clarity and understanding of HRA application within the legislative process, and in informing policy making and public authority duties under Section 6.
5. I have mentioned below several important LGBT ECtHR cases, which have been taken into account by the Scottish and UK governments in order to show the benefit this jurisprudence can bring to UK policy making and legislation, bringing about a higher overall level of access to Human Rights.
6. In 1981 *Dudgeon v the United Kingdom* was a ECtHR case which argued that the criminalisation of male homosexual acts in Northern Ireland through the Criminal Law Amendment Act 1995 violated the a right to a private life under the ECHR. As a result of this ruling Northern Ireland decriminalised male homosexual sex in 1982.

7. In 1999, in *Smith and Grady v UK* there was a decision by ECtHR which found that the investigation into, and resultant discharge of, personnel from the Royal Navy on the basis of these personnel being homosexual was a breach of their right to a private life under the ECHR. Previously this case had been dismissed in both the English High Court and the Court of Appeal.

8. In the same month in 1999 the case of *Lustig-Prean and Beckett v UK* was brought to the ECtHR by two members of the Royal Navy who had previously been dismissed from for being homosexual. The ECtHR also found that these cases violated their right to a private life under the ECHR. Following these rulings all pending disciplinary hearings for those who were suspected of being homosexual were suspended by the Defence Secretary. The ban was then subsequently lifted in January 2000.

9. In 2000 the case of *A.D.T V UK* was decided by the ECtHR, finding that his conviction for gross indecency was a violation of his rights under the ECHR. A.D.T. had been arrested due to the police seizing, as evidence, a videotape of him having sexual relations with four other men. They charged him with gross indecency under the Sexual Offences Act 1956. As the tapes had not been made public this charge was purely in relation to his private activities. The Court agreed that his right to a private life had been violated and he was awarded compensation.

10. In Scotland this led to the inclusion of the repeal of section 13(2)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995 in the Convention Rights (Compliance) (Scotland) Act 2001. The 1995 Act had consolidated the 1980 legislation which had criminalised homosexual sexual relations between more than two people in private in Scotland. In England and Wales this ruling by the ECtHR was implemented by removing the criminalisation of group homosexual acts in the Sexual Offences Act 2003.

11. In 2002 the case of *Christine Goodwin v UK* was decided by the ECtHR. Christine Goodwin, a trans woman, claimed she had faced sexual harassment at work following her gender reassignment. She also stated that the fact that her NI number remained the same meant her employer was able to see her previous name and gender, revealing her trans history without her permission. The ECtHR found this to be a violation of the ECHR both with regards to the right to a private life as well as with regards to the right to marry and start a family. This latter infringement was a result of the Matrimonial Causes Act 1973, which declared any marriage not between a man and a woman void. The Act defined the sex of men and women for the purposes of marriage on chromosomal, gonadal, and genital tests and sex registered at birth, with trans people entirely unable to marry legally in their lived sex. As a result of this case the Gender Recognition Act 2004 was introduced in the UK.

12. As these examples show, jurisprudence from ECtHR has helped pave the way for some important improvements in human rights legislative developments for LGBT people in the UK. This benefits them as individuals, and UK society as a whole, by ensuring that the UK does not fall behind globally in its promotion of and legislative measures for human rights. The requirement for courts to consider case law from the ECtHR has helped increase clarity on how ECHR rights apply to both individual circumstances and services that are provided. This especially allows for increased cooperation with similar organisations and networks across Europe as we share a mutual understanding of ECHR rights and their meaning in practice, even as circumstances evolve.

13. Case law benefitting the understanding of evolving circumstances is key. Acknowledging case law has benefited the progression of Human Rights in Scotland. It has meant we are able to ensure our courts are remaining aware of best practice across Europe. We are extremely concerned that

any distancing between the UK and the ECtHR jurisprudence could lead to a reduction in the overall standard of rights for people within the UK.

III. Impact of the HRA

The second theme considers the impact of the HRA on the relationship between the judiciary, the executive and the legislature. The IHRAR have stated that they would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change. This is where we focus now.

14. We will respond to this ask in the more general context of the theme, rather than with regard to the specific technical questions. We believe the role of the judiciary and judicial review is extremely important to the protection of rights because, whilst Parliaments create laws for everyone, the application of the law (especially in changing circumstances and across a wide variation of services) is uncertain. Therefore, courts are important in ensuring accountability for any areas a law, as applied, falls short and therefore impacts fundamental human rights. These impacts could be, for example, on particularly vulnerable individuals such as members of the LGBTI community.
15. An example of this is in 2009: A lesbian couple who were refused IVF treatment by NHS Greater Glasgow and Clyde (GGC) were given permission for a judicial review. Originally, the Health Board defended its right to not provide this service, however, following legal advice it changed its position. This was done before the judicial review took place but the accountability it provides can be seen to have affected the outcome of the dispute.
16. Judicial review in court is therefore an important mechanism through which unintended or unfair consequences of seemingly neutral laws can be identified in order to ensure they don't, in practice, breach rights. This role of the courts under the HRA, far from making judgements against the legislature's intention, instead improve our law by ensuring there are mechanisms to test and clarify its application.
17. The HRA is important for the LGBTI population and Scotland as a whole. Scotland is currently in the process of human rights legislative reform. While the UNCRC Bill is making its way through the Scottish Parliament, a National Taskforce on Human Rights Leadership is considering its next steps around incorporating economic, social, and cultural rights. This includes safeguarding LGBTI rights and ensuring that Scotland will keep step with the rest of the world in its protection and promotion of human rights. This entire programme of progression is firmly built on the foundation of the HRA.
18. Prof Nicole Busby writes:

"The IRHRA [Independent Review of the Human Rights Act] does not, on the face of it, contain any direct threat to the continuance of Scotland's human rights journey...However, the disturbance of any existing arrangements to the current structures within which the HRA operates risks unsettling the complex interaction

between devolution and human rights which could give rise to a range of consequences for Scotland and her fellow devolved nations.’¹

IV. Detailed Questions on ToR

19. THE IHRAR seeks views on the detailed question in their ToR. We do not feel that we have any appropriate comments to make in relation to these asks. Therefore, our submission will end here.

¹ <https://hrcscotland.org/2021/02/01/new-briefing-from-professor-nicole-busby-explores-consequences-of-human-rights-act-review/>