

**Campaign for
Freedom of
Information
in Scotland**



Submission to the Independent Review of the Human Rights Act 1998

- Responding to the Call for Evidence

The CFoIS submission focuses on delivery in the UK of access to information rights, under Article 10 of the European Convention on Human Rights (ECHR) and under Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Both rights are given domestic effect through the Human Rights Act 1998 given that the periodic review of UK compliance with the ICCPR may be cited in decisions of the European Court of Human Rights. Therefore human rights at a domestic, regional and international level are interdependent. This outcome sets a good example, globally, on compliance with human rights law.

Although the CFoIS submission examines the operation of the Human Rights Act through the prism of a single right, it is important to understand that the right to form an opinion by receiving and imparting information also serves as a gateway to the equal enjoyment of all other rights.

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1. Overview

- a) The Campaign for Freedom of Information in Scotland (CFoIS) welcomes the opportunity to contribute to this review of the Human Rights Act 1998 (HRA).¹ The HRA gives domestic effect to the European Convention on Human Rights (ECHR). It should be noted that not all ECHR rights are included in the HRA.
- b) The review focuses on a narrow area that is perceived by the UK Government to be problematic. However the alleged problem(s) selected across two 'themes' do not resonate with any concerns we are aware of regarding the operation of the HRA. Any concerns articulated firmly focus on the absence of access to justice for people when there is a breach of the rights listed in the HRA.
- c) In making this submission, we consider we are exercising our rights under Article 10 of the European Convention on Human Rights (ECHR) and require access to informed opinions and evidence in order to form a conclusion. There is no evidence of a problem but the UK Government appears to be hostile to independent scrutiny of its actions which may or may not negatively impact on the ECHR as given effect through the HRA. Consequently there appears to be hostility from certain elected politicians to transparency and accountability on meeting human rights obligations.
- d) CFoIS challenges the conclusion in the terms of reference for this inquiry that 'The review is limited to consideration of the Human Rights Act, which is a protected enactment under the devolution settlements.' Clearly, any amendment on how the HRA operates will impact on the Scotland Act 1998 and the Belfast agreement 1998.² Furthermore the recent example of the campaign to leave the EU raised huge implications for the Belfast Agreement 1998. The complexities were repeatedly discussed in detail in Scotland during the Brexit Campaign. Bizarrely it is now portrayed as an unintended and unexpected consequence of Brexit and that view is not substantiated by the evidenced debate in Scotland prior to the referendum on leaving the EU. We do not want a repeat of the 'alleged' legislative confusion over any amendments to the HRA.
- e) The terms of reference rightly state that the 'UK's constitutional framework has always evolved incrementally over time, and it will continue evolving. We need to make sure that our human rights framework, as with the rest of our legal framework, develops and is refined to ensure it continues to meet the needs of the society it serves.' It is unreasonable to expect the human rights framework to remain static whilst the UK constitutional framework always evolves.
- f) Whilst CFoIS is pleased to read that the UK government is 'committed to remaining a signatory to the European Convention on Human Rights', those rights come with responsibilities which include supporting the established legal concept of 'margin of appreciation'.³

2. The Law

- a) The Freedom of Information (Scotland) Act 2002 (FoISA), and the Environmental Information (Scotland) Regulations 2004 (EISRs) provide the main legal framework for access to information rights on devolved matters in Scotland. Rights are enforced, for free, through the Scottish Information

¹ At [Call-for-Evidence.pdf \(publishing.service.gov.uk\)](#)

² At [Microsoft Word - Document1 \(publishing.service.gov.uk\)](#) – accessed 3rd March 2021

³ At [Independent Human Rights Act Review - GOV.UK \(www.gov.uk\)](#) – accessed 3rd March 2021

Commissioner (SIC). FoISA and the EISRs give you the 'right to receive' information and places a duty on the body that holds information to provide it unless there are legal reasons not to such as: the requested information is subject to one of the numerous exemptions which allows the body to withhold it; the body is out with the scope of the legislation. Other key components of the legislation are the 'duty to advise and assist' and the pro-active publication of information which links with the separate initiative on 'open government' initiative⁴.

- b) A separate FoI regime applies to reserved matters and to UK wide public authorities: the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 which are enforced by the UK Information Commissioner.
- c) There are key differences between between FOISA and the EISRs and the SIC explains the detail at [Differences between EIRs and FOISA \(itspublicknowledge.info\)](https://itspublicknowledge.info/differences-between-eirs-and-foisa)
- d) FOISA is used more than the EISRs. Helpful information about exercising your rights and the rules on charging on accessing information on devolved matters appear at [Freedom of information at a glance \(itspublicknowledge.info\)](https://itspublicknowledge.info/freedom-of-information-at-a-glance)
- e) A key advantage of the FOISA and EISRs appeal process is that it is free and accessible, with a range of free supports in place to help people exercise their rights.
- f) 75% of FOISA and EISRs appeals to the SIC come from the public and 67% of his decisions were wholly or partially upheld in favour of the requester.⁵

3. Popularity of Rights

- a) The public has consistently used access to information rights and the enforcement system to force publication of information. For example, there were 79,300 reported requests for information in 2019/20⁶.
- b) In 2017 independent polling for the SIC revealed that 94% agreed it is important for the public to access information and 77% would be more likely to trust an authority that publishes a lot of information about its work.⁷
- c) Right to information laws allow people to ensure government officials make good decisions on the environment and a host of other matters. Transparency of public authorities is a key feature of good governance and combats 'fake news'. It strengthens organisations' legitimacy in the eyes of people, and its confidence in them.

⁴ At [Open Government Playbook - GOV.UK \(www.gov.uk\)](https://www.gov.uk) accessed 3rd March 2021

⁵ SIC Annual Report 2019-20 pgs. 14 and 20 at [SIC_ARA_2019-20_FOR_PUBLICATION.pdf](#) ([itspublicknowledge.info](#))

⁶ SIC Annual Report 2019-20 pg. 21

7 SIC

<http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2017.asp>

4. Duty Bearers

- a) The business of government is not static and therefore domestic oversight and review by elected politicians, judges and people who know and understand the issues is to be welcomed.
- b) There are regional and global developments to extend FoI rights using human rights law to increase transparency and accountability of public bodies which CFoIS supports including:
 - The Council of Europe's 'Tromsø Convention', the first binding international legal instrument to recognise a general right of access to official documents held by public authorities, came into force on 1st December 2020⁸. The UK has still not ratified this ground-breaking convention.
 - Article 10 of the European Convention on Human Rights (ECHR) has been ruled to give the right to information to form an opinion⁹ if publication meets four public interest tests: the purpose of the information request; the nature of the information sought; the particular role of the seeker of the information in "receiving and imparting" it to the public; and whether the information was ready and available. We await evidence that the ECtHR decision impact on how FoI rights are understood and enforced across the UK.
 - The ECHR is given effect through the Scotland Act 1998 and the HRA. A process needs to be devised at the UK Parliament and at the Scottish Parliament to ensure that the latest jurisprudence on rights makes an impact domestically. This approach enables the progressive realisation of rights to the maximum extent of our available resources.

5. Review Focus

- a) Given the above, it is surprising that the review of the HRA focuses on two themes: the relationship between domestic courts and the ECtHR; the impact of the HRA on the relationship between the judiciary, the executive and the legislature. The focus should be on duty bearer's compliance, or otherwise, and the accessibility of enforcement procedures when rights are alleged to be breached.
- b) Under FoISA information must be disclosed, unless it is subject to one of the numerous exemptions, even if it causes embarrassment to a public official or to a politician. That commitment to transparency and accountability needs to apply to challenges to government decisions under the HRA.
- c) CFoIS respects the sovereignty of the Scottish Parliament to pass legislation on devolved matters under the Scotland Act 1998. As the HRA is engaged with sections 29, 57 and 100 of the Scotland Act 1998 there are indirect and direct complication arising from any amendments to the HRA. These need to be articulated, considered and subject of another consultation.

6. Conclusion

⁸ Council of Europe website at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205>

⁹ For example, the Grand Chamber decision in the case of on Magyar Helsinki Bizottság v. Hungary (Application no. 18030/11) 8th November 2016 <http://hudoc.echr.coe.int/eng?i=001-167828> and Studio Monitori and Others v. Georgia (applications nos. 44920/09 and 8942/10) 30th January 2020 at <http://hudoc.echr.coe.int/eng?i=001-200435>

Accessing information rights helps individuals and families, community groups and trade unions to get information. Accessing information is a human right. Domestic law should be informed by regional and international human rights law to ensure rights are robust and duties enforced. However a system needs to be adopted in the UK so that happens on FoI and across other issues engaging civil, political, social, economic, cultural and environmental rights. By focusing on such two narrow themes, the review of the HRA is not relevant to the experiences of people trying to assert rights on a daily basis.

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