

Human Rights

Supplementary written evidence

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I refer to the evidence session on 4 February. The committee wanted some further thoughts on the relationship between the Scotland Act 1998 and the Human Rights Act 1998.

My points are as follows:

1. Section 29 of the Scotland Act 1998 concerns the competence of the Scottish Parliament. Law made by the Parliament 'is not law' if it falls outwith the competence of the Parliament. For the present purposes we are focusing on Section 29(d) which provides that 'if it does not comply with ...or convention rights'. Convention rights is defined in Section 126 of the Scotland Act as having the same meaning as in the Human Rights Act 1998.

2. The Human Rights Act 1998 has been stated by the Lord Chancellor to be 'neither devolved or reserved' (House of Lords EU subcommittee on Justice Hansard 2 February). However that is the answer to the wrong question. The question should not be 'Are human rights devolved or reserved?' but rather 'What is the legislative competence of the Scottish Parliament in relation to the Human Rights Act?'

Human Rights are not reserved, the Parliament can legislate, and has done in the area of Human Rights. The Human Rights Act is however 'Protected Legislation' under Schedule 4 para 1(2)(f) of the Scotland Act 1998. It therefore falls within Section 29(c) of the Scotland Act and making law modifying it is outwith the competence of the Scottish Parliament.

3. Currently under the Sewel convention, as it applies in practice under Devolution Guidance Note 10 (DGN10), when UK legislation will alter the legislative competence of the Scottish Parliament or the Executive Competence of the Scottish Ministers the consent of the Scottish Parliament is needed. Clause 2 of the Scotland bill, currently awaiting Third Reading in the UK Parliament purports to place the Sewel convention on 'a statutory footing' as required by the Smith Commission Agreement. However Clause 2 only applies to the UK Parliament legislating on devolved matters and does not apply to that part of the convention which relates to legislation which concerns the legislative competence of the Parliament or the executive competence of Scottish Ministers. Therefore future UK legislation which deals with the repeal of the Human Rights Act and/or its replacement with a Bill of Rights Act would not be affected by the statutory formulation of the Sewel convention under Clause 2 as enacted.

Repeal and replacement concerning the Human Rights Act 1998 would necessitate the amendment of the Scotland Act 1998 in such a way that would affect the competences of both the Parliament and Scottish Ministers. The issue is that if the Sewel convention is being interpreted on the narrow basis set out in Clause 2 then

such legislation - as a matter of law would not fall under the Sewel convention as provided for in the Scotland Bill. The UK Government should confirm that the convention as it is set out in DGN 10 will apply to any change to the Scotland Act concerning the Human Rights Act 1998.

I hope this helpful. If you have any questions please let me know.

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