Human Rights Act 1998

The UK Government's consultation paper on "Human Rights Act Reform: A Modern Bill Of Rights"

Response by the Scottish Government

March 2022

Scottish Government
Riaghaltas na h-Alba
gov.scot

Abbreviations and Acronyms

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

HRA – Human Rights Act

IHRAR – Independent Human Rights Act Review

JCHR – Joint Committee on Human Rights

NHRI – National Human Rights Institution

NPF - National Performance Framework

TCA - the UK-EU Trade and Cooperation Agreement

UK – United Kingdom

UNCRC – United Nations Convention on the Rights of the Child

Introduction

1. In responding to the current consultation, the Scottish Government wishes to make clear that it disagrees, as a matter of fundamental principle, with the proposition that the Human Rights Act should be replaced by a "modern Bill of Rights".

2. The Human Rights Act ("HRA") is one of the most important and successful pieces of legislation ever passed by the UK Parliament. It has a 20-year track record of delivering justice, including for some of the most vulnerable people in society, and it plays a critically important role in protecting human rights and fundamental freedoms throughout the whole of the United Kingdom. The proposals set out in the consultation paper represent a direct, and deeply-concerning, threat to these long-established protections.

3. The HRA is also woven directly into the fabric of Scotland's constitutional settlement. Changes to the existing statute would therefore be a constitutional matter with very real implications for the exercise of both legislative and executive competence by devolved institutions. As such, the Scottish Government is clear that no changes affecting Scotland should be made without the explicit consent of the Scottish Parliament.

4. The HRA is significant, too, in an international context and it serves as both an example of legislative best practice and as a very visible expression of the UK's historic record of global leadership in promoting human rights, democracy and the rule of law. That international leadership role is called directly into question by the ill-considered nature of much of what is proposed in the consultation paper.

5. The Scottish Government's responses to the specific questions posed in the consultation paper explore in further detail the serious and wide-ranging damage that would be done to human rights and fundamental freedoms, both in the UK and at the international level, were the UK Government to press ahead with its proposals.

6. Before addressing those specific questions, however, the Scottish Government wishes to record its broader disappointment and concern in relation to the overall approach which has been adopted by the UK Government.

The Independent Human Rights Act Review

7. The current consultation exercise is the second time in just over a year that the Scottish Government – together with many other organisations and individuals – has submitted a detailed response to a UK Government-initiated exercise seeking views on the effectiveness of the HRA.

8. It is therefore extremely disappointing that the UK Government has chosen to ignore not just the Scottish Government's own March 2021 submission to the Independent Human Rights Act Review ("IHRAR") but also the wealth of expert evidence made available to the IHRAR by some of the UK's most eminent legal and human rights practitioners and academics.

9. The overwhelming weight of that evidence demonstrated beyond argument that the HRA has been highly successful and effective. "Reform", of the kind now once again being proposed by the UK Government, is not just unnecessary, but highly undesirable.

10. In fact, as the consultation response from Amnesty International made clear:

> "The HRA is a remarkably finely crafted statute [which] has been highly successful in its purpose: the protection of people's human rights … the HRA is in fact very well designed for its particular place in the UK's constitutional arrangements"[1].

11. That assessment was shared by a wide spectrum of responses from Scotland, including those submitted by the Scottish Human Rights Commission[2] and the Human Rights Consortium Scotland[3]. The Faculty of Advocates replied in relation to key questions posed by the Review that *"we do not consider that a case is made out for any significant change"*[4].

12. Such views were not confined to Scotland, with the Law Society of England and Wales making clear that:

> "While there is significant evidence to demonstrate the value of the HRA in its current form, we have not seen convincing evidence pointing to the need for its amendment. Significant amendment risks … undermining access to justice and the rule of law"[5].

13. There were many, many more responses in similar vein. Moreover, for its own part, the IHRAR panel found no convincing case for a radical overhaul of the HRA of the kind that is now being proposed.

14. It is therefore essential that proper account should now be taken of the overwhelming weight of evidence which demonstrates the utility, value and proven track record of the HRA as a statute which protects the public interest and defends the interests of individuals and communities throughout the UK.

15. For that reason, the Scottish Government would specifically request that its response to the IHRAR is taken into account as a supplemental component of the Scottish Government's response to the current consultation paper. The response itself is publicly-available and can be found on the Scottish Government website[6].

The importance of effective checks and balances

16. Turning more specifically to the proposals which have now been put forward in the current consultation paper, the Scottish Government has particular concerns in

[1] Amnesty International UK Submission to the Independent Human Rights Act Review
[2] Scottish Human Rights Commission Submission to the Independent Human Rights Act Review
[3] Independent Human Rights Review: Evidence from Human
[4] Response from the Faculty of Advocates to the Independent Human Rights Act Review
[5] Independent Human Rights Act Review call for evidence – Law Society response
[6] UK Independent Human Rights Act review: Scottish Government response

relation to those elements of the proposed Bill of Rights which would exempt the actions of the executive from legal challenge and set aside long-established checks and balances designed to prevent the abuse of power.

17. Contained within the consultation are proposals that would restrict the ability of the courts to provide victims of human rights violations with an effective remedy. That is an alarming proposition.

18. It has long been a central principle of both constitutional democracy and administrative law in the UK that executive actions (including legislation made by ministers) can be challenged, and if necessary overturned, in the courts. That principle is one which the UK Government now appears to be trying to set aside.

19. The implication certainly seems to be that certain types of government decision, which can currently be scrutinised in the courts, should in future be immune from effective challenge. That is the thin end of a very dangerous wedge.

20. It also appears that the mere existence of a legislative provision could be treated as sufficient evidence that the actions of a public authority are in the public interest. That will apply not just in the case of primary legislation, which has been subject to detailed parliamentary scrutiny, but to the provisions of secondary legislation, made by Ministers.

21. All that will be required is that the public body is shown to be acting "in accordance with legislation" – irrespective of whether those actions are also compatible with the rights of individual members of the public, or with the UK's obligations under the European Convention on Human Rights ("the ECHR").

22. Related risks arise in connection with proposals to impose a "significant disadvantage" test in order to restrict access to the courts. This presents the very real prospect of encouraging, facilitating and excusing a culture of casual low-level violation of human rights by public authorities, who would be enabled – as a matter of law – to disregard the rights of any individual as long as the violation is kept below the "significant disadvantage" threshold.

23. Quite what constitutes a "significant disadvantage" is not however defined in the consultation and the very real risk exists that such a test (which is necessarily subjective in nature) will discriminate against those in society who are most vulnerable and at greatest risk of experiencing human rights abuses. That risk would be particularly acute for those on the margins of society, whose needs and interests may already be deprioritised by public policy and the decisions of public authorities.

24. Paradoxically, the subjective nature of the test would also be likely to result in a loss of legal certainty in a way that could cause significant difficulties for public authorities themselves.

Executive over-reach and the potential for the abuse of power

25. The net effect of changes such as those identified above, and in relation to the potential devolution consequences of the proposed "Bill of Rights", is such that

the proposals might reasonably be characterised as facilitating a "power-grab" by UK ministers, in a way that diminishes the democratic and legal accountability of the executive[7].

26. The need for such accountability is not some abstract, theoretical requirement. The proposals set out in the consultation paper matter because, if passed into law, they will directly impact the everyday lives of people throughout the UK. They matter also because – as Liberty and others have argued – they risk pushing the UK further down a slippery slope towards an illiberal and intolerant future in which the rights of every member of society are put at risk.

27. The Scottish Government would therefore particularly caution against any approach that is founded in the assumption that public authorities never make mistakes and that governments with large majorities can do no wrong.

28. For its part, the Scottish Government definitively rejects the idea that the checks and balances which constrain the exercise of executive power should be regarded as an inconvenience. Legal challenges, by the same token, cannot be dismissed as being no more than a cause of unnecessary expense and wasted time.

Learning from hard experience

29. The proposals set out in the consultation paper which propose dispensing with legal "obstacles" to the removal of foreign nationals from the UK provide an important illustrative example of the risks inherent in the approach being proposed by the UK Government.

30. In order to fast-track deportations, the consultation proposes eroding the right to have such decisions properly scrutinised by the courts.

31. Whilst the Scottish Government disagrees profoundly with many aspects of the UK's asylum and immigration policies, there is agreement that there will be some circumstances in which it is indeed in the public interest to remove an individual from the UK.[8]

32. What is seriously problematic, however, is the proposition that such decisions should not be exposed to potential challenge, and review, in the courts.

33. The availability of recourse to the courts is important as a general legal and constitutional principle. But it also matters as a very practical safeguard against the abuse of human rights and the infringement of other legal rights.

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[7] The Scottish Government is certainly inclined to agree with Liberty that the proposals are a "blatant, unashamed power grab" by a government that "is systematically shutting down all avenues of accountability through a succession of rushed and oppressive bills". Liberty - Plans to "reform" the Human Rights Act are an unashamed power grab

[8] The reality is also that the UK Government deports several thousand foreign nationals from the UK every year. In the year ending September 2021, the UK forcibly removed 2,830 foreign nationals, most of whom were ex-offenders. How many people are detained or returned? - GOV.UK

34. It is particularly important in the case of deportations because the UK Government has, notoriously, been able to exclude or deport people from the UK in the past, even when doing so was entirely unjustified.

35. That was, of course, precisely the experience of innocent members of the Windrush generation who were incorrectly and unlawfully labelled as undesirable foreign nationals, and denied the right to continue living in the UK, despite being legally entitled to do so.

36. No amount of evidence or reasoned argument proved able to persuade the Home Office of the catastrophic errors which had occurred. Decisions had been made and government could not be wrong. The grave injustices which had been perpetrated were only addressed as a consequence of dedicated investigative journalism[9] and subsequent parliamentary and public pressure for remedial action[10].

37. The suggestion that such government decisions must be accepted without question, and that the supervisory role of the courts can simply be set aside, is therefore not just ill-conceived but dangerous. It is certainly a proposition that denies the hardest of facts and the most bitter of experience.

Further lessons from past failures

38. If the need for effective constraints on the exercise of power by public authorities requires to be further underlined, it is necessary to do no more than to recall a series of high-profile scandals and failures in which ordinary members of the public faced an uphill struggle to overturn bad decisions and obtain justice.

- Justice for those caught up in the Hillsborough disaster was only achieved in the face of serial obstruction by powerful public institutions. That it was obtained at all was a direct consequence of the protections provided by the HRA.

- The families of UK service personnel were able to rely on the HRA in order to hold the Ministry of Defence accountable for its failure to properly equip its own troops. It was the HRA, not the actions of UK Ministers, which ultimately helped deliver justice for brave individuals who risked, and unnecessarily lost, their lives on behalf of the UK.

- The scandalous long-term neglect and negligence which occurred within the Mid-Staffordshire NHS Foundation Trust was exposed as a consequence, amongst other factors, of the protections built in to the HRA.

- Victims of the “Black Cab Rapist” used the HRAin their successful legal challenge to the Metropolitan Police, which had repeatedly failed to properly investigate a catalogue of offences.

[9] The week that took Windrush from low-profile investigation to national scandal | Commonwealth immigration | The Guardian

[10] See also the independent review carried out by Wendy Williams Windrush Lessons Learned Review by Wendy Williams - GOV.UK (www.gov.uk)

39. It is therefore very clear to the Scottish Government that the current protections put in place by the HRA must be rigorously and resolutely maintained. The Scottish Government is deeply concerned that they are, instead, likely to be dismantled by the cumulative effect of the proposals set out in the consultation paper.

European co-operation and international reputation

40. The Scottish Government has further concerns in relation to the proposals in the consultation paper which will serve, in practice, to detach the UK – incrementally and by stealth – from compliance with the ECHR and from the requirements of Council of Europe membership.

41. There are unwelcome echoes in this of the UK's approach to its former obligations as a member of the European Union[11]. In the Scottish Government's view it is not tenable to adopt the position that the UK can both have its cake and eat it - by remaining as a member of the Council of Europe whilst simultaneously seeking to shrug off the obligations which are a necessary feature of membership.

42. Particularly problematic is the idea that the UK can remain as a State Party to the ECHR whilst simultaneously developing its own, separate, national interpretation of the rights which are set out in the ECHR.

43. Whilst the ECHR system does indeed provide scope for a national "margin of appreciation" and certainly does not require that every aspect of each State Party's legal and constitutional order is identical in its detail, there is a limit to the extent which any individual state can reasonably distance itself from the common standards and obligations established by the ECHR.

44. Moreover, were the interpretation of ECHR rights to diverge significantly in future from the wider European consensus (for example because the courts are prevented by the Bill of Rights from applying the accepted meaning of a particular right) this will merely result in cases having to be pursued in Strasbourg. It is very likely that the UK will lose such cases.

45. At present, the UK habitually wins 98% (and more)[12] of the cases brought against it and it has one of the best records of any Council of Europe member state. To seek to alter that situation would, in the view of the Scottish Government, be an abdication of the UK's historic role as a champion of human rights.

46. The damage ultimately inflicted will affect not only the UK's own international standing and reputation. It will also serve to further undermine and weaken the

[11] The UK's departure from the EU has already resulted in a weakening of human rights protections. Protections afforded by EU's Charter of Fundamental Rights were not kept as "retained EU Law" nor were they included in the Trade and Cooperation Agreement. In 2018, the Westminster Parliamentary Joint Committee on Human Rights noted that dropping the Charter without any replacement meant a substantive diminution of rights, in particular regarding the standing of individuals to enforce their rights and the remedies available.
Joint Committee on Human Rights - Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis

[12] Responding to human rights judgments: 2020 to 2021 - GOV.UK

international rules-based order at a time when peace and stability in Europe is under very direct threat.

47. There will also be further potentially significant consequences which are more directly linked to the importance of maintaining fully effective ongoing co-operation with the European Union. In particular, a range of activity which serves to protect public safety is directly linked to our ability to cooperate with operational partners in the EU and its member states.

48. These relationships are now governed by the UK-EU Trade and Cooperation Agreement ("TCA")[13], which provides that law enforcement cooperation is conditional upon respecting the ECHR and "*giving effect to the rights and freedoms in that Convention domestically*" (article 524 TCA).

49. If the way in which ECHR rights are given effect domestically in the UK is fundamentally changed, to the extent that it becomes harder to reply upon those rights, there is the real risk that the EU could seek to suspend or terminate parts or all of the TCA, the outcome of which would be very negative for the people of Scotland.

Inaccuracy and misdirection

50. An important further concern which the Scottish Government wishes to highlight is the extent to which public discourse in relation to human rights in the UK, and with regard to the HRA, has been distorted by inaccurate or misleading claims.

51. The consultation paper, for example, contains a statement (on page 84) that "*where a person is wanted for a crime, there should be no question of limiting the publication of their name and photograph because of their right to a private life*".

52. This statement significantly misrepresents the judgment reached by the court in the case cited in the consultation paper at footnote 142 (*R v Chief Constable of the Essex Police*)[14]. In reality, the scheme in question related to the "naming and shaming" of offenders (who were not currently wanted for a crime). In the end, the Court did not intervene in the operation of the scheme.

53. Whilst the consultation paper does more accurately reflect the facts of the case elsewhere (in paragraph 137 on page 40), it is clearly unhelpful that important proposals in Chapter 4 of the paper appear to be based on a misunderstanding, or perhaps a misrepresentation, of the actual effect of protections set out in the Human Rights Act.

54. This matters more generally because it is indicative of a broader tendency on the part of UK Ministers to present the HRA as constituting a threat to public protection and to the public interest. Indeed the consultation paper itself explicitly makes the claim (on page 28) that "public protection [is] put at risk by the exponential expansion of rights".

[13] UK-EU Trade and Co-operation Agreement
[14] [2003] EWHC 1321 (Admin); [2003] 2 FLR 566

55. The truth however is that the HRA is a very necessary safeguard which was put in place by the UK Parliament for the specific purpose of ensuring that human rights can be vindicated in the UK's own courts. The HRA implements international obligations which the UK itself was instrumental in developing and promoting.

56. There have been a variety of previous instances in which significantly inaccurate claims have risked misdirecting public discourse in relation to human rights and the effects of the HRA.

57. A particularly high-profile example was the "Catgate" speech given by the then Home Secretary, Theresa May, in 2011[15]. Such attacks on the HRA have recurred regularly. A similarly inaccurate claim was made by the current Secretary of State for Justice and Lord Chancellor in his speech to the 2021 Conservative Party conference[16].

58. More recently, in an article in the *Scotsman* on 23 February the Secretary of State presented the effects of the *Osman*[17] case in the following terms:

> "human rights 'obligations'… force our police to allocate law enforcement resources and energy to protect serious criminals from each other. It sounds ridiculous, but … Police Scotland are legally obliged to protect rival gangsters from each other. That straitjacket obligation defies common sense, and inevitably displaces police time spent protecting the law-abiding public." [18]

59. That interpretation is one which the Scottish Government would suggest is unnecessarily simplistic, to the point where it risks causing significant public misunderstanding of the effects of the HRA and of the ECHR.

60. As the facts of the case demonstrate, the *Osman* ruling addressed events in which a father was shot dead and his son badly injured by a stalker who had targeted the son. The police had failed to ensure that the family involved was made properly aware of the threat.

61. It should be self-evident that safeguards designed to prevent a situation of that kind being repeated are essential and must be retained. Indeed, it is hard to think of a more obvious "common sense" example of police resources being used to proper effect in order to protect the law-abiding public.

62. The effect of the proposals set out in the consultation paper would, however, be to undermine and remove existing positive obligations on public authorities (such as the police). They consequently create the very real risk that future protection would be unavailable to individuals in a similar situation. That cannot be acceptable.

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[15] Catgate: another myth used to trash human rights | Adam Wagner on the UK Human Rights blog, part of the Guardian Legal Network | The Guardian

[16] Dominic Raab uses misleading case as reason to water down Brits' human rights protections - Mirror Online

[17] Osman v. The United Kingdom (87/1997/871/1083)

[18] UK Bill of Rights: Replacement for Human Rights Act will restore common sense to justice system – Dominic Raab MP | The Scotsman

63. The claims made in the *Scotsman* article also have other troubling implications. One appears to be the suggestion that "rival gangsters" should be allowed free rein to pursue murderous feuds and vendettas, and that in order to avoid "wasting" resources and energy the police should simply look the other way. That is a proposition which is not only ill-conceived but deeply irresponsible.

64. Inherent within it is the further idea that both the rule of law and human rights protections are somehow contingent and do not need to apply to certain types of person. Criminality and lawlessness can be ignored or condoned, it seems, as long as "bad" people are the victims.

65. What is not explained, of course, is quite where the threshold in such cases might actually be set. Where specifically would the cut-off point be, beyond which the police should ignore a credible threat to life? How serious, and how recent, would an individual's history of offending have to be in order for protection to be denied?

66. The even more alarming difficulty, however, is that a proposition of this kind inevitably exposes the general public to significant risk.

67. Criminals operate, by definition, without regard to the law and without concern for the standards of civilised society. In targeting each other and seeking to perpetrate serious criminal acts – up to and including murder – there is a very real danger that entirely innocent third parties may also be harmed, and may suffer serious injury or death as a result. If deterrent action can be taken to preclude that risk – including by issuing warnings to "rival gangsters" – it should be self-evident that doing so is very far from being "ridiculous".

68. In the view of the Scottish Government, the UK Government's tendency to over-simplify, misrepresent and politicise individual human rights cases in the way noted above is unhelpful and regrettable.

69. It is certainly not an approach that can deliver public policies which are properly founded in an accurate understanding of either the purpose or the effect of existing human rights safeguards. Oversimplification also necessarily fails to take proper account of the careful consideration given by the courts to the facts presented in complex cases. There is in turn a very real risk that public confidence in the judiciary and the courts, and in other public institutions, could be undermined.

70. The Scottish Government would therefore urge the UK Government to base its approach to the HRA firmly in a factually accurate analysis of the benefits delivered by the Act, and to abandon – in consequence – its current proposals for "reform".

Qualified support for minor amendments

71. In line with the emphasis on evidence-based policy-making set out above, the Scottish Government has made consistently clear that it does not object to the possibility of amendments to the existing HRA which have the effect of strengthening and improving human rights protections in the UK.

72. That undertaking by the Scottish Government, to consider all constructive proposals in an objective and open-minded manner, has been underlined in previous submissions and consultation responses.

73. In the context of the current consultation, the Scottish Government does see the potential for a number of minor, but nonetheless important, amendments to the existing HRA, and to related legislation.

74. Whilst explicitly rejecting the idea that the HRA should be replaced by a "modern Bill of Rights", the Scottish Government would be willing to support improvements which command genuine cross-party support and have the backing of civil society and the UK's National Human Rights Institutions ("NHRIs").

75. The potential for such improvements is addressed in more detail in response to the specific questions posed by the consultation. But in summary, the Scottish Government would be willing, in principle, to:

- support a minor amendment to the HRA which has the specific purpose of protecting journalists' sources.
- further explore the practicality of recording instances where the judgment handed down by a court relies upon the use of section 3.
- support changes to section 19 of the HRA in line with the comparable provision made in section 31 of the Scotland Act 1998, including by repealing section 19(1)(b) of the HRA.
- support changes to the definition of "public authority" in order to extend the current definition so that it is clear that "functions of a public nature" include, in particular, functions carried out under a contract or other arrangement with a public authority. That clarification should include functions carried out overseas on behalf of the UK Government, for example in the area of asylum and immigration.
- support adjustments to the Constitutional Reform and Governance Act 2010 in order to ensure that the Scottish Parliament is accorded the same recognition and respect as is given (under Part 2) to the UK Parliament, in situations where devolved competence is engaged by any new international treaty.

76. In light of this offer, the Scottish Government would welcome the opportunity for constructive discussions with the UK Government with a view to refocusing the current debate away from the harmful and unwelcome proposals in the current consultation paper and back towards a common commitment to the HRA in its current form.

77. Such discussions should be directed at developing proposals for minor changes to the existing HRA, in the above areas, and should ensure extensive, and meaningful, engagement with the UK's NHRIs and with civil society.

Summary

78. Subject to the specific minor exceptions noted above, the Scottish Government does not support the proposals set out in the consultation paper.

79. The Scottish Government is however willing to engage in constructive discussions with a view to pursuing potential improvements to the existing HRA which have the effect of strengthening and improving human rights protections in the UK.

80. The Scottish Government remains both disappointed and concerned by the approach adopted by the UK Government, and in particular by its decision to, in effect, disregard the extensive evidence previously submitted to the IHRAR.

81. The Scottish Government further believes that the UK Government has significantly misunderstood not just the importance and value of the HRA as a guarantor of human rights and fundamental freedoms in the UK but also the extent to which the rights enshrined in the HRA enjoy public support and directly benefit individuals, families and communities throughout the whole of UK society.

82. In consequence, the Scottish Government would urge the UK Government to abandon its plans to replace the HRA and to publicly re-commit to upholding, in full, the rights which are already very successfully protected by the HRA in its existing form.

83. The Scottish Government would also propose that UK Ministers give a firm undertaking that they will not pursue any action that has the practical effect, over time, of distancing or detaching the UK from its obligations as a State Party to the ECHR and as a member of the Council of Europe.

SCOTTISH GOVERNMENT
March 2022

Responses to Consultation Questions

1. We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.

84. The Scottish Government disagrees with both the analysis set out in the consultation paper and with the policy intent which informs this proposal.

85. As a matter of legal fact, it is already the case that the domestic courts are able to draw on a wide range of legal sources when determining human rights claims. This sits alongside, and goes beyond, the requirement in the HRA to take European Court of Human Rights ("ECtHR") jurisprudence "into account" when determining questions arising in connection with the Convention rights.

86. This existing discretion afforded to the courts extends, for example, to sources such as case law from other jurisdictions and to the advice and legal argumentation set out in third party interventions. What matters is that the court itself is persuaded that such sources and advice are of relevance to the case in question, having taken account of the specific legal issues that arise in the context of that case. While legislation can quite properly draw attention to potentially helpful sources, deciding what to take into account in each individual case is a key part of professional judicial expertise, and neither the independence of the courts in this regard, nor the ability of the judiciary to ensure that just and equitable outcomes can be delivered by the courts, should be eroded.

87. This general approach, and the balance to be struck between legislative direction and judicial discretion is helpfully illustrated by section 4 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill[19]. This provides that "a court or tribunal … may take into account" a variety of sources which shed light on the purpose and intended effect of the UN Convention on the Rights of the Child ("UNCRC")[20] "so far as it is relevant" to do so. The Bill purposely goes no further in the direction it gives to the courts.

88. However, as the Scottish Government made clear in its response to the IHRAR, there is both a clear rationale and an operational necessity for the more demanding obligation imposed by section 2 of the HRA – i.e. that the court "must" (not "may") take account of the jurisprudence of the ECtHR.

89. This is because the ECHR explicitly exists as a multi-lateral treaty underpinned by a formal institutional framework designed to support the "collective enforcement" of rights originally identified in the Universal Declaration of Human Rights. Crucially, since 1959, that institutional framework has included a court whose jurisdiction extends "to all matters concerning the interpretation and application of the Convention"[21].

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[19] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [as passed]
[20] United Nations Convention on the Rights of the Child
[21] Article 32 of the Convention

90. As a consequence, it is the ECtHR which ultimately determines the correct meaning to be given to each of the rights set out in the ECHR.

91. Since the explicit purpose of the HRA is to give those same rights domestic legal effect in the UK, it is clearly of considerable importance that courts in the UK have regard to the common, Europe-wide interpretation arrived at by the ECtHR.

92. A failure to do so would necessarily give rise to significant confusion and legal uncertainty, with potentially conflicting judgments arrived at, respectively, by the domestic courts and the court in Strasbourg. Ensuring that such divergence does not occur by accident or oversight, and that differences of interpretation can be satisfactorily resolved (in particular by means of "judicial dialogue") is essential to the integrity of the ECHR system as a whole. This requirement was explicitly recognised in debates in the UK Parliament during the passage of the HRA.

93. It is therefore entirely logical to require the domestic courts (up to and including the UK Supreme Court) to give very careful consideration to the jurisprudence of the ECtHR. In that respect, section 2 of the HRA, as it currently stands, strikes an entirely proper balance between the independence of the domestic courts and the need to ensure that the UK gives proper effect to the obligations it has entered into as a party to the ECHR.

94. It should however be stressed (and this point was repeatedly emphasised in submissions to the IHRAR) that the requirement to "take account" does <u>not</u> impose an obligation to slavishly follow every judgment of the ECtHR.

95. As the evidence submitted to the IHRAR made very clear, the process of "judicial dialogue" which takes place between the domestic courts and the ECtHR provides an effective means not only of reaching a definitive conclusion in the particular case in question but of ensuring that the position ultimately arrived at informs the ECHR system as a whole. Moreover, this mechanism (which is a necessary and important feature of the common, Europe-wide framework established by the ECHR) has proven to be an important channel through which the legal expertise of the UK courts has exerted a positive and beneficial influence on European human rights law as a whole.

96. There is consequently no requirement for the amendment of section 2 of the HRA. By contrast there are very good reasons, which were set out in detail in evidence to the IHRAR, why such a change can be expected to have negative and counter-productive impacts.

97. In particular, any attempt to substantively alter the effect of section 2 would run directly counter to the UK Government's statement that it intends the UK to remain as a State Party to the ECHR.

98. That is because the necessary and inescapable consequence of UK participation in the ECHR system is that any right set out in domestic law which corresponds to a right in the ECHR must ultimately be interpreted and applied by the UK courts in a manner that is consistent with the requirements of the ECHR. A

failure to do so will simply result in the UK finding itself in breach of its international obligations.

99. The proposals set out in the consultation paper appear to be at odds with that fundamental reality.

100. At best, the proposals can perhaps be regarded as a further example of the equivocation and "cakeism"[22] which has characterised the UK Government's relationship with the European Union. There is certainly a strong sense in the consultation that the UK should be able to sidestep inconvenient rules, but without giving up any of the benefits which the ECHR system provides.

101. The more troubling suspicion, however, is that the true purpose of the proposals is ultimately to detach the UK – incrementally and by stealth – from the obligations established by the ECHR and from membership of the Council of Europe. Such an approach may stop short of formal denunciation of the treaty and be calculated to avoid an overt exit from an international institution that the UK was instrumental in founding. But it is nonetheless a policy that risks compromising the effectiveness of mechanisms which it is very much in the UK's national interest to support and maintain.

102. For its part, the Scottish Government explicitly and wholeheartedly rejects any attempt to distance the UK from the ECHR and the Council of Europe. Scotland's wish instead is to be an active and constructive member of the international community, and one which acts conscientiously to observe and implement the international obligations which bind all progressive, democratic nations. There should be no place in domestic human rights legislation for the kind of parochial insistence on British exceptionalism which characterises many of the proposals in this consultation paper.

103. In summary, the view of the Scottish Government is that section 2 of the HRA works well in practice and should be retained in its existing form. The Scottish Government strongly opposes any amendments that attempt to distance the UK from its international obligations, that risk undermining legal certainty, or that have the effect of restricting access to justice in the domestic courts.

Comments on the draft clauses

104. The Scottish Government's reading of the draft clauses is that they are intended, incrementally, to disconnect domestic law from the ECHR and to call into question the future effect of established domestic case law developed under the HRA.

105. Attempts to do so are, for the reasons already outlined above, likely to be harmful in a domestic context and will be damaging also to the UK's wider interests as a member of the Council of Europe. Doing so would certainly be at odds with both the original purpose of the HRA in "bringing rights home" and with the objective

[22] CAKEISM | meaning in the Cambridge English Dictionary

of the ECHR as a treaty which implements the Universal Declaration of Human Rights and establishes a common Europe-wide standard.

106. In practice, it is both pointless and counter-productive to construe rights which are explicitly derived from the ECHR in any way other than by reference to the original instrument and in line with the interpretation arrived at by the ECtHR.

107. As already noted, Article 32 of the ECHR makes very clear that the ECtHR is the ultimate interpretive authority. If decisions in the domestic courts diverge significantly from the ECtHR's interpretation, the predictable result will simply be an increase in individual applications to Strasbourg and a subsequent need to reconcile any divergent domestic decisions with the requirements established by the UK's international obligations. Both legal certainty and access to justice are likely to be adversely affected, as will the UK's international standing. That is a result which is not in the interest of any party and will inevitably disadvantage litigants seeking a definitive remedy to an alleged human rights breach – something which they should be able to obtain from the UK's own courts[23].

108. Adopting such a course of action is also entirely unnecessary in light of the active manner in which the UK's own courts have engaged with questions of interpretive alignment and consistency.

109. It appears that the draft clauses set out in the consultation paper are intended as an attack on the interpretive principle originally developed by Lord Bingham in *Ullah*. That principle established the general expectation that while ECtHR "case law is not strictly binding" it is nonetheless the case that the UK courts should, "in the absence of some special circumstances, follow any clear and constant jurisprudence" of the ECtHR. In doing so "[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less"[24].

110. However, *Ullah* does not create (and should not be portrayed as creating) inflexible constraints on domestic courts which prevent them from undertaking their own analysis of the matters brought before them in cases arising out of the HRA.

111. Far from adopting a passive and unquestioning approach to the interpretation of human rights, the UK courts have demonstrated very clearly their willingness and ability to function as an integral part of the process through which Strasbourg jurisprudence evolves. As was made clear in a great many of the responses received by the IHRAR, the constructive interactions and "judicial dialogue" which take place between Strasbourg and the national courts are themselves an important strength of the ECHR. Indeed, in many instances the analysis and interpretation generated by the UK's courts has proven influential in shaping the ECtHR's own thinking and jurisprudence.

[23] The right "to have an effective remedy before a national authority" is itself explicitly recognised in Article 13 of the ECHR.
[24] Ullah, R (on the Application of) v Special Adjudicator [2004] UKHL 26 (17 June 2004)

112. There is consequently no requirement to seek to overrule *Ullah* by legislative means or to otherwise attempt to constrain or restrict the proper exercise by the UK courts of their independent functions.

113. The further suggestion in both Option 1 and Option 2 that the courts need to be instructed on how to deal with legal precedent is similarly unnecessary and unwelcome. In fact, it is not only actively disrespectful of judicial competence but symptomatic in a wider sense of the tendency towards executive overreach and unwarranted centralised control which appears, increasingly, to characterise the policies of the current UK Government.

114. In relation, more specifically to devolved matters in Scotland, the Scottish Government would point out that whilst the Scotland Act does not itself explicitly establish an equivalent duty on the Scottish courts to take Strasbourg jurisprudence into account, the requirement to do so under section 2 of the HRA has been held by the Scottish courts and the House of Lords to apply also when determining matters of ECHR compatibility which arise as a devolution issue.

115. Amendment of section 2 of the HRA could therefore have potentially significant devolved implications. Any amendment to the HRA that alters the way in which the Scotland Act is interpreted and applied would necessarily be of significance in a devolved context and would be likely to require the legislative consent of the Scottish Parliament.

116. It is therefore particularly important to emphasise not only that the observation and implementation of the ECHR in Scotland, in devolved areas, is a matter for Scotland's devolved institutions, but that wider changes to the devolution settlement must not be pursued without the explicit agreement of the Scottish Parliament. It is disappointing that the consultation paper does not give more specific consideration to the potential implications of this proposal for devolved institutions – including not just the Scottish Parliament and the Scottish Government but also the Scottish courts.

2. The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

117. The Scottish Government disagrees with both the analysis set out in the consultation paper and with the policy intent which informs this proposal.

118. The UK Supreme Court is already the ultimate judicial arbiter of domestic laws in the UK[25]. It is unnecessary to restate that fact in new legislation, and nothing within the existing mechanisms established by the HRA calls into question the authority of the UK Supreme Court.

119. As the Scottish Government made clear in its response to the IHRAR consultation[26] and in its response to Question 1 (above), section 2 of the HRA merely requires the UK Supreme Court to take ECtHR jurisprudence "into account". The UK Supreme Court does so in a way that successfully reconciles domestic tradition and practice with the UK's obligations under the ECHR, and in a manner that ensures the overall consistency of a system that binds all 47 Council of Europe member states.

120. Where the UK Supreme Court has had good reason to depart from rulings of the Strasbourg court, it has done so. Crucially, that process has then enabled the expert legal analysis contained in UK Supreme Court judgments to be examined by the ECtHR, in a way that has shaped the Strasbourg court's own thinking and jurisprudence.

121. The nature of this interaction is one which to which judges in both the UK and in Strasbourg have given active, and carefully considered, thought. For example, the Scottish Government's response to the IHRAR consultation quoted Lord Phillips' judgment in *Horncastle* in 2009, where he rejected the argument that the UK Supreme Court should simply follow the decision of the ECtHR in the previous *Al-Khawaja* case:

> "There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court."[27]

[25] In the Scottish context, the High Court of Justiciary sitting as an appeal court is the final court of appeal in relation to all matters of the criminal law. Its jurisdiction is only subject to the authority of the UK Supreme Court in respect of devolution issues and questions of ECHR compatibility. For further information see: The Jurisdiction of the Supreme Court of the United Kingdom in Scottish Appeals

[26] UK Independent Human Rights Act review: Scottish Government response

[27] R v Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division) at 11

122. The Scottish Government therefore believes that the current balance struck between the UK and Strasbourg courts is the right one, and that the process of "judicial dialogue" provides an appropriate method for resolving differences of interpretation. That includes recognition of the existing and well-established role played by the UK Supreme Court as the ultimate judicial arbiter at the domestic level and its critically-important role in articulating, in a definitive manner, any difference of interpretation which might then form the basis for further judicial dialogue.

123. As extensive and authoritative evidence submitted to the IHRAR also made clear, the quality of the legal analysis presented in judgments from the UK Supreme Court has exerted a direct and beneficial influence on the thinking of the ECtHR. Attempts to detach the work of the UK courts from that of the wider ECHR system will necessarily be harmful not just to the interests of individual litigants but will run the serious risk of depriving that wider system of access to the legal expertise which informs the judgments of UK courts.

124. The HRA as it is currently drafted already provides certainty and access to a legal remedy in the UK's domestic courts, including by means of a definitive judgment by the UK Supreme Court. There is consequently no properly-reasoned case for change and the draft provisions in the consultation paper do nothing to enhance the standing or authority of the UK Supreme Court.

125. In fact, in attempting to artificially disconnect the interpretation of rights in domestic legislation from the interpretation of the same rights adopted by the ECtHR, they run the risk of diminishing the considerable influence which the UK Supreme Court currently enjoys.

126. The Scottish Government therefore strongly opposes the proposal set out in this section of the consultation paper.

3. Should the qualified right to jury trial be recognised in the Bill of Rights? Please provide reasons

127. Scotland's justice system has a proud and ancient tradition which is independent of, and distinct from, that of England and Wales.

128. Whilst Scots law shares features with both the common law model of England and Wales and the civil codes which are characteristic of most European legal systems, the Scottish legal system constitutes a separate and distinct jurisdiction in its own right. Questions of criminal procedure in Scotland are a devolved matter and legislation in this area is for the Scottish Parliament.

129. This proposal would therefore cut directly across a matter that falls squarely within the devolved competence of the Scottish Parliament and must not be legislated for without the explicit consent of the Scottish Parliament.

130. The use of trial by jury is long established for the prosecution of serious offences in Scotland. However, there is no right per se to a trial by jury. Whether an offence will be tried by a jury will generally depend on how the prosecution of specific offences has been provided for in statute, the powers of Scottish courts under the Criminal Procedure (Scotland) Act 1995, and the decision of the prosecutor on the most appropriate court to hear the case. The vast majority of trials in the Scottish criminal justice system, which are for less serious offending, are heard by way of summary procedure which involves a judge-only trial and does not involve a jury.

131. The Scottish Government is currently consulting on a variety of proposals relating to jury trials in Scotland, as committed to in last year's Programme for Government[28]. Enshrining a "right to jury trial" does not form part of those proposals.

132. The Scottish Government has also committed to giving careful consideration to the Lord Justice Clerk's report on improving the management of sexual offence cases[29], which includes a recommendation on giving consideration to a time-limited pilot of single-judge rape trials to ascertain their effectiveness and how they are perceived by complainers, accused and lawyers, and to enable the issues to be assessed in a practical way. A UK-wide right to jury trial could undermine this clear manifesto commitment and the Scottish Parliament's ability to take forward the recommendations in this review, if it is minded to do so.

133. The Scottish Government is clear that Scots law already guarantees the right to a fair trial. It currently does so by means of the HRA, the Scotland Act 1998 and other domestic statutory provision and the common law. Jury trial forms part of these existing arrangements, but there is no requirement for a trial to be heard in front of a jury in order for it to be fair. That position is fully consistent with the requirements of the ECtHR, which has expressly ruled that the right to a fair trial does not include a right to trial by jury[30], and reflects the existence of a variety of procedures across the independent states and jurisdictions which form the Council of Europe.

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[28] Programme for Government - gov.scot (www.gov.scot)
[29] Improving the Management of Sexual Offence Cases
[30] *Twomey, Cameron and Guthrie v United Kingdom* [2013] ECHR 578. See also *Callaghan v United Kingdom*

134. The Scottish Government respects the right of other jurisdictions within the UK to make different arrangements, but does not consider it appropriate or necessary for the UK Parliament to legislate on this matter in a way that extends the proposed right to Scotland.

4. How could the current position under section 12 of the Human Rights Act be amended to limit interference with the press and other publishers through injunctions or other relief?

135. A free, vibrant and independent press forms an essential part of the bedrock of a functioning, modern democracy. The Scottish Government is therefore unequivocal in its support for freedom of expression, including the protection which this right affords to journalists.

136. The right to freedom of expression recognised in Article 10 of the ECHR is however a qualified right which the ECHR explicitly identifies as one which "carries with it duties and responsibilities". A particular obligation is placed on States Parties to ensure that the right is exercisable, *inter alia*, in a way that prevents the disclosure of information received in confidence and which protects the reputation or rights of third parties.

137. It is therefore clear that the ECHR requires a careful balance to be struck between the right to freedom of expression and the Article 8 right to respect for private and family life. In striking that balance, the Scottish Government does not believe that Article 10 rights should automatically or inflexibly be prioritised over those set out in Article 8 which protect the privacy of the individual. There is nothing to indicate that Article 10 was intended (or has been applied), for example, to override that right to privacy in order to facilitate the publication by the media of salacious gossip or the sensationalised reporting of the intimate and personal details of a person's private life.

138. A series of media scandals in recent years involving intrusive and unnecessary coverage, including the use of illegal methods such as phone hacking, have underlined the dangers which can arise when an appropriate balance is not achieved.

139. One particularly important lesson from this experience is that self-restraint and good judgment on the part of the media are not always sufficient means of protecting members of the public against unjustified breaches of their privacy. Whilst celebrities have been the most obvious targets for such intrusion, the impacts have also been felt by many others in society, including victims of crimes and individuals caught up unwittingly in major events and news stories.

140. The Scottish Government is therefore committed to ensuring the practices which led to the establishment of the Leveson Inquiry do not recur and believes that all individuals should have the ability to seek redress[31] when they feel they have been the victim of press malpractice.

141. At the same time, there are necessarily also instances when the private conduct of an individual is indeed a matter of genuine public significance. That is particularly the case where the individual in question holds high public office, plays

[31] Press regulation in Scotland is devolved and arrangements are distinct from those in England and Wales. The Scottish Government decided in 2017 not to introduce statutory measures to incentivise participation by the press in the formal regulatory system established under the Royal Charter on independent self-regulation. Scottish Government - Press Regulation

an important leadership role or otherwise exerts significant public influence. It is essential that the media are not prevented from reporting on matters which genuinely do merit public scrutiny[32].

142. For the reasons set out above, the HRA already recognises that the courts have a central role in ensuring that the appropriate balance is struck between the rights established by Articles 8 and 10. Indeed, section 12 of the HRA explicitly directs the courts to "have particular regard to the importance of the Convention right to freedom of expression" and to "the extent to which … it is, or would be, in the public interest for the material to be published".

143. That test is one which appears to the Scottish Government to be the correct one. Section 12 as it currently stands is consistent with both the purposes of the ECHR and with the importance of allowing the courts to reach a judgment in light of the particular facts of an individual case.

144. The Scottish Government is very clear that privacy should not be breached for trivial reasons or simply for commercial gain. The proper test to apply is whether there are strong and compelling public interest reasons which override the right to privacy. The courts are best placed to make an objective and impartial judgment of whether that test has been met.

145. As a result, the Scottish Government does not consider that section 12 of the HRA requires amendment.

[32] There is also a clear public interest served by the reporting of legal proceedings (subject to such restrictions as may be imposed by a court). The Scottish courts have a long tradition of dealing with cases in public – sometimes referred to as "open justice" or "justice being seen to be done" – with the media carrying out an important role in ensuring that justice is seen to be done. The Lord President has made clear the continuing importance of the principle of open justice and that the general position in Scotland is that judicial proceedings must be heard and determined in public.

5. The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above [in the consultation paper]. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?

146. The Scottish Government does not believe that Article 10 rights should be automatically or inflexibly prioritised over those set out in Article 8.

147. To do so would be to expose individual members of the public, including potentially vulnerable individuals, to abuses perpetrated by commercial organisations which stand to gain financially from unnecessary and gratuitous intrusions into matters which should properly be regarded as private in nature.

148. Instead, a balance must be struck which explicitly allows for (and protects) publication which is in the public interest but which otherwise safeguards privacy. That balance is already a requirement of the HRA and amendment is unnecessary.

149. The Scottish Government would particularly caution against attempts to develop a domestic interpretation of Article 10 which significantly diverges from the interpretation given to the same rights by the ECtHR. To do so would risk going beyond the scope of the national "margin of appreciation" which is available to individual States Parties, and would in turn risk an increase in the number of individual applications to Strasbourg in cases where, for example, Article 8 rights had not been properly protected under UK laws.

150. Divergence or discrepancy of that kind would necessarily then require to be retrospectively addressed in order to ensure effective protection for the rights of individual members of the public and to maintain full compliance with the UK's international obligations. The resulting confusion, and the potential threat to legal certainty, would be in the interests of no-one.

151. In relation to the specific question of guidance which might be given to the courts it should be noted that, in Scotland, it is the role of bodies such as the Scottish Civil Justice Council and the Judicial Institute of Scotland, under the leadership of the Lord President of the Court of Session, to develop court rules and provide training to the judiciary.

152. These bodies are best placed to assess the need for guidance and to address any requirement for changes to procedure or practice which may be necessary to secure ECHR rights, including those protected by Article 10. They exercise this function within the wider context of arrangements which support the administration of justice in Scotland's courts, including measures to promote open justice.

153. On a particular point of detail, the Scottish Government is concerned by the statement on page 84 of the consultation paper that "where a person is wanted for a crime, there should be no question of limiting the publication of their name and photograph because of their right to a private life".

154. This statement appears to significantly misrepresent the judgment reached by the court in the case cited in the consultation paper at footnote 142 (*R v Chief Constable of the Essex Police*)[33]. In reality the scheme in question related to the "naming and shaming" of offenders (who were not currently wanted for a crime). The court gave proper consideration to a number of relevant factors, including the potential impact on the family of the individuals concerned (in particular, the need to safeguard the Article 8 rights of children).

155. No judgment was made by the Court as to whether or not the scheme as a whole could be operated lawfully. It was held by the Court that this would be fact-specific and "*depend upon the circumstances of the offenders solicited for the Scheme and how it is operated in practice*."[34] The way the scheme was to operate in practice would be a matter for the police.

156. There is consequently no sense in which the outcome of the case can properly be presented as preventing the publication of the name and photograph of a person who is being actively sought in connection with a crime.

157. Although the facts of the case are more accurately presented elsewhere in the consultation paper (on page 40), potentially misleading statements of the kind made on page 84 are unhelpful and risk undermining properly-informed public debate in relation to the importance and practical effect of the HRA.

158. The obvious further danger exists that any resulting policy decisions, and legislation, will negatively affect established human rights protections in the UK, having been based on inaccurate evidence and/or a mistaken understanding of the law.

159. The Scottish Government would therefore urge the UK Government to base its approach to the HRA firmly in a factually-accurate analysis of the benefits delivered by the HRA, and to abandon its current proposals for "reform".

[33] [2003] EWHC 1321 (Admin); [2003] 2 FLR 566
[34] *Ibid* at para 37

6. What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?

160. Protection of journalistic sources is one of the basic conditions for press freedom.

161. The ECtHR has stated that orders to disclose journalistic sources can have a "*potentially chilling effect*" on press freedom in a democratic society[35] and that without protection, sources may be "*deterred from assisting the press in informing the public on matters of public interest … and the ability of the press to provide accurate and reliable information may be adversely affected*"[36].

162. The Scottish Government would therefore support, in principle, a minor amendment to the HRA which has the specific purpose of protecting journalists' sources.

163. In reality, the principal threat in this area is one of executive overreach and the attempt by state institutions to restrict the ability of the media to undertake investigative journalism. Such journalistic endeavour serves to draw attention to matters that are of genuine public interest. As such it is a necessary feature of a modern democracy founded on respect for human rights and the rule of law. There is consequently a clear public interest in ensuring that the freedom of the press to investigate and to report is properly safeguarded.

164. Support for a minor amendment offering enhanced protection for journalists' sources is, however, very much conditional on the development of specific proposals which are capable of securing widespread support across the political spectrum and within civil society.

165. To the extent that further analysis identifies any need for guidance relating to the operation of the courts in Scotland, this requirement should properly be addressed by the Scottish Civil Justice Council and the Judicial Institute of Scotland, either in the form of court rules or by means of judicial training.

[35] Telegraaf Media Nederland Landelijke Media BV and Others v The Netherlands 34 BHRC 193
[36] Goodwin v the United Kingdom 22 EHRR 123

7. Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?

166. The Scottish Government's principal suggestion would be that the UK Government takes action to reverse its own long term policy of undermining and eroding civil liberties in the UK.

167. In particular, the current Police, Crime, Sentencing and Courts Bill[37] has been widely condemned as an attack on fundamental rights and democratic values. Whilst the Bill has only limited direct relevance to Scotland, the Scottish Government agrees with Liberty, Amnesty International and others that:

> "Protest is not a gift from the State – it is a fundamental right. The Policing Bill is an attack on the rights of everyone who has a cause they believe in, from climate activists to grieving families looking for answers and justice …Protest is a core pillar of any healthy democracy. [The Bill is] a threat to our rights, and an opportunistic move from a Government determined to shut down dissent, stifle democratic scrutiny and make itself untouchable … The Bill is one part of a larger campaign by the Government to remove itself from accountability and undermine everyone's ability to stand up to power."[38]

> "Rattled by democratic protests, ministers have drawn up sweeping new policing powers which you'd fully expect to see in the pages of a novel about a future dystopian Britain … The Policing Bill is a calculated attack on our bedrock basic rights, and if passed would diminish the UK's standing in the world."[39]

168. The illiberal inclinations of the UK Government have also been noted internationally, and constitute an ongoing source of reputational damage which embarrasses the UK on the world stage and serve to encourage and embolden repressive regimes around the globe.

169. For example, the New York Times recently opined that:

> "A raft of bills likely to pass this year will set Britain, self-professed beacon of democracy, on the road to autocracy. Once in place, the legislation will be very hard to shift. For Mr. Johnson, it amounts to a concerted power grab… Amid the chaos wrought by the pandemic, Brexit tumult and increasing questions about the stability of Mr. Johnson's individual position, the full scale of the impending assault on civil liberties has — understandably — not yet come into focus for much of the British public. The list of legislation is long and deliberately overwhelming. But pieced together, the picture is bleakly repressive."[40]

[37] Police, Crime, Sentencing and Courts Bill - Parliamentary Bills
[38] Liberty - Policing Bill amendments are a dangerous power-grab
[39] Amnesty International UK - MPs should vote down 'dystopian' policing bill
[40] New York Times - Boris Johnson's Repressive Legislation Reveals Who He Really Is

8. Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters? Please provide reasons.

170. The Scottish Government does not object in principle to the use of permission mechanisms as a means to filter out cases which are ill-founded or have no realistic chance of success. In fact, the Courts Reform (Scotland) Act 2014[41] introduced a permissions stage in which the court assesses whether an application for judicial review "has a real prospect of success" [42].

171. Moreover, the HRA already contains, in section 7, a further requirement that a person can only bring proceedings if they are a "victim" of the unlawful act for the purposes of Article 34 of the Convention. Analogous provision is made in section 100(1) of the Scotland Act.

172. However, it is a very different matter to assert – as this proposal necessarily does – that some human rights breaches are significant whilst others are, in effect, merely trivial in nature.

173. The firm view of the Scottish Government is that *any* violation of human rights is a serious matter, and is necessarily of significance not just to the individuals or communities who are directly affected, but also to wider society. For that reason it is essential that there is free and unrestricted access to the courts and to a legal remedy in all circumstances where there is good reason to believe that rights have been breached.

174. Further, the Scottish Government would challenge the premise in para 219 of the consultation paper that unsuccessful claims, even those which are ultimately shown to be without merit, undermine public trust in the justice system. Instead, the Scottish Government is strongly of the view that the price of a fair and effective justice system which enjoys full public confidence is that every member of society has a right to bring their claim before an impartial and objective court or tribunal. If the claim is weak, it will not succeed. It is important, nonetheless, that justice should be seen to be done and that no-one is unreasonably or inflexibly denied the opportunity to obtain a definitive judicial decision.

175. It would therefore be entirely wrong, for fundamental reasons of principle, for government to seek to obstruct or prevent access to justice on the basis of a subjective test of "significant disadvantage"[43].

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[41] Courts Reform (Scotland) Act 2014 - Explanatory Notes

[42] In practice many human rights claims will proceed by means of judicial review and a permission test (in addition to the more restrictive "victim" requirement for human rights claims, discussed above) therefore already applies both in Scotland (under the Court of Session Act 1988, as amended by the Courts Reform (Scotland) Act 2014), and in England and Wales (Senior Courts Act 1981, section 31(3) and Civil Procedure Rules, rule 54.4). It is consequently difficult to see what the proposed new legislative provision would achieve. The inevitable suspicion is that the proposal is intended to restrict access to the courts so as to exclude cases that the existing permissions test would currently allow to be heard. If so, this represents a clearly unacceptable attack on access to justice in the UK.

[43] Article 35 of the ECHR (as amended by Protocol 14) contains both a "significant disadvantage" provision and an exception in cases in which respect for human rights requires an examination of an

176. The degree to which a claimant has suffered actual disadvantage is relevant at the end of the case, when the court is required to reach a decision on the nature and extent of any remedy. But this is an aspect to any case which must not be prejudged – not least because an accurate assessment can only properly be made once the court has had the benefit of hearing the facts of the case in full.

177. A provision of the kind proposed would – at a practical level – run the serious risk of encouraging, facilitating and excusing a culture of casual low-level violation of human rights by public authorities, who would be enabled – as a matter of law – to disregard the rights of any individual as long as the violation is kept below a threshold of "significant disadvantage".

178. In practice, since the victim of any breach is inevitably at a disadvantage from the outset, a provision of this kind would also discourage potential claims, in particular by those in society who are most vulnerable and at greatest risk of experiencing human rights abuses. It would thereby restrict their access to justice. That risk would be particularly acute for those on the margins of society, whose needs and interests may already be deprioritised by public policy and the decisions of public authorities.

179. At the same time, given the subjective nature of the legal test being introduced, the provision would undermine legal certainty in a way that could cause difficulty for public authorities. In practice, it is likely that the meaning of the term "significant disadvantage" in relation to human rights would require to be established through case law and the result, at least initially, could be an increase in the number of cases which sought to test the limits of the law in this area. By contrast, the existing requirements of the HRA are well understood[44].

180. In summary, any measure which creates barriers to justice – and which results in a situation in which substantive breaches of the UK's international human rights obligations are simply overlooked or dismissed as "insignificant" - is neither consistent with the purposes of the ECHR nor with the general principles which inform the Scottish legal system. For that reason, the Scottish Government opposes the UK Government's proposal in the strongest terms.

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application on its merits. However, these conditions are significantly different from the UK Government's proposals in both their purpose and effect. This is because the ECtHR can only exercise its jurisdiction once domestic remedies have been exhausted. The Court therefore deals with matters which have not been, or cannot be, successfully resolved by means of consideration in the national courts. It is appropriate in that context for the case load of the Strasbourg court to be filtered in a way that excludes cases which do not raise significant matters of either actual detriment or general principle. By contrast, were the same filter to be imposed at the domestic level, the practical effect would be to prevent the domestic courts from carrying out their essential function of hearing all potential cases at first instance – as a result of which cases which lack merit can be quickly identified and dismissed. One of the obvious unintended consequences of the UK Government's proposal would be to increase the burden on the Strasbourg court since it would inevitably then be required to determine the admissibility of cases which have been excluded from consideration in the UK courts. Such a development would run directly counter to the work (strongly supported by the UK) which has been undertaken to improve the efficiency and effectiveness of the Court.

[44] As noted above, section 7 of the HRA already includes a "victim" test for standing, as provided for in Article 34 of the ECHR.

181. Taking forward the proposal would do very real damage to public confidence in domestic legal protections, to the UK's international standing, and to the integrity of the international human rights framework.

182. The Scottish Government's overall position continues to be that the HRA in its current form is a carefully drafted and highly effective statute, and one which has proven its practical worth in safeguarding human rights across the whole of the UK for more than two decades.

183. As the overwhelming weight of evidence submitted to the IHRAR unequivocally demonstrated, there is no rational or defensible case for "reform".

9. Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

184. The Scottish Government opposes both this proposal and the preceding suggestion that access to justice should be confined to cases which can pass the subjective threshold imposed by a test of "significant disadvantage"[45].

185. For the avoidance of doubt, the firm view of the Scottish Government is that *any* violation of human rights is a serious matter, and is necessarily of significance not just to the individuals or communities who are directly affected, but also to society as a whole.

186. Drawing a distinction of the kind set out in the consultation paper is therefore unnecessary. Indeed, to do so appears illogical. Any case which is of public importance will necessarily be significant to the individual affected and it is hard to see how a case might, on the first test, be assessed as essentially trivial in nature, but then be considered to be of "overriding public importance".

187. The dangers of proceeding in this way, including the potential for unintended and irrational consequences, can be illustrated by a variety of hypothetical scenarios in which the relative wealth of an individual might become a factor in determining whether they are entitled to seek a human rights remedy in the courts.

188. Would it, for example, be the case that someone who is relatively wealthy would be barred from vindicating their rights because the loss they have suffered is considered "insignificant" when viewed in the context of their overall circumstances? By the same token, would a person of limited means find that they are unable to pursue a claim because the impacts (such as loss of access to social security payments) are deemed by the UK Government to be unimportant, on the basis that the sums of money involved are relatively small – however critical they may be in enabling the individual concerned to pay for the fundamental necessities of life?

189. Scenarios of this kind present an alarming prospect. They raise the very real possibility that access to human rights remedies in the UK could become subject to an unprecedented and unwarranted "means test" barrier. Such a test would exclude the ability of individuals to seek a remedy in the courts based simply on the UK Government's subjective belief that the loss they have suffered is somehow unimportant.

190. The further consequence of the proposals would then appear to be that the only means by which an individual in this position could obtain justice would be by persuading the court to hear their claim on the grounds that it engages principles which are of "overriding public interest".

[45] See footnote (above) in relation to the very different purpose and effect of the "significant disadvantage" test in Art 35 of the ECHR, and the related requirement on the Court not to rule a case as inadmissible where respect for human rights requires an examination of an application on its merits.

191. To require an individual applicant to, in effect, bring a test case addressing general principles of public policy – as opposed to seeking an individual remedy – would itself create a practical barrier which hinders access to justice. In reality, it is unlikely that such a challenge would be within the means of most potential applicants unless they are able to secure the support and assistance of a well-funded third party.

192. All of these potential outcomes are clearly unacceptable in terms of human rights principle and they would be inconsistent not only with the general requirement to ensure access to justice for all but also with the specific obligation established by Article 13 of the ECHR. Unintended consequences of this kind illustrate the extent to which the proposals set out in the paper have not been properly thought through by the UK Government and serve to further underline why the plans set out in the consultation paper should be firmly rejected.

10. How else could the government best ensure that the courts can focus on genuine human rights abuses?

193. The Scottish Government does not accept the premise on which the proposals are based.

194. It is asserted by the UK Government, without the presentation of any convincing evidence, that the courts are routinely asked to deal with spurious or trivial human rights cases, which ought to be excluded from consideration.

195. In reality, the UK Government's true difficulty with the HRA is that cases can be brought against it which are unwelcome and inconvenient, and which threaten to expose errors, negligence, flawed decision-making and (in some instances) a flagrant disregard for human rights.

196. That is an entirely different proposition on which to found proposals for "reform". The fact that a case is inconvenient and potentially damaging to government does not, on any analysis, imply that it is somehow spurious or trivial.

197. Indeed, the whole point of the human rights mechanisms put in place after the Second World War is that individual members of society should be protected from the potential depredations of callous, insensitive and overly-powerful state institutions which are happy to countenance "collateral damage" in pursuit of ideological goals. What may appear as "trivial" to a large public body intent on implementing some major strategic project, may be of existential importance to the individuals most likely to be impacted by that policy.

198. Attempts by the executive to draw a distinction between human rights abuses which are "genuine" and violations which are merely 'fanciful' or 'unimportant', reveal a deep and fundamental misunderstanding of both the principles and practice of human rights. That is a sad indictment of the extent to which the current UK Government has abandoned the UK's historic role as a leading advocate of internationally-recognised rights and freedoms which are, by definition, universal and inalienable in nature.

199. In relation to the substance of the proposal, the Scottish Government would draw particular further attention to the importance of preserving and upholding judicial independence.

200. It is fundamentally a matter for the courts to examine the facts of each individual case and to determine whether or not the claims which are presented in court have any legal substance. That is a function which necessarily belongs to the judiciary and it is one which must not be interfered with by the executive. Judges in the UK are already more than capable of identifying cases which have no legal merit and they already have adequate powers to ensure that such claims do not waste court time, whilst simultaneously protecting the right to a fair hearing.

11. How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.

201. The Scottish Government disagrees fundamentally with the idea that "positive obligations" are undesirable or unnecessarily burdensome.

202. The requirement for public authorities to take action to ensure that human rights are given full and substantive effect is an important and necessary feature of both the ECHR and the HRHA. It is one which also aligns very directly with the public expectation that public authorities will act lawfully, fairly and in keeping with the principles of natural justice.

203. Attempts to limit or remove the positive human rights obligations placed on public authorities would therefore be wholly unacceptable.

204. The proposal to do so would appear to be driven by the UK Government's ongoing desire to prevent and obstruct access to justice. Where a public authority has failed to act to protect and uphold human rights, those who have suffered as a consequence must be able to hold that public authority to account and to obtain justice, if necessary by means of recourse to the courts. That is a principle to which the Scottish Government is fully and unequivocally committed.

205. Rather than seeking to persuade public authorities in the UK to evade their human rights obligations, the UK Government should instead be acting decisively to remind all public bodies that action that ensures human rights are respected, protected and fulfilled is part of the core business of any institution which exists to serve the public.

206. If it is not willing to communicate that message, clearly and unequivocally, the UK Government should make clear which positive obligations it views as unnecessary and inconvenient. For instance, is it the position of the UK Government that public authorities should not have a positive obligation to consider the safety and well-being of an individual whose life may be in danger and should not be obliged to properly investigate if its actions result in loss of life[46]?

207. Similarly, is it the UK Government's intention to prevent the victims of crime from holding the police accountable for a failure to properly investigate serious offences? It was precisely the existence of a positive obligation arising out of the HRA Act that enabled the victims of the "Black Cab Rapist" to challenge serious failings on the part of the Metropolitan Police[47]. Can justice in such cases really be regarded as nothing more than "costly human rights litigation"?

208. Public bodies are funded by the taxpayer to deliver services which are in the public interest and which deliver public benefit. That objective cannot be achieved if proper account is not taken of all relevant human rights obligations. It is therefore

[46] The relevance of Osman v. The United Kingdom (87/1997/871/1083) as an important illustrative example is considered above, at paragraphs 58 to 68.
[47] Human Rights Watch - UK's 'Black Cab Rapist' Ruling Shows Importance of Human Rights Act

essential that all public authorities mainstream human rights throughout their operations, including by taking full account of relevant positive obligations.

209. In Scotland, the commitment made by the Scottish Government and the wider public sector is clearly set out in the National Performance Framework ("NPF"). The NPF makes clear that public bodies have a key role to play in ensuring that Scotland is a nation where "We respect, protect and fulfil human rights and live free from discrimination"[48].

210. The Scottish Government therefore rejects any attempt to prevent individuals and communities obtaining justice and opposes the proposals in the consultation paper in the strongest terms.

211. In relation to the detailed implications of the proposal, the Scottish Government would once again underline the very real difficulties which will arise if there is any substantive divergence between the rights set out in the proposed "modern Bill of Rights" and those set out in the ECHR and given effect through the judgments of the ECtHR. The existence of positive obligations is a prime example of this difficulty.

212. Whatever may be done by means of domestic legislation to exclude such obligations, they will continue to exist as an integral feature of the rights enshrined in the ECHR.

213. The practical consequence of divergence would simply be that individuals who are unable to obtain justice in the domestic courts will be forced to seek a remedy in Strasbourg. Positive obligations will continue to be recognised by the ECtHR and the result will be an ever-increasing list of cases in which the Court has found against the UK both in relation to the initial, substantive breach and in relation to the absence of the effective remedy required under Article 13 of the ECHR.

214. Such an outcome would run directly counter to the purposes of the HRA in enabling individual litigants to vindicate their human rights in the domestic courts. It would also, in the process, do further unnecessary damage to the UK's international reputation and its standing within the Council of Europe.

[48] National Performance Framework - Human Rights

12. We would welcome your views on the options for section 3:

- Option 1: Repeal section 3 and do not replace it.
- Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.

We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

215. The suggestion that changes to section 3 of the HRA are required was comprehensively dismissed by the overwhelming majority of responses submitted to the IHRAR consultation.

216. Those responses included submissions from some of the UK's leading legal experts, who made clear that the HRA is already fully consistent with the UK's internal constitutional arrangements.

217. In particular, section 3 of the HRA has been very carefully drafted so as to avoid any infringement of the Westminster doctrine of Parliamentary sovereignty.

218. It is clear that section 3 as currently drafted is fully consistent with the principles on which the UK's current constitution is constructed. Within that context it quite clearly achieves a practical and pragmatic balance between the respective constitutional roles of the legislature, in making legislation, and the courts, in interpreting and applying that legislation.

219. In fact, when seen as part of the UK's current constitutional arrangements, section 3 can be regarded as providing a solution which is both elegant and pragmatic. It enables legislation to be read by the courts in a manner that integrates Westminster's intent in passing the HRA with its subsequent intent in making other statutory provision. The result is that the UK's domestic courts and tribunals already do interpret legislation in a manner consistent with the principles of parliamentary sovereignty and judicial deference.

220. Accordingly, the courts acknowledge that section 3 will not allow them to interpret ECHR rights in such a broad or expansive way so as to touch on matters of policy or to directly contradict the original intention of Parliament. In such circumstances, they will properly leave the task of clarifying the law to the legislature.

221. The courts are, however, explicitly empowered by the HRA (and therefore by the UK Parliament) to interpret and apply legislation in a manner that is consistent with the overall intention of the legislature. That can be done because the intention of Parliament can properly be determined by examining the legislation (including the HRA) that Parliament has itself passed. The last word does however always remain with the legislature, which can intervene at any time to clarify the law by passing new legislation should there be significant disagreement about the effect of a court judgment.

222. As Lady Hale indicated in her oral evidence on the Government's Independent Human Rights Act Review to the Joint Committee on Human Rights ("JCHR"):

> " … if Parliament does not like something that the courts have done in pursuance of the interpretation obligation in Section 3 of the Act, Parliament can always put it right, it can always say, "No, this is what the law is", and you cannot interpret your way out of it"[49].

223. That outcome was explicitly the intention of the UK Parliament when it passed the HRA, and it is a mechanism that has demonstrated its practical value over more than two decades.

224. Indeed, the practical importance of section 3 is further underlined by the extent to which it has been proactively used by the UK Government itself as a means to resolve matters of interpretation which do not merit the passing of new legislation.

225. As Lady Hale's evidence to the JCHR inquiry demonstrated, the use by the courts of section 3 has frequently been explicitly at the instance of the government itself, with counsel for the government proposing in submissions to the UK Supreme Court that the most appropriate course of action would be for the court to "read down" a particular provision rather than issuing a declaration of incompatibility.

> "I cannot remember a case that I was involved in where we did not do whichever of [a section 3 interpretation or a declaration of incompatibility] the Government asked us to do"[50].

226. The Scottish Government therefore fundamentally disagrees with the assertion in the consultation paper that section 3 has resulted in "*an expansive approach*" with courts "*adapting legislation*" in a way that is somehow unconstitutional, undesirable or contrary to the true intentions of Parliament.

227. Moreover, the particular case quoted by way of example (*Ghaidan v Godin Mendoza*)[51] appears to the Scottish Government to be an example of exactly the kind of carefully considered judicial decision-making which is necessary in a democratic society founded on both human rights and the rule of law. It is certainly the view of the Scottish Government that, where legislation can be read and applied in a way that is compatible with ECHR rights, it is entirely proper that the courts should be empowered to do so. That was, in fact, the explicit intent of the UK Parliament when it passed the HRA.

228. It may of course be the position of the UK Government that it no longer wishes UK legislation to be read and applied in a way that properly implements human rights and gives effect to the UK's international obligations. Indeed, that does appear to be the necessary implication of both the current consultation and of some of the more general anti-human-rights language which has tended to characterise UK Government pronouncements on this subject.

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[49] Joint Committee on Human Rights - Oral evidence taken on 3 February 2021, HC 1161, Q27
[50] Ibid.
[51] [2004] UKHL 30

229. For its part, the Scottish Government robustly rejects the options presented in the consultation paper. Section 3 of the HRA is both necessary and effective. Its value (and that of the HRA as a whole) has been repeatedly demonstrated, often to the direct benefit of both the executive and the legislature, which have been spared the onerous task of amending legislation which might otherwise have been rendered incompatible.

230. On the specific question of whether the definition of legislation should be extended to the legislation of the devolved legislatures (paragraph 8 of Appendix 2 of the consultation paper), it follows from the Scottish Government's fundamental objection to the idea that section 3 of the HRA should be repealed or amended, that there need be no change to the way the legislation of the devolved legislatures is to be interpreted.

231. In summary, there is no credible, objective case for making any change to section 3 and the HRA should be retained in its existing form.

13. How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?

232. The Scottish Government is strongly supportive of work which ensures that the effectiveness of legislation is kept under review. This is a necessary and important part of the post-legislative scrutiny carried out by parliamentary committees.

233. It is therefore entirely sensible for the UK Parliament to monitor and consider the implications of important court judgments.

234. The UK Parliament's JCHR has a strong record in undertaking scrutiny of this kind. As a joint committee, with membership drawn from across the political spectrum, the JCHR provides the most appropriate context within which any objective and factually-accurate consideration of the effect of section 3 judgments should be undertaken.

235. The Scottish Government is similarly supportive of work undertaken by committees of the Scottish Parliament to monitor and review the effect of judgments which have a bearing on devolved matters.

14. Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?

236. The Scottish Government would have no objection to a process which records instances where the judgment handed down by a court relies on the use of section 3.

237. This would make it easier to establish how often section 3 is used. Such a mechanism would be of obvious assistance to the JCHR, to the Scottish Parliament where devolved competence is engaged, and to a wider audience including civil society stakeholders, legal professionals and the academic community.

238. The Scottish Government would, however, suggest that the practicalities of such a scheme are discussed with the judiciary and the courts in order to ensure that the costs to the courts system in Scotland of administering a mechanism of this kind are not disproportionate.

239. That is especially the case given that the system would have to capture all reported lower court judgments in addition to judgments in the higher courts[52]. As such, the Scottish Courts and Tribunals Service's independent and objective views should be sought in the event that a decision is made, in principle, to develop and implement proposals for a recording mechanism.

[52] The obligation in section 3 is not confined to the higher courts. This can be contrasted with the more restricted scope of the power to issue a Declaration of Incompatibility under section 4 (see the definition of "court" in section 4(5) of the HRA). The database would therefore have to capture all reported judgments in the lower courts, including Sheriff courts in Scotland.

15. Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

240. No. A change of the kind suggested would be constitutionally unacceptable.

241. The effect would be to treat secondary legislation, made by ministers, as if it were equivalent to primary legislation made by the legislature. The power to make secondary legislation is merely delegated to ministers and it is a central principle of constitutional democracy and administrative law in the UK that executive actions can be challenged, and if necessary overturned, in the courts.

242. This proposal therefore amounts to an attempt by current UK Government ministers to place themselves above the law and to confer on themselves a supremacy, and immunity from challenge, which the UK constitution allows only for primary legislation i.e. Acts of Parliament.

243. More generally, the Scottish Government takes the view that all incompatible legislation, including primary legislation, should be susceptible to legal challenge.

244. Where legislation is found to violate fundamental requirements, such as compliance with human rights obligations, it should be open to the courts to strike down the legislation in whole or in part. That is of course already well-established as a general principle within the current devolution settlement in Scotland, in relation to legislation which is outwith devolved competence.

245. For example, an Act of the Scottish Parliament which is outwith the competence of the Scottish Parliament is “not law”. Similar arrangements are a feature of many modern democratic constitutions.

246. There is in fact a strong sense in which this particular proposal exemplifies the stark contrast between a UK Government approach which is increasingly controlling and intolerant of dissent, and the modern, progressive, human-rights-focused vision being pursued by the Scottish Government.

247. Where the actions of the UK Government reveal a desire to obstruct access to justice and to limit scope for effective legal and political challenge, the Scottish Government wishes instead to promote good governance, to enhance accountability and to ensure compliance with international human rights standards.

16. Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.

248. As has been made clear in the answer to the previous question, it would be constitutionally unacceptable for the UK Government to seek to exempt executive legislation from the possibility of being struck down by the courts.

249. Where secondary legislation is found to be incompatible with ECHR rights, the minister making that legislation has, by definition, acted unlawfully and the courts must retain a discretion as to remedy. The Scottish Government would therefore strongly oppose any proposal which alters the legal and constitutional status of UK secondary legislation.

250. The Scottish Government would be particularly concerned if there were to be an attempt to prevent the judgment of a court from providing a meaningful and effective remedy, for example by suspending its effect unnecessarily.

251. It is of course essential that any individual whose rights have been found by the court to have been breached can obtain justice in the domestic courts. That is a fundamentally important principle which cannot be compromised. The very real fear is that the proposal put forward in the consultation paper is in fact intended to allow the UK Government to continue to evade its responsibilities by persuading, or indeed requiring, the court to suspend the effect of an adverse judgment.

252. Such a conclusion is supported by an examination of clause 1 of the Judicial Review and Courts Bill[53] (as currently drafted) which requires a court, in certain circumstances, to suspend or limit the retrospective effect of a quashing order. That appears to the Scottish Government to be objectionable as a matter of general principle since it seeks to constrain judicial discretion and interferes to an unacceptable degree in the independent decision-making of the courts. The Scottish Government would strongly oppose any amendment to the HRA which seeks to achieve a similar outcome.

253. More generally, the Scottish Government wishes to emphasise that it considers the courts to have struck a proper balance in dealing with provisions of subordinate legislation that are incompatible with the HRA. As such, the Scottish Government is clear that no change is required to this existing approach.

254. The Scottish Government would robustly oppose any amendment which has the effect of weakening judicial oversight of the executive or of undermining the rule of law.

[53] Judicial Review and Courts Bill

17. Should the Bill of Rights contain a remedial order power? In particular, should it be:

a. similar to that contained in section 10 of the Human Rights Act;
b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;
c. limited only to remedial orders made under the 'urgent' procedure; or
d. abolished altogether?

Please provide reasons.

255. As the Scottish Government made clear in its response to the IHRAR consultation, the existing power to make remedial human rights orders strikes an appropriate balance.

256. A case can be made for further restricting the scope of such remedial orders so that they cannot be used to amend the HRA itself, and this would better align with the principle that significant changes to primary legislation should only be made by means of new primary legislation.

257. However, the Scottish Government does not believe that there is a pressing case for an amendment of this kind.

18. We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.

258. The requirement in the HRA for a statement of compatibility under section 19 of the HRA is an entirely sensible and necessary measure which imposes a duty on Ministers to assess the potential human rights implications of proposed primary legislation.

259. The resulting ministerial statement binds neither Parliament nor the courts, and there is of course no guarantee that a Bill which is compatible on introduction will not subsequently be amended in ways that render it incompatible.

260. Nonetheless, it is important that legislation brought forward by the executive is seen to be compliant with both domestic human rights guarantees and with the UK's international obligations.

261. The requirement for a statement of compatibility under section 19 of the HRA is similar to the requirements imposed by sections 31(1) and 31(2) of the Scotland Act 1998[54]. Section 31(1) requires the person in charge of a Bill to state that in their view the provisions of a Bill would be within the legislative competence of the Parliament. Section 31(2) requires the Presiding Officer to decide whether or not in their view the provisions of a Bill would be within the legislative competence of the Scottish Parliament and to state that decision. The provisions of a Scottish Parliament Bill would not satisfy either test if they are considered to be incompatible with the ECHR rights set out in the HRA by virtue of section 29(2)(d) of the Scotland Act.

262. However, there are two significant flaws in the current mechanism provided by section 19 of the HRA.

263. The first is that UK Ministers are able to introduce legislation that breaches human rights. Whilst they must alert Parliament to that fact by stating that they are unable to make a statement of compatibility, it is clearly unsatisfactory that the UK Government is able to bring forward legislative proposals that it knows are in conflict with both established domestic safeguards and international law.

264. The current requirement in the HRA for a statement of compatibility should therefore be regarded as an absolute *minimum* level of protection, and it must not be removed or eroded.

265. The Scottish Government would in fact suggest that the current threshold should be raised, and that a government which has a genuine commitment to human rights would be happy to emulate the mechanism set out in section 31(1) of the Scotland Act. Section 19(1)(b)[55] of the HRA Act should therefore be repealed so that it is no longer permissible for UK Ministers to intentionally introduce incompatible legislation.

[54] Scotland Act 1998
[55] Human Rights Act 1998

266. The second flaw in section 19 is that the requirement to make a statement applies only to Ministers. This contrasts with the requirement in section 31(1) of the Scotland Act, which applies to any Member of the Scottish Parliament, with the result that Member's Bills also require a statement on competence. An equivalent requirement at Westminster might provide a helpful reminder to all Members of Parliament that assessing the human rights compliance of a Bill is an essential part of the legislative process.

267. Against that background, the Scottish Government is particularly concerned by the apparent suggestion in the consultation paper that compliance with human rights obligations represents some kind of obstacle to the development of "innovative policies".

268. "Innovating" in ways that violate human rights is not an option which should be available to, or contemplated by, any democratic government.

269. To do so would be to undermine not just human rights but the rule of law at both the domestic and the international level. To that extent it again appears that the UK Government has significantly misunderstood the universal and inalienable nature of human rights and the purpose of the legal protections which are embedded within domestic and international law.

270. Human rights obligations are not some minor matter which can be treated as optional, or which can be set aside by the UK Government or the UK Parliament whenever it is felt that compliance might prove troublesome, inconvenient or insufficiently "innovative".

19. How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

271. The firm view of the Scottish Government is that Scotland's interests, history and independent legal system are best protected (under the current constitutional settlement) by retaining the HRA in its current form. The Scottish Government therefore strongly opposes the proposal for a new "Bill of Rights".

272. The Scottish Government has consistently made clear that it would regard the repeal or replacement of the HRA as a matter of deep concern and that such a move would be unacceptable were it to apply in Scotland. Loss of the HRA would also be detrimental to the UK's national interest and to human rights at the international level.

273. It is absolutely clear under the Scotland Act that, while the HRA itself cannot be modified by the Scottish Parliament, human rights per se are not reserved.

274. As such, it is open to the Scottish Parliament to legislate, within devolved competence, in relation to all aspects of human rights in Scotland. In the event that members of the UK Parliament representing other parts of the UK were to decide to repeal or replace the HRA, those changes should not apply to Scotland.

275. The established view of the Scottish Government, and of the overwhelming majority of members of the Scottish Parliament, is that changes affecting Scotland must not be made to the HRA without the explicit consent of the Scottish Parliament[56]. That requirement is reflected in long standing UK Government guidance on the devolution settlement.[57]

276. Any new legislative provision relating to human rights in devolved areas is, similarly, a matter for the Scottish Parliament. The Scottish Government intends to introduce its own human rights bill during the current parliamentary session, in line with the manifesto commitment given at the last Scottish Parliament election in 2021. The proposed legislation is intended to go further than the HRA by incorporating internationally-recognised economic, social and cultural rights into Scots law, as well as restating the rights protected by the HRA[58].

[56] The Scottish Parliament passed motions in 2017 and 2014 expressing support for the Human Rights Act and calling on the UK Government to avoid actions that weaken international human rights.
[57] Devolution Guidance Note 10, Post – Devolution Primary Legislation affecting Scotland
[58] See also page 49 of the Scottish Government's Programme for Government 2021-22

20. Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.

277. The definition of "public authority" adopted in the HRA was intended to be broad in its scope and flexible in its application. In particular, the temptation to list all relevant public authorities by name was explicitly avoided, although doing so is a legitimate potential mechanism which is used in a number of other statutes.

278. The Scottish Government believes that, overall, the approach currently taken in the HRA remains the correct one. It continues to implement the original legislative intention, which was that a wide range of bodies performing public functions should be subject to the requirement set out in section 6. This makes it unlawful for a public authority to act in a way that is incompatible with the Convention rights established under the Act[59].

279. The flexibility and "future proofing" that were intentionally built into the HRA remain important features of the legislation. They are certainly in keeping with the wider idea of the ECHR as a "living instrument" – that is, one which is capable of evolving to address developments which were unforeseen at the time the original provisions were drafted. In that sense there is a strong case to be made for a definition of "public authority" which can accommodate the emergence of new forms of "public function" and new models of public service.

280. The practical difficulty which has arisen, and which has been highlighted by civil society campaigners and others, is that a relatively restrictive interpretation has tended to be applied by the courts. This was the case from as early as 2002 and the JCHR specifically addressed the matter in a March 2004 report[60].

281. As the recent decisions of the Court of Session in *Ali v Serco*[61] demonstrate, the question remains very much a live issue. In addressing the issues raised by the case, the Outer House held that, when providing accommodation to asylum seekers pursuant to a contractual arrangement with the Home Secretary, Serco was exercising a function of a public nature for the purposes of the HRA (with the result that it would be bound to act compatibly with ECHR rights when exercising that function).

282. In the Court's view, the relationship between Serco and the Home Secretary, whilst commercial in nature, was nonetheless such that Serco was essentially "taking the place of central government in carrying out what in essence [was] a humanitarian function".

283. However, on appeal, the Inner House reversed that aspect of the Outer House's decision, holding that, in this case, Serco was not exercising functions of a public nature and was not, in consequence, bound to act compatibly with ECHR rights. Serco, in the Inner House's view, should more properly be considered to be

[59] Human Rights Act 1998
[60] Joint Committee on Human Rights: The Meaning of Public Authority Under the Human Rights Act
[61] *Ali v Serco Ltd* [2019] CSOH 34

subject to private law obligations and responsibilities, with the Home Secretary being responsible for the discharge of public law obligations.[62]

284. The view of the Scottish Government, having given careful consideration to the judgments handed down by the Court of Session in *Ali v Serco*, is that further clarification of the law by means of legislation would now be desirable. That is a position which, broadly, is shared by civil society campaigners and by the UK's NHRIs. As previously noted, where such clarification becomes necessary, it is proper that the decision is made by the legislature.

285. What is required, however, is a relatively minor adjustment to the existing mechanism in order to extend the current definition so that contractual services of the kind performed by Serco in the *Ali* case are definitively caught by the requirements of the HRA.

286. The Scottish Government would not support changes to the general approach currently adopted in section 6 of the HRA (for example by creating a list of named public authorities) and would vigorously oppose any attempt to narrow or restrict the extent or scope of the existing duty, for example by exempting public authorities (in whole or in part) from the need to comply.

287. The purpose and effect of an amendment to section 6 should therefore be to make clear that a private or third sector organisation which is contracted to carry out a function on behalf of a public authority will itself become subject to human rights responsibilities. The contracted organisation must not, as a result, act in a way that is incompatible with the ECHR rights set out in the HRA. This should apply to the extent that these rights are engaged by the particular services being provided. Whilst general overall responsibility for compliance will continue to rest with the respective public authority on whose behalf the relevant function is carried out, it should also be the case that the service-provider itself is explicitly subjected to compliance responsibilities in respect of its own actions.

288. Such an outcome could be achieved in a variety of ways, but the Scottish Government believes that the simplest and most effective mechanism remains the one set out in section 6 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, as passed by the Scottish Parliament in March 2021[63]. This makes clear that "functions of a public nature" include, in particular, "functions carried out under a contract or other arrangement with a public authority"[64].

289. As a further feature of such an amendment to the HRA, the Scottish Government would propose that the responsibility placed on a private or third sector service-provider should explicitly include functions carried out overseas on behalf of the UK Government. This requirement arises as a consequence of the increased use which is being made of private sector procurement in areas such as asylum.

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[62] *Ali v Serco Ltd* [2019] CSIH 54

[63] The Bill was subsequently referred to the UK Supreme Court by the UK Government on competence grounds including, *inter alia,* in respect of section 6. The competence of section 6(3A) of the Bill was not, however, in issue in that case. The judgment of the court is available here.

[64] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [as passed]

Particular concerns arise in relation to the Nationality and Borders Bill[65] and the risk that asylum and immigration functions delivered off-shore by private companies may be carried out in contravention of the UK's obligations under the ECHR.

290. The Scottish Government would be very happy to engage in further constructive discussions with all interested parties with a view to securing support for proposals of the kind identified above. It should however be stressed that the requirement for further clarification in relation to this particular aspect of section 6 of the HRA does not provide any justification for more wide-ranging "reforms".

291. It remains the case that the HRA is a highly-effective and carefully-drafted statute which has repeatedly proven its worth in protecting the rights and freedoms of individuals and communities throughout the UK. The Scottish Government therefore explicitly opposes any attempt to replace the HRA with a "modern Bill of Rights".

[65] Nationality and Borders Bill

21. The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer?

- Option 1: Provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or
- Option 2: Retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above [in the consultation paper] for section 3.

Please explain your reasons.

292. The Scottish Government does not support any change to the overall approach adopted in section 6 of the HRA.

293. In particular, the Scottish Government does not agree that it is appropriate or acceptable for situations to arise in which legislation requires a public authority to act in a way that breaches human rights. The preference would instead be to apply the model provided by the Scotland Act 1998, under which such legislation can be challenged in the courts and is "not law" if it is found to be incompatible.

294. However, within the context of the UK's existing constitutional arrangements, and the power which the UK Parliament retains to knowingly and intentionally violate human rights should it wish to do so, the Scottish Government accepts that the existing qualifications in section 6(2) are a necessary clarification. It is important that public authorities have explicit instruction on how they should proceed in the event that there is a conflict between human rights obligations and other legislation and the public authority consequently finds itself in a situation in which it has no option other than to act incompatibly.

295. It is, nonetheless, important to be clear that in such circumstances the public authority would indeed be acting unlawfully, were it not for the exception created by section 6(2).

296. That is particularly important where there is any dispute about the options available to the public authority. Any relaxation of the current provision would run the significant risk of encouraging public authorities to act incompatibly without fully testing alternative options. As with other proposals in the consultation the ultimate effect could well be to encourage and to facilitate a culture of casual disregard for human rights. Such an outcome would certainly be consistent with the general antipathy to human rights which has all too often been exhibited by the UK Government. But it is one which the Scottish Government will strenuously resist.

297. It is also important that the existence of an exception in domestic legislation does not obscure the fact that the actions taken by the public authority would conflict with the UK's international obligations. Those affected may well, as a result, be successful in obtaining a remedy by applying to the ECtHR. The UK would then be obliged, by virtue of Article 46 of the ECHR, to abide by the final judgment of the Court.

298. The better course of action is therefore for the public authority to ensure that its actions are fully compatible with ECHR rights from the outset. Where there is a genuine choice to be made, the public authority should not seek to rely on exceptions which may potentially be available under domestic legislation but which would not be permissible under the ECHR.

299. In summary, the Scottish Government believes section 6 already deals satisfactorily with the situation of public authorities and changes are neither necessary nor desirable.

22. We would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

300. The Scottish Government's response to the IHRAR consultation made clear that the existing situation in relation to extraterritorial jurisdiction does not require to be altered.

301. It remains essential in all circumstances that UK forces continue to demonstrate the international leadership expected of a major liberal democracy, including by rigorously adhering to human rights standards. Acceptance of extraterritorial jurisdiction should be viewed as a public expression of that commitment.

302. It should also be emphasised that extraterritorial jurisdiction confers important protections on UK service personnel, who can have recourse to the domestic courts when the UK Government fails to abide by the undertakings it has given to support and protect those who risk their lives in the national interest.

303. The Scottish Government is therefore clear that the HRA should continue to apply wherever the UK exercises meaningful jurisdiction, in line with the case-law of the ECtHR. That is the correct approach for any state which is committed to the ECHR and which wishes to demonstrate international leadership and signal its own adherence to an international order founded in the principles of democracy, human rights and the rule of law.

304. As was made clear in numerous expert responses to the IHRAR consultation, both the ECtHR and the domestic courts have given careful consideration to the question of "extraterritorial" application of the Convention and the HRA. As a matter of established law, extraterritorial jurisdiction applies only to a limited degree and in exceptional circumstances. Changes are therefore unnecessary.

305. The Scottish Government notes that changes to the HRA in relation to the armed forces have already been made by means of the Overseas Operations (Service Personnel and Veterans) Act 2021[66]. These relate to criminal responsibility for human rights violations overseas, and limitations for bringing civil claims. Given the approach already taken in the Overseas Operations Act, it seems likely that any further changes envisaged by the UK Government would be intended to limit the extraterritorial reach of the HRA in ways that will give rise to significant criticism from international human rights institutions[67].

306. The Scottish Government would particularly warn against any temptation to respond to the position established by the ECtHR in *Al-Skeini* by means of some form of unilateral UK "opt-out".

[66] Overseas Operations (Service Personnel and Veterans) Act 2021
[67] See for example interventions by the UN High Commissioner for Human Rights and correspondence with the International Criminal Court

307. Amending the HRA to exclude extraterritorial application would have no effect on the jurisprudence of the ECtHR and would not change the substance of the UK's obligations under international law.

308. It would, however, complicate the work of UK courts and signal to the wider international community that the UK is unwilling to act in accordance with international human rights standards. The UK Government's own consultation paper appears to tacitly acknowledge this at paragraph 280, where it states that "if the extraterritorial scope of the Bill of Rights were to be restricted, other legislative changes would be required in order for the UK to continue to meet its obligations under the Convention."

309. Any attempt by the UK Government to undermine the current extraterritorial effect of the ECHR could inadvertently give succour or support to states which commit acts of aggression.[68] Doing so would risk seriously compromising the human rights values espoused by all democratic states. Extreme care must therefore be exercised.

310. For that reason, the Scottish Government would urge the UK Government to distance itself from any suggestion that the established effect of international human rights law might be weakened or set aside in the context of extraterritorial military actions.

[68] The ECtHR may well be asked, in due course, to address the gross human rights violations committed in Ukraine by the Russian Federation. Both countries are full States Parties to the ECHR and are bound by its obligations.

23. To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act? We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this?

- Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.
- Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

311. The Scottish Government fundamentally disagrees with the proposition in the consultation paper that the requirement for proportionality has given rise to "problems".

312. That contention is simply not supported by the evidence, as was made very clear by the many expert responses supportive of the HRA which were submitted to the IHRAR panel.

313. Nor is there is any credible evidence that the UK's courts exercise their functions in ways that fail to have proper, and careful, regard to the respective constitutional roles of the legislative, executive and judicial branches of government.

314. Indeed, the degree to which the courts exhibit an appropriate deference to the respective roles of law-makers and decision-takers was strongly underlined by the expert evidence received by the IHRAR panel. The approach adopted by the courts includes both a proper regard for the legislative intention of the Parliament, when interpreting legislation, and for the legitimate right of government to take executive decisions.

315. Accordingly, the Scottish Government does not believe that any credible or persuasive argument exists to support the UK Government's contention that judicial "activism" has led to the courts exceeding their own powers or that courts in the UK fail to give appropriate weight to the views, and legitimate powers, of either the legislature or the executive.

316. It is, however, correct to say that the HRA has empowered the courts to closely and critically examine the proportionality of government decisions and policies. Indeed, this is one of the core strengths of the HRA and it is a feature that has repeatedly proven its value over the last two decades.

317. That ability has meant in practice that courts in the UK have been able to scrutinise the actions of the executive in a way that has enabled the substance of ECHR rights to be properly protected. The exercise of that judicial function is an

essential feature of a society which is founded on the rule of law and it is necessary that government is fully accountable for the actions it takes.

318. Whilst the HRA does not provide the only means by which such challenges can be brought, the HRA has, crucially, established an approach that has both enabled and required the courts to look beyond previous common law or pre-HRA mechanisms. The practical result has been that individuals whose rights have been infringed as a result of lazy, careless, or negligent decision-making have had proper access to appropriate redress in line with the UK's obligations under Article 13 of the ECHR.

319. It is therefore essential that the existing level of protection is maintained and that nothing is done to permit or excuse executive actions that are convenient and expedient for the government of the day but detrimental to the rights of individuals and to the wider interests of society.

320. Ensuring that there are adequate safeguards in place to prevent government abuses of human rights and fundamental freedoms is an essential feature of any functioning liberal democracy. The consultation paper is therefore entirely wrong to suggest that democratic decision-making and effective human rights protections are somehow in conflict. The reality, of course, is that legislative and executive decisions cannot, under any circumstances, be regarded as consistent with democratic norms if they are not also human rights compliant.

321. Whether government actions or decisions actually meet that necessary basic standard is ultimately (and properly) a matter for the courts to determine – and they should do so objectively and impartially. For its part, the Scottish Government is entirely happy with that arrangement and with the fact that the HRA enables the courts to assess whether a public authority is acting in a legal, necessary and proportionate way (and therefore justifiably and lawfully) when its actions infringe a person's human rights.

322. In contrast, what the UK Government's new proposals seek to do is to require the courts to accept that the very existence of a piece of primary and secondary legislation is somehow – in and of itself – determinative of what constitutes the public interest.

323. It appears that even if that legislation has been passed or made in the explicit knowledge that it violates the human rights of individual members of society, the ability to challenge the practical human rights impacts of that legislation will be restricted by law. It seems evident that the intention is to obstruct the domestic courts in the exercise of their own vitally-important, and independent, constitutional function. That is an alarming proposition and one which the Scottish Government strongly opposes.

324. The unfortunate reality is that, far from representing a desire "to balance individual rights with due respect for the wider public interest", the proposals set out by the UK Government crudely conflate the will of the UK Parliament with the public interest.

325. They do so in a way that appears to be designed to place not only legislative but executive actions beyond effective legal challenge. This reflects a belief, which seems increasingly to be a feature of UK Government thinking, that UK Ministers should be able to disregard inconvenient rules and legal constraints. The apparent intention is to override opposition and to disregard the wider public interest, including the requirement to respect, protect and fulfil human rights.

326. Moreover, the draft provisions set out in Option 2 on page 100 of the consultation paper also extend to "a decision of a public authority made in accordance with a provision of legislation". This too is a deeply alarming proposal.

327. Its purpose and effect would appear to be to ensure that *any* decision of a public authority must, by definition, be regarded as being in the public interest.

328. The test to be applied will simply be whether the decision in question can be justified by reference to legislation passed or approved by the UK Parliament. If it can, then the existence of the legislative provision is itself sufficient evidence that the public authority is acting in the public interest. That will apply whether or not the public authority has been careless or diligent in its decision-making and irrespective of whether it has made any effort to take appropriate steps to respect, protect and fulfil the rights protected by the HRA.

329. As with other proposals set out in the consultation paper, the practical effect of the draft provisions set out in Option 2 can only be to encourage and facilitate a culture of casual disregard for human rights by public authorities.

330. The Scottish Government therefore objects to these proposals in the strongest terms.

24. How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective?

- Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment;
- Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights; and/or
- Option 3: provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.

Please provide reasons.

331. The Scottish Government fundamentally disagrees with the deportation proposals set out in the consultation paper.

332. These risk further eroding the rights of individuals throughout the UK in a way that will inevitably have grave personal consequences for individual members of society and their families, including individuals who may be particularly vulnerable or at risk.

333. Protecting the public is of course an essential function of government and, for its part, the Scottish Government recognises that there will be instances in which the public interest does indeed require that a foreign national should be removed from the UK. It is also clear that genuine abuses of the immigration and asylum systems should be prevented and deterred.

334. However, as things currently stand – and contrary to the claims made by the UK Government[69] – the HRA creates no automatic or necessary impediment to the deportation of foreign nationals where deportation is clearly shown to be in the public interest.

335. Indeed, deportations which are in the public interest are already not merely legally permitted, but are actually carried out. In the year ending September 2021, the UK forcibly removed 2,830 foreign nationals, most of whom were ex-offenders.[70] It is therefore factually incorrect to assert that "deportations that are in the public interest are …frustrated by human rights claims".

[69] It is notable that the consultation paper itself provides no convincing evidence that the HRA presents a significant barrier to deportation where there is a risk to the public. Despite the claim (on page 38) that "discretion left to the courts" has been "used to dilute the intended impact" of the UK Government's immigration policies, only two specific examples are citied – *AD (Turkey)* and *OO (Nigeria)*. In the former, the Upper Tribunal made very clear that the decision to overturn the deportation order on Article 8 grounds was "rare and exceptional". In the latter, the Upper Tribunal was explicit in its endorsement of the view reached by the First-Tier Tribunal that a "very high threshold" would need to be satisfied "if the public interest in deportation is to be outweighed".

[70] How many people are detained or returned? - GOV.UK

336. The long-established position of the Scottish Government is that deportation should be viewed as a last resort, reserved for the most serious cases and for those who have exhausted all relevant appeal mechanisms. It should never be regarded as the default option or as something to be automatically applied without proper regard for the human rights of the individual concerned, and of their children and other dependants.

337. It also remains essential that deportation decisions made by UK Ministers can be effectively challenged in the courts and that they can be struck down where the decision is shown to be defective.

338. The ability to bring such challenges is a necessary feature of a system founded on respect for human rights and the rule of law. In fact, safeguards of this kind, which protect the individual against arbitrary, erroneous or unlawful decision-making by public authorities, are a necessary and non-negotiable feature of any modern liberal democracy. By the same token, where such challenges are successfully brought, it is entirely inappropriate for the UK Government to criticise the courts for upholding the rule of law.

339. Against that general background it ought not to be necessary to remind the UK Government of the very real human rights abuses perpetrated as a consequence of the Windrush scandal.

340. It is sobering to reflect on the fact that, in practice, the existing protections of the HRA were not enough to prevent the wrongful deportation and removal of at least 83 people from the UK, some of whom died before being able to claim any redress[71]. There is consequently the very real risk that a weakened HRA may facilitate or encourage the violation by the UK Government of the rights of entirely innocent and law-abiding individuals, as occurred in the Windrush case. It is certainly the case that a variety of groups within UK society have been targeted in a similarly discriminatory manner by UK Home Office policies.

341. The Scottish Government regards the Windrush example as indicative of the actual and potential abuses to which innocent members of society risk being exposed as a result of the UK Government's attempts to ignore, override and deconstruct human rights protections in the UK.

342. Rather than bringing forward proposals to further reduce and restrict such protections, the UK Government should devote greater effort and resources to rectifying and remedying the abuses for which it is already responsible.

343. In relation to the further detail of the proposals, the Scottish Government would caution strongly against the risk of "reforming" existing mechanisms in ways that give rise to unintended consequences.

[71] In 2018, the then Home Secretary, Sajid Javid, in a letter to the Home Affairs Committee confirmed that 83 people had been wrongly removed from the UK.

344. This is a particular concern in the context of the obligations arising under the TCA reached with the European Union in 2020. The terms of the TCA explicitly provide that:

> "cooperation can be suspended in case of violations by the UK of its commitment for continued adherence to the European Convention of Human Rights and its domestic enforcement."[72]

345. As matters currently stand, the implementation of the ECHR in the UK by means of the HRA satisfies the requirements of the TCA. However, should those existing protections be deconstructed, as the UK Government proposes to do, then the UK's ability to return EU nationals to their home country could well be called into question.

346. It is therefore clear to the Scottish Government that the proposals set out in the consultation seek to address problems which do not actually exist, whilst threatening to create new, and very real, problems in an area where there is currently strong and effective co-operation between the UK and EU member states.

347. It is also a matter of very real concern that the proposal to exclude the possibility of legal challenge, based for example on the categorisation of groups with certain characteristics, will place the UK at odds with its obligations under the ECHR in a way that will simply result in the UK losing increasing numbers of cases in the ECtHR.

348. Any attempt to automatically exclude the consideration of rights such as those arising under Article 8 or Article 14 without regard to the facts and circumstances of individual cases will itself, in turn, present the risk of non-compliance with the requirements of Articles 6 and 13. That cannot be an outcome which the UK Government can reasonably contemplate whilst remaining a State Party to the ECHR. Such an approach is, ultimately, incompatible with a commitment to the rule of law and it is therefore essential that the UK Government does not place itself in a position where it is in breach of the UK's international obligations.

349. More generally, in relation to the overall situation of foreign nationals resident in the UK, the Scottish Government has repeatedly drawn attention to flaws in the existing asylum and immigration in the UK and continues to call on the Home Office to develop and implement policies that are both more humane and more flexible.

350. The Scottish Government will therefore continue to argue for mandatory judicial oversight in all cases where individuals may be subject to immigration detention or removal. This is an essential, and non-negotiable requirement which ensures proper compliance with human rights obligations and serves to uphold fairness, equality and proper respect for human dignity.

351. Scotland welcomes those who are in need of protection as well as the many individuals and their families who help Scotland to develop and to prosper economically by contributing their skills and labour in ways that benefit the whole of

[72] The EU-UK Trade and Cooperation Agreement | European Commission (europa.eu)

Scottish society. For that reason, the Scottish Government has consistently argued in favour of immigration laws and policies which enable everyone resident in Scotland to play a full and active role within Scottish society, including through productive economic activity. Policies such as those pursued by the UK Government which result in exclusion, poverty and lost opportunities for both individuals and society as a whole are most certainly not in the wider public interest.

352. While immigration is reserved, the Scottish Government has further proposed that the Scottish Ministers should play a formal role in the migration system and in cases relating to any individual who is normally resident in Scotland. Such involvement would serve to ensure that an assessment of the public interest is properly determined by reference to Scottish facts and circumstances.

25. While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

353. The Scottish Government fundamentally disagrees with the premise to this question.

354. The ECHR and the HRA do not constitute "impediments" to dealing with the challenge of migration. It is also inaccurate and misleading to refer to "illegal migration". The UK has very clear international obligations, including the requirement to render assistance to individuals who have a well-founded fear of persecution.

355. The Scottish Government has repeatedly made clear that action to deter and prevent abuse of the immigration and asylum systems must be fully compatible with the UK's human rights obligations and with the need to treat individuals and their families with dignity and respect. The Scottish Government also remains extremely concerned by the UK Government's response to the pressures created by large-scale migration.

356. In particular, there are significant concerns in relation to the UK Government's inhumane and unlawful plans to intercept and divert people crossing the English Channel in small boats. Action to turn back or obstruct vessels which are already out at sea is inherently dangerous and will significantly increase the already unacceptable risk to life. The UK Government must instead prioritise the preservation of life and ensure that action is taken to ensure the immediate rescue of the occupants of boats attempting to make the crossing.

357. The UK has both a moral and a legal duty to fully comply with the requirements of the 1951 UN Refugee Convention. Support and assistance must be rendered to refugees seeking protection and entry provided into the UK for the purposes of claiming asylum. Individuals exercising their right to claim asylum under international law should never be treated as having committed a criminal offence.

358. The Scottish Government does, however, explicitly condemn the actions of the criminals who profit from the desperation of those who attempt to reach the UK. Robust deterrent action is required to target the criminal gangs whose illegal, irresponsible and exploitative people-smuggling activities continue to place individual migrants and asylum-seekers in grave danger.

359. It should be remembered that the current migration pressures felt in Europe and in the UK are themselves a consequence of larger patterns of population displacement. These are a global phenomenon and have their roots in war, famine, poverty, political instability and, increasingly, climate change.

360. In response to these pressures the Scottish Government has urged the UK to adopt a humane and flexible approach to asylum and migration and to support international co-operation to address the root causes of population displacement. The UK should start with the immediate opening up of safe, legal routes for people

seeking sanctuary in the UK including a replacement for the Dublin III agreement and the Dubs amendment.

361. The Scottish Government wishes also to take this opportunity to underline the need for the UK to have an asylum system which is effective and efficient, and which works for the benefit not only of people seeking asylum, and of the communities to which they belong, but which also supports the wider socio-economic interests of Scottish society.

362. The Scottish Government is very clear, in particular, that asylum seekers and refugees have the potential to contribute to wider society in many positive ways, and that Scotland can benefit directly from the skills, hard work and economic productivity that they can deliver as new, and very welcome, members of Scottish society.

363. Significant investment is therefore needed to improve the quality and speed of asylum decisions, so that people who have been forced to flee their home country, or have been living in the UK at a point it became unsafe for them to return, can access the protection they need.

364. Home Office statistics show that there has been an increasing backlog in cases waiting for initial asylum decisions, with significant increases in the number of people waiting more than six months for a decision even prior to the Covid-19 pandemic. Home Office outcome analysis of asylum applications shows a significant decline in the number of initial decisions made in 2019. As a result, an increased number of people were waiting for an initial decision the year prior to pandemic restrictions.

365. Plans to increase the complexity of the UK asylum system through use of inadmissibility notices and introduction of new classes of refugee risk creating further delays which will increase the cost of the asylum system and to people who are awaiting a decision. Reduced rights for people with recognised protection needs, based on how they reached the UK, will also increase the risk that people are marginalised and at risk of exploitation, including by organised criminals profiting from irregular migration.

366. There is currently no way for someone to apply for asylum from outside the UK. The UK has increased refugee resettlement in recent years, but this has remained limited. Family reunion can support people to come to the UK, but this is only available where someone already in the UK has recognised status and only allows for a spouse or partner and dependent children who were part of the family prior to the need to flee persecution to travel.

367. Increasing the number of safe and legal routes for people to come to the UK as refugees or be reunited with family already living in the UK would help to reduce irregular migration. For this to work, routes also need to be accessible and processes clear. At present the complexity of visa and immigration rules, high cost of associated fees and restrictions make this challenging.

368. Rather than wasting time and effort on unnecessary proposals for a “modern Bill of Rights”, the UK Government should be investing in action to address and resolve the manifest deficiencies and failures which characterise current UK immigration policies.

26. We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:

a. the impact on the provision of public services;
b. the extent to which the statutory obligation had been discharged;
c. the extent of the breach; and
d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

Which of the above considerations do you think should be included? Please provide reasons.

369. It is properly for the courts to determine the most appropriate remedy in cases where there has been a violation of human rights.

370. Both the domestic courts and the ECtHR have an established track record in this area and government should not seek to constrain the ability of the courts to perform their proper function as a guarantor of the rule of law.

371. Under existing arrangements the courts have powers to award damages where doing so is necessary to ensure "just satisfaction". They properly make that assessment on a case by case basis, in light of all of the relevant facts, and it is entirely for the court to determine whether damages should be awarded and, if so, how much.

372. Financial compensation is not automatic and is unlikely to be awarded where there is an alternative option to remedy a human rights violation. Where damages are payable, the amounts involved do not tend to be particularly large[73].

373. It is of course true that the overall cost may prove to be significant in situations where large numbers of individuals have been affected. In those instances, relatively small individual payments can result in a large overall impact. However, it is the Scottish Government's view that it is for the courts to consider the factors which apply in each individual case and that judicial independence in this matter must be strictly protected.

374. It should also be noted that section 8(3) of the HRAexpressly links the domestic human rights damages regime to the ECtHR regime through its use of the concept of "just satisfaction".

375. To the extent that removing or altering that provision would risk breaking the link between domestic and international law, these proposals appear likely to result in a significant increase in the number of UK cases being heard in Strasbourg. Such a situation would benefit neither the litigants in individual cases nor the UK as a State Party to the ECHR.

[73] In September 2021 the Investigatory Powers Tribunal (IPT) awarded £229,471 in respect of actions by the Metropolitan Police which had "grossly debased, degraded and humiliated" a female environmental activist. However, awards of this size are unusual.

376. The consequence, once again, would be to frustrate access to justice whilst further damaging not only the UK's own international reputation but the integrity and coherence of the wider ECHR system.

27. We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this?

- Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or
- Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

Please provide reasons.

377. This proposal raises serious concerns in relation to both general principles and practical application.

378. Any attempt to restrict the enjoyment of human rights, or prevent access to justice, based on some general assessment of the moral character of a particular individual would be repugnant from the point of view of both human rights and the rule of law.

379. Justice must be impartial and available to all, and dispensed solely in accordance with the merits of each case. It would be wholly unacceptable to make the outcome of a case dependent, even in part, on the general public standing or reputation of those who come before the courts.

380. The very obvious further risk is that the subjective judgments which would necessarily be involved would be informed by social prejudices and by other subjective factors. The consequence would be to further disadvantage those who are already on the margins of society and who lack power and influence.

381. The question of whether a court should have regard to the conduct of an individual in a particular case when deciding on the most appropriate remedy is a rather different, and entirely separate, matter.

382. As the consultation paper itself recognises, such considerations can already form part of the judgment reached by a court. For example, in paragraph 306, the consultation paper cites *McCann v United Kingdom*[74] in which the ECtHR quite properly declined to award damages, as the violation found by the court would not have occurred if the individuals concerned had not been intent on committing an act of terrorism.

383. Such decisions should, however, be reached in an entirely impartial and objective manner by a court of law, without the risk of political interference and without the need for any constraint or direction of the kind proposed by the UK Government.

[74] [1995] 21 EHRR 1997

384. The Scottish Government therefore opposes both of the proposals in the consultation paper and reiterates that the HRA as it currently stands is not only highly effective and well-drafted, but has a proven track record in relation to human rights protection in the UK.

28. We would welcome comments on the options, above [in the consultation paper], for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.

385. UK Ministers are already able to ensure that the UK Parliament is kept fully informed of all relevant developments, including adverse judgments in both the domestic courts and in the ECtHR. In fact the UK Government publishes an annual report (submitted to the JCHR) which details the UK Government's response to human rights judgments[75].

386. Ministers are also in a position to invite Parliament to debate any matter which they regard as raising matters of concern.

387. In Scotland, the Scottish Ministers are similarly in a position to ensure that the Scottish Parliament is kept properly informed of judgments which are of particular significance. Moreover, the Scottish Government has full confidence in the ability of the Scottish courts to interpret and apply the Convention rights in a manner which responds appropriately to developments in the jurisprudence of the ECtHR.

388. These existing arrangements deliver a system which has sufficient flexibility to allow the Scottish Ministers, the Scottish Parliament, and the Scottish courts to address (as appropriate) any issues which may arise as a consequence of an adverse Strasbourg judgment. The proposed new statutory requirement adds nothing of value to these arrangements and is unnecessary.

389. The Scottish Government does however remain committed to working with UK Government counterparts, including via the UK Mission in Strasbourg, to ensure that developments affecting devolved interests are appropriately monitored, assessed and acted upon.

390. Whilst the Scottish Government does not see a need for proposals of the kind set out in the consultation paper, it does consider that action should be taken to properly reflect devolved interests in connection with the ratification by the UK of new international obligations.

391. In particular, in situations where devolved competence is engaged by any new international treaty which the UK Government proposes to ratify, the Scottish Parliament should be accorded the same recognition and respect as is given to the UK Parliament under Part 2 of the Constitutional Reform and Governance Act 2010[76].

392. In terms of parliamentary procedure it should be the case that any treaty which would give rise to obligations in a devolved area is laid before the Scottish Parliament prior to ratification so that the Parliament has an opportunity to consider the effect of the treaty and to determine whether, in its view, the treaty should be ratified.

[75] Responding to human rights judgments: 2020 to 2021
[76] Constitutional Reform and Governance Act 2010

29. We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:

a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights?
b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform?
c. How might any negative impacts be mitigated?

Please give reasons and supply evidence as appropriate.

393. The Scottish Government's overriding concern in relation to a proposed Bill of Rights is that the strong existing protections delivered by the HRA and by the UK's status as a full State Party to the ECHR will be undermined and eroded.

394. In fact, it is difficult not to come to the conclusion that the UK Government's true purpose in bringing forward these proposals is to deconstruct these existing human rights protections.

395. It is certainly the case that the inevitable practical effect seems likely to be the detachment of the UK – incrementally and by stealth – from the ECHR and from the wider obligations of Council of Europe membership.

396. The proposals presented in the consultation paper are certainly consistent with a long history of antipathy to the HRA displayed by the Conservative Party, both in opposition and in government. It therefore seems disingenuous to suggest that the "modern Bill of Rights" now proposed by the UK Government has any purpose other than to restrict and limit the enjoyment of rights which have been statutorily protected in the UK for more than two decades.

397. Within that broader context the Scottish Government has particular concerns in relation to the equality implications of the proposals.

398. Since its inception, the ECHR and the judgments of the ECtHR have helped to confront discrimination and advance equality for individuals and communities within UK society who have been marginalised and disadvantaged.

399. That has included the repeal of laws which criminalised homosexuality and the overturning of the ban on gay people serving in the Armed Forces. The ECHR and the Human Rights Act have been instrumental in ensuring that local authorities meet their obligations to vulnerable children, in ending corporal punishment in Scotland, and in protecting the right to freely express religion and belief in the workplace.

400. These are just some of the significant judgments that have upheld rights for disadvantaged groups and struck down discriminatory practices. Bringing the ECHR into domestic law through the HRA was a necessary and hugely beneficial development which has unquestionably improved access to justice for those who experience discrimination.

401. The UK Government's proposals for a "modern Bill of Rights" appear to be intended to frustrate and obstruct that existing ability to obtain justice in the UK courts, not least by restricting access to justice in cases which the UK Government regards as insignificant, trivial or spurious.

402. In fact, as this consultation response has already argued, the very real danger exists that the proposed "Bill of Rights" will encourage, facilitate and excuse a new culture of casual low-level violation of human rights by public authorities, who will be enabled – as a matter of law – to disregard the rights of any individual as long as the violation is kept below a threshold of "significant disadvantage".

403. The practical impact of any such reform will inevitably be felt the hardest by those in society who are already the most vulnerable and at greatest risk of experiencing human rights abuses.

404. That risk will be particularly acute for those on the margins of society, whose needs and interests may already be deprioritised by public policy and the decisions of public authorities. This is an extremely worrying prospect for anyone who is committed to securing equality, fairness and social justice and to addressing the pressing need to confront the inequalities which plague UK society.

405. The Scottish Government therefore regards the proposals set out in the consultation paper as unnecessary and ill-conceived. The very clear view of the Scottish Ministers is that replacing the HRA with a "modern Bill of Rights" would do significant harm to individuals and communities throughout Scotland and across the rest of the UK. To pursue such a course of action amounts not just to an act of legislative vandalism but constitutes a direct assault on the human rights and fundamental freedoms of every member of Scottish society.

406. The reality is that the HRA – and the protection it delivers – enjoys very strong public and political support in Scotland, including from four of the five political parties represented in the Scottish Parliament.

407. The degree to which informed, expert opinion also supports the HRA and opposes proposals for its replacement was itself conclusively demonstrated by the evidence submitted to the IHRAR. Many of those submissions were from experienced and very hard working campaigners for equality and social justice, who understand very well the importance of the Act and the threat posed by ill-conceived proposals for "reform".

408. In the opinion of the Scottish Government those views serve as conclusive evidence of the equality risks inherent in the proposals which the UK Government has now brought forward. The Scottish Government would therefore urge the UK Government to give detailed scrutiny to the responses received by the IHRAR and to abandon its proposals for a "modern Bill of Rights".

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