SHRC
Scottish
Human Rights
Commission

Submission: Independent Review of the Human Rights Act, Call for Evidence

March 2021

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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"Our aim is a straightforward one. It is to make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home."[1]

Executive Summary

The Human Rights Act ("the Act") has been in force for over twenty years. The Act made it possible for us to enforce our rights under the European Convention on Human Rights ("the Convention")[2] directly in our national courts. Incorporation of our Convention rights through the Act has had a significant positive impact on people across the UK in many areas, including: children, disability, equality, health, justice, privacy, religion and belief, rights at work, seeking refuge, speech and protest and victims of crime.[3]

The Act's requirement that all public bodies, and other organisations carrying out a public function, comply with Convention rights has been an essential catalyst in encouraging and promoting a human rights culture in the design and delivery of services across Scotland. It provides important legal accountability for decisions of public bodies which are unfair and unjust and which do not respect the principle of human dignity. For example, it means public bodies like the NHS have a duty to protect our right to life when we're being treated in hospitals, and that any deaths in care homes must be properly investigated.

The Act, and Convention compliance, are embedded into the Scotland Act 1998. As a result of this, Convention rights have become part of the fabric of Scotland's laws, judicial analysis, and crucially the legislative competence of the Scottish Parliament. This is widely considered to be a positive dimension to devolution, and the Parliament, duty-bearers and civil society have sought to build on this in developing a rights-based culture.[4]

While there remains much to be done, Scotland is on a progressive path with regard to the enforceability and justiciability of rights and has taken

some very notable steps, building on the success of the Act, by initiating the incorporation of other international human rights treaties. Any regression in the realisation of Convention rights would put those rights, largely civil and political, on a backwards trajectory, while Scotland pushes forwards on other internationally protected rights, including economic, social, cultural and environmental rights.

The Independent Human Rights Act Review ("the Review") has been set up by the UK Government to consider making considerable changes to the Act. The Commission is highly concerned that if the Review panel recommends the types of changes foreshadowed in the framing of the questions posed by the Review, we may lose protection of our Convention rights in significant ways.

The ability to claim our Convention rights in national courts, without having to pursue claims all the way through national courts and then to the European Court of Human Rights ("the ECtHR"), is an essential way of securing access to justice for people in relation to their fundamental rights. In order for this to work effectively, it is vital our courts both take account of ECtHR case law and interpret legislation compatibly with Convention rights insofar as they can do so. Such an approach secures necessary alignment in the protection of our rights with our international obligations. It also ensures maximum clarity and certainty in relation to the standards and better access to justice for all.

In addition, the ability of our national courts to declare that UK legislation is incompatible with our Convention rights provides for a structural approach to remedy where violations occur. For UK legislation, this has almost invariably resulted in the UK Parliament replacing or amending the offending legislation. In the case of Scottish legislation, incompatible legislation can be declared outside the competence of the Scottish Parliament and therefore effectively struck down.

The structural nature of a declaration of incompatibility means a law that breaches the rights of many people can be addressed, rather than a lot of individual rights holders having to pursue claims through the courts. This avoids the considerable burden on individuals of having to pursue a remedy in court, as well as relieving the courts of a higher volume of

claims. Critically, where acted upon effectively it helps secure action by the executive and legislature to remedy incompatible legislation, leading to better outcomes for all.

Making changes to the central mechanisms in the Act risks significantly undermining its central purpose: to make our Convention rights directly applicable here in the UK and enable us to enforce our rights at home. It risks distancing us from our rights, making them harder to realise and enforce, undermining accountability and the development of a rights based culture.

This review has been initiated at precisely one of the most challenging times in UK history: within weeks of the UK's withdrawal from the EU and during the second wave of the largest public health crisis in our shared national experience. This calls into question how sufficient evidence can be gathered in such a short space of time, when individuals and organisations are limited in their capacity to respond. Any review of such a critical piece of legislation should only be carried out with active, direct participation of rights-holders, those who will be most affected by any changes. The Commission is concerned that the timescales set out will not allow for any meaningful participation as would be appropriate.

The Commission is concerned that the framing of the questions of the Review infer the possibility of stripping away accountability, oversight and access to justice. When the foreshadowed outcomes of this Review are considered alongside the UK Government's current review of Judicial Review and any potential review of the powers of the Supreme Court, there appears to be a risk of undermining the effective and appropriate roles of the Judiciary, Parliament and the Executive that are at the heart of the UK's constitutional makeup.

Where the UK Government seeks to limit the reach of Convention rights so that they do not apply to UK activity abroad, this would: remove protection for UK personnel abroad, as well as for non-UK citizens under our control; seriously undermine the Convention system as a whole, and may encourage other countries to be selective in their recognition of Convention rights.

The impact of the pandemic has been significant on all our human rights, including our right to work, to education, to housing, to private and family life, to liberty, and to due process. COVID-19 has shone a light on the longstanding inequalities we face as a society. It has shown us the gaps and inadequacies in our struggling public services and highlighted the need for strong, participative, transparent public institutions. Now more than ever, we need human rights laws which govern state actions and choices, ensuring that the principles of dignity and equality underpin the decisions taken by governments.

The Commission calls on this Review to recommend that the UK Government comply with its obligations under the Convention, retain the Act in full and ensure that accountability for Convention rights compliance is not diminished in any way. A summary of our key recommendations is set out below.

Recommendations

The Human Rights Act 1998 ("the Act") is retained in full and accountability for Convention rights compliance is not diminished in any way. In particular:

- The Act is the mechanism through which the UK implements its international law obligations under the Convention, in particular Article 1,[5] Article 13[6] and Article 46.[7] It must be retained in full to avoid breaching our obligations under international law.

- The Act is a pillar of the constitutional framework of devolution in Scotland. Convention rights are protected in Scotland under both the Act and the Scotland Act. Any change to the Act could upset this constitutional arrangement.

- There should be no change to Section 2.[8] It is integral to the Act, ensuring that the ECtHR's authoritative interpretation of Convention rights is taken into account by our national courts. This is essential to the core objective of the Act, to bring

Convention rights home, allowing us to enforce the full extent of our Convention rights in national courts.

- There should be no change to the way courts approach matters falling within the UK's margin of appreciation. Courts play a vital role in considering and resolving matters where the ECtHR has decided that national authorities should have the discretion to do so, as they are better placed to balance the interests of the community and individuals. UK courts are exercising their role in an appropriate way.

- There should be no change to the current process of judicial dialogue, which appears to be working well. Judicial dialogue can be an effective method of explaining the UK's specific national context to the ECtHR, leading to development in ECtHR case law.

- There should be no change to Section 3.[9] It provides an effective remedy for incompatible legislation. Courts apply this with caution where it is possible to read legislation in a compliant way, without going against the purpose of the legislation. It is important that national courts make the decision as to whether or not it is possible to read legislation in a complaint way.

- There should be no change to the courts' discretion to make a declaration of incompatibility under Section 4 if it decides that legislation is incompatible with Convention rights. A declaration does not affect the continuing operation of legislation and it is a matter for Parliament to decide how to address the incompatibility.

- There should be no change to the powers available to courts in considering designated derogation orders. It is essential that we have effective judicial oversight of this executive power.

- There should be no change to the discretionary power of courts to strike down subordinate legislation which is incompatible with Convention rights. The availability of this remedy allows courts flexibility in addressing incompatibilities. Any change may reduce the courts' ability to protect rights.

- There should be no change to the extra-territorial application of the Act. It is essential that the Act applies to UK activity abroad, for the protection of UK personnel, as well as for non-UK citizens who are under the control of UK authorities.

- There should be no change to the Act in respect of remedial orders. The remedial order process enables an incompatibility in legislation to be addressed more urgently than is possible through the full Parliamentary process for primary legislation. In some cases that will be important in order to protect rights.

Introduction

1. In this submission we firstly provide an overview of our position in relation to the Act, giving context to the specific Review questions and highlighting the potential implications of any changes, in particular for people living Scotland. We then address each of the specific questions posed in the Call for Evidence.

The Human Rights Act 1998

2. The Convention is seen as one of the most effective systems of human rights protection in the world. The UK signed and ratified the Convention over 50 years ago, committing itself to the rights and freedoms set out therein, including the rights to: life; liberty; a fair trial; expression; assembly; privacy and family life; freedom from torture, inhuman or degrading treatment, and discrimination.

3. As a signatory to the Convention the UK was required to secure the Convention rights to everyone in the UK,[10] and ensure that we had an adequate remedy for breaches.[11] However, it was not possible to enforce our rights before our national courts, as the Convention rights were not part of our national law. This meant that although in theory people living in the UK had the protection of the Convention rights, they were not able to enforce those rights at home. They had to make an application to the ECtHR, which sits in Strasbourg. Before they could make that application they had to exhaust all national remedies. In practice, that meant:

    - taking a claim to the national courts, even although the national courts would not apply Convention rights, as they were not part of national law;[12]
    - appealing the decisions of the national courts all the way up to the Supreme Court, where possible; and
    - finally, often after years of court procedure and expense, applying to the ECtHR where Convention rights would be applied.

4. Most people were not able to pursue their rights due to the very significant barriers to justice that stood in their way. In those cases where people did manage to pursue their rights all the way through the

national courts and then to the ECtHR, some very important decisions were issued. However, enforcement of those decisions was far less straightforward than enforcing a decision from a national court. This meant that in practice Convention rights were very distant from people in the UK. The Act was brought in to address this.

5. The White Paper for the Bill, which would become the Act, explained:

> "It will give people in the United Kingdom opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights Commission and Court in Strasbourg. It will enhance the awareness of human rights in our society. And it stands alongside our decision to put the promotion of human rights at the forefront of our foreign policy".[13]

6. When the Act came into force our Convention rights finally became part of our national law. Ensuring that people could enforce their rights in national courts was transformative, but the purpose and effect of the Act went far beyond individual court decisions. By making Convention rights directly enforceable at home, decisions would be issued by our national courts clarifying the scope of our rights and holding organisations carrying out public functions accountable. This would in turn promote a human rights culture, increasing awareness of rights and obligations, and developing a human rights based approach to policy setting and decision making. While there is still much to be done on this front, significant progress has been made as a consequence of the incorporation of Convention rights through the Act, particularly in Scotland.

7. Two of the key ways in which the Act gives effect to our Convention rights are:

    i. we can rely on our Convention rights before our national courts. Our courts will review decisions taken by individuals or organisations carrying out public functions to assess whether or not they comply with our Convention rights.

ii. our national courts can declare that UK legislation is incompatible with Convention rights. This puts considerable pressure on the UK Parliament to amend or repeal it. Scottish legislation that is incompatible can be struck down by the courts altogether (see below).

In carrying out both of these functions our national courts must take into account ECtHR decisions, which elaborate on the scope of Convention rights and how they apply in particular circumstances.

8. It is these key mechanisms, among other things, that the UK Government proposes to revisit through this Review. Therefore, what may change as a consequence of this Review are key mechanisms through which the Act brought our rights home and made our rights real.

9. The impact of the Act has been felt by people in many settings, sectors and spheres: from protecting children from physical punishment in school, to protections in prisons and police custody to the media and safeguards on personal data. As the UK has not signed up to individual or collective complaints procedures under other UN or the Council of Europe treaties, there are few other routes for human rights redress. In an era of new and evolving challenges, including the loss of protections emanating from the EU Charter of Fundamental Rights and broader EU law, the mechanisms in the Act to ensure domestic realisation and protection of Convention rights will be all the more vital going forward.

The Human Rights Act in Scotland

The Scotland Act

10. The Human Rights Act is a pillar of the constitutional framework of devolution in Scotland. In Scotland, Convention rights are protected under both the Human Rights Act and the Scotland Act 1998. Where a human rights issue arises, claims may be taken under either or both Acts. The relationship between the two Acts is complex; any proposed change to the Act would require very close consideration of the potential impact on the carefully crafted devolution arrangement given the interplay between the two Acts. The position is very similar in Wales and Northern Ireland.

11. The Scotland Act[14] created a Scottish Parliament and Scottish Executive, now known as the Scottish Government, and required that both act in compliance with the Convention.[15] Consequently, compliance with human rights obligations is part of the fabric of the Scottish Parliament, and all legislative proposals must be assessed for and certified as being in compliance with Convention rights.

12. The Scotland Act provides a greater degree of human rights protection for the people of Scotland. Under the Human Rights Act, actions of public authorities that are incompatible with Convention rights are unlawful and can be subject to Judicial Review.[16] Where UK legislative provisions are found to be incompatible with Convention rights they can be declared as such, providing Ministers with the opportunity to amend the incompatible provisions.[17] However, under the Scotland Act, the Scottish Government, Scottish Ministers and the Scottish Parliament do not have the power to act inconsistently with Convention Rights. To do so is beyond their competence, or ultra vires. Acts which are ultra vires have no legal effect. An Act of the Scottish Parliament is therefore "not law" so far as it is incompatible with any of the rights contained in the Convention.[18] An Act of the Scottish Parliament that is found by a court to be incompatible with Convention rights can be, in effect, struck down or prevented from coming into force under the Scotland Act.

13. This affords greater rights protection than under the Human Rights Act, where court declarations of incompatibility have no effect on UK legislation, and it is a matter for the UK Parliament to decide if it will replace or amend the legislation.

14. It is not clear to what extent the devolved arrangements are being considered by the Review. The Terms of Reference note that: "The review is limited to consideration of the Human Rights Act, which is a protected enactment under the devolution settlements." There appears to be no suggestion that any changes to the Scotland Act are being considered.

15. Amending either Act to change how Convention rights are interpreted or implemented may require legislative consent from the Scottish Parliament, as such changes may modify the legislative competence

and functions of devolved institutions. As set out above, the Scotland Act limits the competence of the Scottish Parliament, Scottish Government and Scottish Ministers to only act compatibly with Convention rights. In addition "Observing and implementing …obligations under the…Convention" are devolved to the Scottish Government and Parliament.[19] The Scotland Act 2016 put the Sewel Convention on a legislative footing, in terms of which the UK Parliament will not ordinarily legislate on Scottish matters without consent from the Scottish Parliament.[20] To legislate on such an important matter as human rights without the consent of the Scottish Parliament could be highly contentious and is likely to be resisted in Scotland.[21]

16. Alterations to the way in which the Act is implemented, after over twenty years, could introduce uncertainty, confusion and complexity, jeopardising the significant progress Scotland has made in developing a human rights culture and incorporating other international human rights treaties.

Significant Scottish Human Rights Act cases

17. The Act has had a significant impact upon the Scottish courts, which have increasingly engaged with ECtHR jurisprudence over the past 20 years. This has had an impact in a range of areas, from fair trial requirements to private, home and family life. More broadly, the introduction of the Act has encouraged a more general rights-based approach in the case law of the Scottish courts. The Act has aided the effective protection of individual rights at a domestic level, by strengthening the common law alongside incorporation of the jurisprudence of the ECtHR into domestic law.

18. A number of claims have been taken to the Scottish courts based on the Act which have had a significant impact on people's rights. The following are some notable examples.

Ending unlawful detention in care homes - *Equality and Human Rights Commission v Greater Glasgow and Clyde Council*

In a Judicial Review against NHS Greater Glasgow and Clyde and the owner of a chain of care homes, the Equality and Human Rights

Commission (EHRC) challenged their practice of discharging elderly patients with incapacity from hospital into care homes, without consent or legal authority to do so. These elderly patients were kept in locked units for up to a year while waiting for a welfare guardian to be appointed. In the Judicial Review the EHRC argued this violated their liberty under Article 5 of the Convention, their dignity, physical and psychological autonomy under Article 8 of the Convention and was discriminatory under Article 14 of the Convention. As a result of the Judicial Review the Council committed to ending this practice and EHRC has dropped the proceedings.[22]

Ending degrading prison conditions: *Robert Napier v. The Scottish Ministers*[23]

Robert Napier was a remand prisoner in HMP Barlinnie, Glasgow. He brought a petition for Judicial Review seeking a determination that the conditions in which he was held were inhuman and degrading, in contravention of Article 3 of the Convention. Inmates did not have access to a flush toilet in the cell and had to empty human waste when prison cells were unlocked in the morning. This practice was known as "slopping out."

The Scottish courts decided that the Scottish Government, as operators of the prison, had acted unlawfully in terms of the Act. The practical implications of the Napier case were hugely significant as the practice of slopping out was banned in prisons across Scotland, almost a decade after the practice was banned in England and Wales.

Improvements to criminal procedure, legal representation during police questioning: *Cadder v HM Advocate*[24]

Scottish criminal procedure allowed the police to detain and question people for up to 6 hours without a solicitor present. The UK Supreme Court decided that this breached the Convention right to a fair trial (Article 6). Following the decision the law was reformed to introduce a

right of access to legal advice for suspects being questioned by the police.[25]

Strengthened independence and impartiality of judiciary: *Stars v. Ruxton*[26]

The use of temporary sheriffs in Scottish sheriff courts, appointed by the Scottish Government who decided whether their tenure was renewed or not after a year, was successfully challenged. The court considered the jurisprudence of the ECtHR and decided that the sheriffs could not be said to be independent of the executive due to the lack of judicial security of tenure. Article 6 of the Convention offered additional protection compared to the pre-Act position concerning independence and impartiality of the judiciary.

Unreasonable delay in prosecution: *HM Advocate v Little*[27]

The Scots common law rule was that an accused must be brought to trial within a reasonable time period. If there was unreasonable delay the prosecution may be considered oppressive. However, it was necessary to show that the accused had suffered some form of prejudice as a result of the delay. Relying on ECtHR jurisprudence, the High Court of Justiciary held that a pre-trial delay of 11 years between charge and indictment was 'unreasonable'. Under the Article 6 right to a fair trial there was no requirement to demonstrate specific prejudice beyond that inherent in the infringement of that right and the unreasonable delay itself.

Progressive incorporation and promotion of human rights culture

19. The Act has fostered an ever evolving human rights culture in Scottish public bodies over the last 20 years. It has encouraged public bodies to mainstream human rights considerations throughout their decision making, in order to ensure fairer outcomes for people.

20. The Commission has supported a wide range of public bodies and providers of public services to embed human rights considerations and take a human rights based approach to processes and decisions.

21. For example, Her Majesty's Inspectorate of Prisons for Scotland reports itself as taking a human rights based approach to the inspection and monitoring of prisons.[28] Similarly, Scotland's Health and Social Care Standards, which were implemented from April 2018, explicitly "seek to provide better outcomes for everyone and to ensure that individuals are treated with respect and dignity and that the basic human rights we are all entitled to are upheld."[29] A further example is NHS Health Scotland which has tested improvement approaches to embedding human rights in their work and has produced a range of resources setting out how the right to health and a rights based approach can strengthen work to reduce health inequalities.[30]

22. There are a number of drivers for organisations choosing to adopt a human rights based approach, such as providing legitimacy and accountability for reasoned and person-centred decision making. However, the Commission believes that the Act has contributed significantly to the encouragement and development of a human rights culture in public bodies in Scotland. Whilst there is still much work to be done to ensure full compliance both in the spirit and the letter of human rights law, the Act has been the bedrock of the development of a human rights culture in public services.

23. In addition to this, the parallel development of Scotland's National Action Plan for Human Rights (SNAP), launched in 2013, has facilitated a collaborative culture across Scotland. SNAP has brought together a wide range of public sector bodies, national and local government and civil society organisations, to take forward action to build a stronger human rights culture and improve human rights outcomes in many areas including: health and social care, justice and safety and in relation to poverty and adequate living standards.[31]

24. The Scottish Government's National Performance Framework tracks Scotland's progress towards a set of National Outcomes, which are aligned with the UN's Sustainable Development Goals. The National Outcomes include a human rights outcome: "We respect, protect and fulfil human rights and live free from discrimination."[32]

25. The Scottish Parliament has acknowledged the requirement to embed human rights across its work. In 2018 the Equalities and Human Rights Committee of the Scottish Parliament set out a 'human rights roadmap' for the Scottish Parliament, to make human rights more central to its work, take a human rights based approach to scrutiny and become a strong human rights guarantor.[33] Increased focus on international human rights standards has also been reflected in references to international human rights instruments in Scottish domestic legislation.[34]

26. There is widespread, cross-party, support in Scotland for stronger human rights laws that provide greater protection. Building on the success of the Act, a dialogue has been taking place in Scotland for a number of years around the importance and role of international human rights standards, particularly economic, social, cultural and environmental rights. Although economic and social issues can fall within the scope of the Convention, it is not primarily designed to deal with such issues. The Commission has long advocated for the incorporation into Scots law of international human rights treaty standards, over and above those protected by the Act.

27. In 2017, the First Minister's Advisory Group on Human Rights Leadership ("FMAG"), of which the Commission is a member, was established with a remit to "make recommendations on how Scotland can continue to lead by example in human rights, including economic, social, cultural and environmental rights".[35] FMAG produced its report in 2018 recommending new human rights framework legislation, incorporating into Scots law a number of international human rights treaties, including economic, social, cultural and environmental rights.[36] The Scottish National Taskforce on Human Rights Leadership was established to produce more detailed recommendations for the framework legislation, which is expected to be published shortly.

28. The Scottish Parliament is currently in the final stages of considering a Bill to incorporate the United Nations Convention on the Rights of the Child into Scots law.[37] This will ensure children and young people's rights are better protected and will provide them with access to a remedy where their rights are breached.[38] In the UNCRC Bill, Scotland is going farther than the Act, for example by allowing individuals with sufficient

interest in a case, and not only 'victims', to take cases to court.[39] The Scottish Government has also tabled an amendment to the Bill to widen the definition of public functions.[40] This amendment will seek to hold private companies delivering public services to the same human rights standards as public bodies.[41] This definition of public function implements a key recommendation of the UK Joint Committee on Human Rights, who have twice looked at the issue of public functions under the Act and recommended supplementary legislation to give clarity to the provision.

29. There has been considerable progress in the development of a human rights culture in Scotland and the bedrock of this progress is the Act. In an era of new and evolving global challenges, the protections provided by the Act, the Convention and other international human rights treaties will be all the more vital.

Timing and timescale of Review

30. Such a fundamental piece of legislation should not be reviewed without direct, active participation of rights holders, those who will be most affected by any changes. The Commission is concerned that the timing of the Review and the procedure so far adopted mean that it will not be possible for a human rights based approach to be followed.

31. A human rights based approach requires that we respect, protect and fulfil human rights in both process and outcome. This means ensuring that people know their rights and are able to participate in decisions that affect them.[42]

32. The Review was announced on 7 December 2020. However there was no information available at that stage regarding the procedure the Review would adopt. On 16 January 2021 the Review announced a call for evidence, with a deadline of 3 March. The Call for Evidence and Terms of Reference set out a number of highly technical legal questions, without any explanation as to the potential impact of changes in these areas. Rights holders without in-depth knowledge of the Act, the procedures through which it is implemented and case law may reasonably conclude that the Review is concerned only with relatively minor technical points. In fact, as we set out in this submission, this

Review could have a very significant impact on implementation and enforcement of Convention rights in the UK, and in particular in Scotland.

33. Many people will be unaware of the Review, let alone have the capacity to engage with it, particularly within the very tight timeframe that has been set. The window of seven weeks for submission of evidence would have been a very short timeframe in ordinary times. Clearly, we are not in ordinary times. This Review has been initiated by the UK Government at the worst possible time. Rights holders, those who will be affected by any changes the Review may recommend, have been living in the most extreme situation for over a year due to the public health emergency created by the Covid-19 pandemic. The situation remains highly uncertain; no one is living or working as they ordinarily would be, and many people are suffering the most grave consequences. As ever, the most vulnerable and marginalised have been hit the hardest. Moreover, many charities and non-governmental organisations are experiencing serious capacity constraints right now due to school closures and Covid-related absences. Coupled with the ongoing health emergency, people and organisations are dealing with Brexit related impacts.

34. We urge the Review to acknowledge that consideration of changes to rights protection for people across the UK should not happen without the meaningful participation of those who hold those rights, including people in Scotland.

Context of Review

35. For over ten years the Conservative Party has repeatedly declared its intention to withdraw from the Convention, replace the Act with a UK Bill of Rights and refuse to follow decisions of the ECtHR.[43] The Conservative party election manifesto for the 2019 General Election stated: “We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government” and this Review can be seen as part of the implementation of that manifesto promise.

36. Along with this Review, the UK Government currently has an Independent Review of Administrative Law considering changes to

Judicial Review, the primary means by which rights holders in the UK can challenge state failures in our courts.[44] We understand that a third review, into the powers of the UK Supreme Court, was also expected as part of the UK Government's Constitution, Democracy and Rights Commission, announced in 2019.[45] However, there has been no further announcement regarding a separate review into the role of the Supreme Court as of yet.

37. This Review and the Administrative Law Review are inextricably linked, as Judicial Review provides a key means of holding the state to account, including through the Act and the Scotland Act. It allows individuals to challenge decisions of public bodies and central government which may violate a person's human rights or be otherwise unlawful. For example, many of the cases highlighted above have successfully challenged human rights issues by way of Judicial Review proceedings. Accountability and maintaining a check on state power sits at the core of human rights law. Any weakening of Judicial Review has the potential to limit our ability to enforce our rights in our courts. If we are unable to go to court when our rights have been breached, we lose the ability to hold the state to account for failures to fulfil our rights.

Overall recommendation

38. We strongly urge the Review to robustly call on the UK Government to comply in full with its obligations under the Convention, retain the Act as it is and not roll back on human rights protections. Now more than ever, we need human rights laws which govern state actions and choices, ensuring that the principles of dignity and equality underpin the decisions taken by governments.

Theme One of the Review: the relationship between domestic courts and the European Court of Human Rights (ECtHR)

> Q: "We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change."

Strengths of the current approach

40. The relationship between the domestic courts and the ECtHR is working well. The overall relationship is premised on subsidiarity, with national authorities, including national courts, having the primary role in the protection of Convention rights. For this reason the ECtHR will only accept an application once all domestic remedies have been exhausted.[46] Prior to incorporation of the Act, many applications were made to the ECtHR and the court found against the UK in a relatively high number of cases. Since the Act came into force, people have been able to secure decisions from our national courts that reflect their Convention rights, and far fewer applications are made to the ECtHR. UK courts have also developed an approach to the application of Convention rights that reflects the approach taken by the ECtHR itself, and the ECtHR now very rarely rules against the UK.[47] This is a measure of the success of the relationship.

41. We note that the UK has recently reaffirmed its commitment to the Convention system, including the shared responsibility for protection of Convention rights of the ECtHR and the member states. The UK has participated in high-level conferences on reform of the Convention system, through which the ECtHR has been reformed.[48] The UK has signed declarations issued by the member states at these conferences, including the most recent, the Copenhagen Declaration 2018[49], in which they:

    - noted the concept of shared responsibility, which aims at achieving a balance between the national and European levels of the Convention system, and an improved protection of rights, with better prevention and effective remedies available at national level;

- noted that a central element of the principle of subsidiarity, under which national authorities are the first guarantors of the Convention, is the right to an effective remedy under Article 13 of the Convention;

- called on states parties to the Convention to improve effective domestic remedies and ensure that policies and legislation comply fully with the Convention, including by checking the compatibility of draft legislation and administrative practice in the light of the ECtHR's jurisprudence.

Section 2 of the Act

> Q: "How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?"

How does Section 2 operate?

42. Section 2 is integral to the Act and critical to the core objective of bringing rights home. Section 2 requires our national courts and tribunals to "take into account" relevant decisions of the ECtHR when deciding a case concerning a Convention right. This applies to Scottish courts as it does to courts across the UK.

43. The requirement that our courts take account of relevant ECtHR decisions is essential to ensure that we are able to enforce the full extent of our Convention rights through our national courts. The ECtHR is the authoritative interpreter of Convention rights and it is important that our courts follow its authoritative interpretation so that people can access their full rights.[50]

44. This is all the more important because the Convention is a "living instrument", a treaty which must be interpreted in the light of present day conditions so as to be practical and effective. Sociological, technological and scientific developments, evolving standards in the field of human rights and changing views on morals and ethics have necessarily to be considered when applying the Convention. It is essential that national courts apply this evolving jurisprudence.

45. The Section 2 requirement to “take into account” has been interpreted by UK courts as a duty on national courts to “keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”[51] In general, UK courts follow the ECtHR where there is “clear and constant” case law[52] and, where there is an absence of clear ECtHR decisions in relation to similar facts, apply the principles developed by the ECtHR to the domestic context.

46. On rare occasions, UK courts will depart from ECtHR decisions where they consider there are good reasons for doing so. This could be, for example, where national courts think the ECtHR has not sufficiently appreciated or accommodated particular aspects of domestic processes.

47. As a result of the flexibility within Section 2, national courts are able to reach a particular domestic outcome which may be distinct from the outcome the ECtHR would reach, based on its previous decisions. This has resulted in ‘judicial dialogue,’ whereby the UK courts have, through their legal reasoning, provided the ECtHR with a stronger understanding of the domestic context in which the Convention rights are being applied. The greater level of understanding of the domestic system provided by the UK court’s legal reasoning appears to have on occasion been accepted by the ECtHR. Lord Philips put it as follows:

> “The requirement to “take into account” the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic 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 the domestic 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 the domestic court and the Strasbourg court.”[53]

Strengths of this approach

48. The fact that Section 2 does not require national courts to follow ECtHR decisions allows for a degree of flexibility. The courts have found this helpful, as it allows them to engage in constructive dialogue which is valuable to the development of Convention rights.[54]

49. However, the duty to take account remains a duty, which means courts cannot ignore ECtHR case law. This approach is important as it ensures that individuals don't receive less protection in national courts than by going to the ECtHR itself. This is one of the fundamental aims of the Act – to allow people to secure remedies for human rights issues in national courts – and it has ensured significant and lasting human rights protection for individuals in Scotland.

50. The duty to take account is also important as it ensures cases are decided consistently throughout Europe and that people in similar circumstances are protected to the same extent.

51. We have set out above a number of important cases where reliance on Convention rights through the Act and the jurisprudence of the ECtHR has had a significant positive impact on people's lives. However, the impact of our national courts following the developing case law of the ECtHR goes beyond our court rooms. It is important that there is one clear line of judicial authority, with consistency between national courts and the ECtHR, in order that our public service providers have clarity and certainty as to the scope of Convention rights and how they apply in practice. They need this clarity to comply with their duty under Section 6 of the Act, to comply with Convention rights. One current example of the importance of this is the situation in care homes during the pandemic.

Care Home Deaths During Pandemic

To understand the scope of the right to life under Article 2 of the Convention, our national authorities can following ECtHR decisions that make it clear that the state is obliged to take appropriate positive steps to safeguard lives and prevent a person's life being avoidably put at risk.[55] This includes the obligation to undertake an effective investigation where the right to life may have been breached.[56] The

system set up to determine the cause of death should be independent, prompt and completed within a reasonable time, with involvement of the deceased person's family.[57] ECtHR case law makes it very clear that investigations must be carried out into the circumstances that resulted in the high numbers of deaths occurring in care homes.[58]

Risks of amending Section 2

52. Weakening the duty to take account of ECtHR decisions would allow national courts to disregard the principles set down by the ECtHR, even if the case law is clear and constant. If our national courts did not have to take into account relevant ECtHR decisions in the way they currently do, they may apply very different reasoning and produce very different outcomes than the ECtHR.

53. This could create a situation in which we may no longer be able to access our Convention rights in full before our national courts, to some extent taking us back to the situation we were in pre-incorporation of the Act. Should section 2 not function as described above there is a risk that claimants would have to take their case all the way through our national courts and then make an application to the ECtHR sitting in Strasbourg to determine an outcome which upholds the Conventions rights as intended.

54. The different outcomes produced through national courts as compared to the ECtHR would undermine legal certainty, create confusion and make efforts to develop a human rights based culture much more difficult.

55. Currently, public authorities and those carrying out public functions are required by Section 6 to act compatibly with Convention rights. The rights themselves are written in fairly succinct terms. In order to understand the full scope of those rights, and how they apply in particular circumstances, it is necessary to have regard to court decisions. Case law has developed our understanding of the substance of Convention rights across the UK.

56. If the case law of national courts diverged from ECtHR jurisprudence, public authorities would no longer be clear how a Convention right

should be interpreted. This lack of clarity would undermine a human rights compliant culture. Where human rights standards are not consistently or coherently applied across all public sector decision-making, this risks leaving people vulnerable to poorer outcomes. The lack of legal certainty could also lead to an increase in litigation in order to clarify rights, which would be costly for public authorities as well as being burdensome for individuals and our courts.

57. Weakening the extent to which UK national courts take account of ECtHR jurisprudence could have consequences for the regional system of protection, potentially undermining rights protection in other Council of Europe countries. The lack of a strong and effective system for taking into account ECtHR case law would highlight on an international level the UK's lack of effective remedies to protect rights at home.

Recommendation: There should be no change to Section 2. It is integral to the Act, ensuring that the ECtHR's authoritative interpretation of Convention rights is taken into account by our national courts. This is essential to the core objective of the Act, to bring Convention rights home, ensuring we are able to enforce the full extent of our Convention rights in national courts.

The margin of appreciation

> Q: "When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?"

How does the margin of appreciation operate?

58. The 'margin of appreciation' is a principle developed by the ECtHR.[59] It allows national authorities a degree of discretion in the implementation of Convention rights. The principle recognises that, depending on the circumstances of a case, national authorities, including national courts, are often best placed to determine how to balance individual rights with the community interest. The extent of the margin of appreciation varies depending on a number of factors, for including, for example, the nature

of the Convention right and the degree to which the issue is one of social policy.

National authorities and the margin of appreciation

59. Where the margin of appreciation applies and the ECtHR is deferring to the national authorities, nationally the question arises as to the particular role of the three arms of the government, the executive, parliament and the judiciary, in exercising the discretion. Lord Reed explained in *Axa General Insurance Ltd v Lord Advocate*:

> "The concept of the margin of appreciation reflects a recognition on the part of the Strasbourg court that in certain circumstances, and to a certain extent, national authorities are better placed than an international court to determine the outcome of the process of balancing individual and community interests. At the domestic level, the courts also recognise that, in certain circumstances, and to a certain extent, other public authorities are better placed to determine how those interests should be balanced. …
>
> Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies."[60]

60. The question the Call for Evidence appears to be looking at is the one expounded by Baroness Hale in the case of *In Re G*[61]: how should national courts respond where government action appears to be incompatible with Convention rights, but it would be regarded by the ECtHR as being within the state's margin of appreciation? Should the courts form their own view of the content of Convention rights or should they leave it to the legislators?

61. In answering this question, Baroness Hale noted that, as a public authority, the national courts must act compatibly with Conventions

rights.[62] Parliament legislated, through Section 6 of the Act, to render unlawful any act of a public authority, including a court, which is incompatible with a Convention right. National courts are therefore bound to uphold Convention rights.[63] She concluded that yes, courts should form their own view of the content of Convention rights, as Parliament had intended that judges "would be able to contribute to [the] dynamic and evolving interpretation of the Convention".[64] In forming their view of the content of Convention rights, national courts are guided by the general principles and approach taken by the ECtHR.

62. In terms of the role of different branches of government, Lord Bingham put it as follows:

> "It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called "relative institutional competence". The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions".[65]

63. The courts are more likely to defer to the executive and legislature where the Convention right at issue is qualified and requires a balance to be struck between the rights of individuals and the wider public interest, and where matters of social or economic policy are involved. Matters that are squarely within the court's remit include justice, fair trial, liberty and discrimination.

Strengths of this approach

64. Rights which we now take for granted are often first laid down as a benchmark by courts based on clear judicial reasoning. The following example illustrates an important outcome secured through our national courts recognising that where a law was clearly discriminatory, there was

a breach of the Convention even although it concerned a matter of social policy.

In the case **of In Re G (Adoption: Unmarried Couple)**, a couple were prevented from adopting a child in Northern Ireland because they were not married.[66] Legislation from 1987 stated that adoption orders could only be made to married couples. The House of Lords was asked to consider if this legislation was compatible with the Convention. It noted that, while the state was entitled to take the view that marriage was an important institution, it was irrational to have a blanket ban on the basis that in every case a child would be better off living with married parents rather than unmarried ones. The House of Lords therefore concluded the couple should be allowed to adopt the child.

In its reasoning, the House of Lords recognised that questions of social policy would ordinarily be a matter for Parliament. However, that did not mean that the legislature was entitled to discriminate in any area which could be described as one of public policy. The court decided that there was no rational basis for the blanket approach applied in the legislation. On the basis of the ECtHR's developing jurisprudence on discrimination against unmarried couples, it appeared likely that the ECtHR would consider the adoption law discriminatory and therefore in breach of the Convention.

The House of Lords noted that it was not exclusively a matter for Parliament to determine delicate areas of social policy which fall within a state's margin of appreciation; courts also play a role.[67] As noted by Lord Hope: "[c]ases about discrimination in an area of social policy…will always be appropriate for judicial scrutiny."[68]

This judgment is important as it demonstrates that national courts have, in a principled and rational way, protected the rights of individuals in areas within the margin of appreciation.

65. The courts have exercised their role responsibly and with caution, ensuring that they don't substitute their own views on matters of social policy when considering proportionality. The fact that the courts can decide these important questions does not substitute processes of a

democratic government, but complements them, ensuring rights are respected.

66. National courts have considered where the right balance in interpreting Convention rights might be struck. In reaching this balance, courts have given appropriate weight "to the decisions of a representative legislature and a democratic government".[69] How this weight is apportioned in a particular case will depend on the nature of the right and whether it falls within an area in which the legislature, executive or judiciary can claim particular expertise.[70] It is also worth noting that while the executive and the legislature are elected politicians, courts are independent. As such, they may be more suited to deciding certain questions. For example, judges are often best placed to decide on whether legislation has the effect of discriminating against individuals or groups. This is particularly important as marginalised groups may not be adequately represented in Parliament.

67. The more legislation relates to matters of social policy, the less ready our national courts will be to intervene.[71] For example, in the case of *Nicklinson*, the Supreme Court decided by a majority that although they had the constitutional competence to decide if the prohibition on assisted suicide was a breach of Article 8 of the Convention, it would not be appropriate for them to do so, as it was an inherently legislative issue for Parliament to properly consider and debate. However, they did note that if Parliament did not address the issue, that may change in the future.[72] While the responsibility to fulfil rights within the national context rests first of all with Parliament, the approach taken by courts recognises that in limited circumstances, it is important for them to make decisions to protect fundamental human rights.

Risks of changing this approach

68. If the courts are excluded from considering matters that fall within the margin of appreciation they will be prevented from performing the important role they play in upholding rights, as outlined above. If they were constrained from determining the scope of rights based on ECtHR jurisprudence in areas within the UK's margin of appreciation, that could

seriously limit the court's ability to uphold the protection of Convention rights as it did in *In re G*.

69. Curtailing the role of the courts in this way would interfere with the careful balance of responsibilities as between the executive, legislature and judiciary. Where an executive has a strong majority in Parliament, the restriction of the judicial role is of particular concern in stripping away judicial scrutiny and review.

70. When passing legislation, it is made clear that Parliament does not intend to create laws that are incompatible with human rights.[73] Sometimes human rights issues arise where the legislation was adopted at a time when the concept of rights was substantially different from today's societal norms. More often, human rights issues only become evident where they affect an individual or group of persons in an unintended way. The only way for that individual to resolve the issue is through recourse to the courts. If the courts decided that the case fell within the UK's margin of appreciation and they were restrained from being able to interpret and apply Convention right, they would be unable to provide an adequate and effective remedy to the individual, as required by Article 13 of the Convention. This would lead to inadequate protection of Convention rights in the UK. Such an approach would also be counter-intuitive, as courts are often best placed to consider the proportionality of decisions taken by public authorities. If courts were unable to decide on these issues, it would also leave a significant gap in the development of rights protection in line with evolving societal expectations and domestic law. There is no justification for removing or reducing the courts' ability to decide on these issues.

***Recommendation*:** There should be no change to the way courts approach matters falling within the UK's margin of appreciation. Courts play a vital role in considering and resolving matters in relation to which the ECtHR has decided that national authorities should have discretion, as they are better placed to balance the interests of the community and individuals. UK courts are exercising their role in an appropriate way.

Judicial dialogue

> Q: "Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?"

How does judicial dialogue operate?

71. As discussed above, 'judicial dialogue' occurs where national courts have concerns about the approach the ECtHR has taken in a particular area, or where they are resistant to following ECtHR jurisprudence because it does not sufficiently take into account national circumstances. In rare cases, where national courts consider there to have been a serious misunderstanding or the ECtHR has made an error, UK courts have declined to follow ECtHR. When they do so they carefully set out in their judgement the reason for departing from ECtHR jurisprudence, in order that if the case reaches the ECtHR it will respectfully consider their reasoning and better understand the national position.

Strengths of judicial dialogue

72. On the rare occasions where the UK courts do not follow ECtHR case law, this can give the ECtHR the opportunity to reconsider particular aspects, and in some cases change its approach accordingly, which courts have found to be a "valuable dialogue".[74] A good example of this is the *Horncastle* case.

***Horncastle and others v UK*[75]**

In R v Horncastle[76] (the UK part of the case) the Supreme Court ruled that where a criminal conviction was based solely or to a decisive extent on hearsay evidence (as the witness was unable to attend the trial), this did not breach the right to a fair trial. The Supreme Court noted that the ECtHR principles on absent witnesses could not be applied inflexibly. It decided that it was appropriate to depart from

ECtHR case law, as the case law did not sufficiently appreciate or accommodate a particular aspect of the domestic process.

When the case went to the ECtHR on appeal, it considered the Supreme Court judgment. The ECtHR decided that, when taken with other sufficient safeguards, the jury was able to make a fair and proper assessment of the reliability of the evidence even though the witness was absent, and that there was accordingly no violation. In this case the ECtHR departed from its previous case law on absent witnesses, having apparently been persuaded by the UK Supreme Court's reasoning, taking full account of the national context.

73. Judicial dialogue allows judges within the UK, who are charged with interpreting rights, to play an active and leading role in the development of ECtHR case law.

74. Where the ECtHR has been persuaded by the UK courts' decisions, this is evidence of a genuine openness by the ECtHR to listen to the UK's perspective when deciding UK cases. This is beneficial for the UK Government, as it will reduce the likelihood of an adverse judgment against the UK and protect the UK's international reputation in this regard.

How can this be strengthened/preserved?

75. Judicial dialogue appears to be working well and demonstrates the genuine willingness of the ECtHR to listen to UK perspectives. It is the national courts' prerogative to set out judgments with persuasive justification, should they consider it appropriate to depart from ECtHR case law on rare occasions.

76. We note however that the ECtHR is responsible for interpreting the rights set out in the Convention as a matter of international law. The ECtHR is therefore not bound to follow a national judgment where they believe a violation of the Convention has occurred. Similarly, the UK courts are not strictly bound to adhere to ECtHR case law. The system of judicial dialogue is an effective and organic development in the relationship between the different courts. Were the UK government to legislate on this relationship, this may result in constraints to this

effective method of dialogue. For that reason, we can see no benefit in seeking to alter this process.

***Recommendation*:** There should be no change to the current process of judicial dialogue, which appears to be working well. Judicial dialogue can be an effective method of explaining the UK's specific national context to the ECtHR, leading to development in ECtHR case law.

Theme Two of the Review: The impact of the Human Rights Act on the relationship between the judiciary, the executive and the legislature.

> Q: "We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the Human Rights Act, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change."

General views

77. We note that the Terms of Reference also states: "the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review will consider the way the Act balances those roles, including whether the current approach risks "over-judicialising" public administration and draws national courts unduly into questions of policy."

78. The Terms of Reference suggest that national courts are inappropriately interfering in matters of policy. The Human Rights Act however, which is at the heart of our democracy, has expressly given courts a key role in upholding Convention rights, whilst taking full account of the principle of parliamentary sovereignty. When determining human rights questions, there is no reason why courts should not be involved in carefully considering whether Convention rights have been upheld through public

policy. For example, as discussed above, cases about discrimination will always be appropriate for judicial scrutiny. Occasionally, courts need to look at issues which Parliament has not considered sufficiently in order to ensure that fundamental rights are protected.[77] Indeed, where there is a breach of rights and an individual raises a case, courts are obliged to act as a backstop and make a determination. An independent judiciary provides important checks and balances within our system. Without this, the executive and legislature would be able to increase their own powers and reduce accountability for human rights violations.

Section 3 of the Act

> Q: "Specifically, we would welcome views on the detailed questions in our ToR:
>
> a) Should any change be made to the framework established by sections 3 and 4 of the Human Rights Act? In particular:
> i) Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?"

How does section 3 operate?

79. In recognition of the UK's international legal obligation to comply with Convention rights, Section 3 of the Act requires primary and subordinate (secondary) legislation to be read and given effect to in a way which is compatible with Convention rights. This means that courts must interpret or 'read down' legislation as being compatible with human rights wherever possible, so as to avoid a breach of Convention rights.

80. Section 3 strikes a very careful balance between protection of rights and upholding parliamentary sovereignty. It recognises that the UK Parliament is primarily responsible for protecting human rights. However, it allows courts to interpret legislation in such a way as to achieve compliance with Convention rights.

81. It is worth noting that new legislation that is incompatible with the Convention should be rare, as ensuring compatibility with the Convention is built into the legislative process. A Government Minister must make a statement of compatibility before the second reading of the Bill in Parliament.[78]

82. In interpreting legislation courts firstly apply the ordinary rules of statutory interpretation.[79] If they find that on an ordinary interpretation the legislation is incompatible with the Convention the court will consider whether this can be cured by interpreting it compatibly with Convention rights. Where this cannot be achieved, the court will move on to consider its discretion to declare the legislation incompatible under Section 4, as discussed below.

83. Section 3 provides a potential remedy for legislation that is incompatible on an ordinary reading, avoiding the application of legislation that would breach Convention rights and the need for Parliament to have to repeal legislation or amend it. However, courts have interpreted Section 3 cautiously.[80] They have declined to read down legislation under Section 3 where that could be seen as legislating on their own account, such as where a range of policy alternatives might be suitable.[81] Section 3 will not be used where to do so would interpret the legislation in a way that would be inconsistent with an essential principle of the legislation. The courts avoid crossing the line from interpretation to amendment, which is a matter for parliament.[82]

84. Acts of the Scottish Parliament are ‘subordinate’ legislation under the Act and must be interpreted in line with Section 3.[83] Lord Reed explained in the case of *S v L*:

> “When an issue arises as to the compatibility of legislation with the Convention rights, it is.. necessary to decide in the first place what the legislation means, applying ordinary principles of statutory interpretation. Those principles seek to give effect to the legislature's purpose. … The court will also apply the presumption, which long antedates the Human Rights Act, that legislation is not intended to place the United Kingdom in breach

of its international obligations. Those international obligations include those arising under the Convention.

If however the ordinary meaning of the legislation is incompatible with the Convention rights, it is then necessary to consider whether the incompatibility can be cured by interpreting the legislation in the manner required by section 3… If the legislation can be construed in accordance with section 3 in a manner which is compatible with the Convention rights, then it will be within the competence of the Scottish Parliament so far as the Convention rights are concerned. If it cannot be so construed, then it will not be within competence."[84]

85. As discussed above, under the Scotland Act the courts can effectively strike down any Act or provision which is found to be outside the competence of the Scottish Parliament.[85]

Strengths of this approach

86. Section 3 has been crucial in ensuring that legislation is interpreted in a way which protects human rights.

An example of this is the case of ***Ghaidan v Godin-Mendoza***.[86] The issue was that the Rent Act 1977 only allowed heterosexual partners to take over a tenancy when their partner died. The House of Lords looked at the essential principles and scope of the legislation. It decided that the intention of Parliament was for this legislation to be compatible with Convention rights and therefore read the legislation as providing that same sex couples had the same rights as a spouse or cohabitee to take over their partner's tenancy, in the event of their partner's death. This avoided the need for Parliament to repeal or amend the legislation, and the potential for many more individual claims to be taken had the legislation not been read down.

This is an important example of how section 3 has been used to protect human rights. Reading down is a form of structural remedy,

resolving a Convention rights issue built into legislation which may affect a lot of people.

87. The clear benefit of section 3 is that courts, who are responsible for interpreting the law, can fulfil this role while ensuring human rights are protected. The decision in *Ghaidan* was a proper and considered use of section 3, enabling legislation to be brought into line with the fundamental principle that discrimination against same sex couples is wrong.

88. As the court had concluded that the Rent Act was clearly discriminatory and so incompatible with the Convention, had they not been able to use section 3 in *Ghaidan*, they would have had to declare the legislation incompatible with Convention rights under section 4. This would not have resulted in any immediate change for the individual who's rights had been breached, unless the relevant Government Minister considered there to be compelling reasons to make a remedial order removing the incompatibility.[87] In the case of *Ghaidan*, it is likely the individual would have been evicted from his tenancy. Discrimination of this sort would have continued until either Parliament clarified the legislation or the case was raised at the ECtHR. That would be wholly unsatisfactory, as it would leave individuals and whole communities to face continuing violations of their rights without allowing an effective and timely remedy.[88]This would go against the aim of the Act, which is to bring rights home. It would also increase the administrative and financial burden on the legislature to fix the problem.

89. The flexibility available to courts between Section 3 and 4 (discussed below) is important to retain. In some cases reading down legislation will not be appropriate, but where it is it offers an immediate solution that benefits everyone. Section 3 offers the benefit of courts resolving the issue in a straightforward and cost effective manner.

90. We note that the wording in section 3 is linked to section 6(2). This section states that an act of a public authority (or a failure to act) which is incompatible with Convention rights is not unlawful if, as a result of primary legislation, the authority could not have acted differently or it was acting so as to give effect to primary legislation which cannot be

read in a way that is compatible with human rights. Clarification by our courts as to how legislation can be read compatibly with Convention rights has therefore provided greater clarity for public authorities as to how to undertake their statutory duties in a way which is compatible with Convention rights.[89]

Risks removing or amending Section 3

91. Removing or amending Section 3 would remove important flexibility available to courts and risks reducing human rights protection.

92. Removing section 3 would mean courts would no longer be able to protect rights to the extent that they currently do, by reading incompatible legislation in a human rights compliant way. In the case of *Ghaidan*, it would have left the individual without a remedy until the UK Government or Parliament decided to address the declaration of incompatibility which would most likely have had to be made.

93. If the courts were unable to rely on Section 3, it is likely there would be an increase in declarations of incompatibility under Section 4. This would create additional burden for Parliament to resolve incompatibilities through remedial orders and new legislation. If Parliament was not minded to resolve the incompatible legislation it would mean more cases being taken to the ECtHR, with resources (both time and cost) being expended unnecessarily by both individuals and the UK Government.

94. A change to Section 3 could reduce the ability of the courts to provide a speedy and effective remedy in an individual's case.

95. We note that amending Section 3 would also necessarily involve amending section 6(2) of the Act, which is beyond the scope of this Review.

Recommendation: There should be no change to Section 3. It is an effective remedy for incompatible legislation, which courts apply with caution where it is possible to read legislation in a compliant way without going against the purpose of the legislation. It is important that national courts make the decision as to whether or not it is possible to read legislation in a complaint way.

> Q: “If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?"

96. It is the Commission’s view that Section 3 should not be amended or repealed. Previous section 3 interpretations by the courts have been crucial in securing human rights compliant outcomes for individuals. The interpretations by courts provide clear explanations, following ECtHR case law. They provide public authorities with guidelines on how to ensure compatibility with human rights. We do not think there are any justifiable reasons to depart from these interpretations. With over 20 years of case law, if any change was retroactive, the effect could have far reaching consequences.

***Recommendation*:** There should be no change to section 3.

Section 4 of the Act

> Q: “Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?”

How do declarations of incompatibility operate?

97. Section 4 allows courts to make a declaration of incompatibility if primary legislation is incompatible with a Convention right. This is an option available to the courts if it has been unable to read down legislation as compatible in accordance with section 3. A declaration can also be made where subordinate legislation is incompatible but primary legislation prevents removal of the incompatibility. Declarations are a rare occurrence however, with just over 30 declarations of incompatibility made in 20 years of operation of the Act.[90]

98. When a declaration is made by a court it does not affect the continuing operation of the UK legislation, reflecting the fact that parliamentary sovereignty is protected as a foundational principle of UK constitutional law.[91] However, it acts as a way of notifying Parliament that there is an issue with legislation which needs to be discussed and resolved. There is no legal obligation on the Government or Parliament to rectify the situation, but in almost every case they have responded by amending the legislation or repealing and bringing forward new legislation. Parliament decides how to resolve the incompatibility. In some cases the Government can amend and replace the provision by way of remedial order (see below), and Parliament also plays a key role in that process.

99. The position for Scottish legislation is distinct, as set out above. Under the Scotland Act incompatible legislation from the Scottish Parliament is not law, as the Scottish Parliament has not authority to act incompatibly with Convention right. This gives greater protection than under the Act. It is notable that in finding Scottish legislation incompatible with Convention rights, the courts have been flexible in terms of the orders they have issued, recognising the importance of the role of the legislative branch in remedying breaches.[92]

100. In relation to UK Acts of Parliament which make provisions relating to Scotland, the High Court of Justiciary, the Court of Session and the Supreme Court are able to make declarations of incompatibility in Scottish cases.[93]

Strengths of this approach

101. The power of our national courts to declare UK legislation incompatible with the Convention is a very important structural remedy for human rights breaches that affect many people, where incompatibility cannot be resolved through the application of Section 3 of the Act.

102. Declaration of incompatibility have been used relatively infrequently, indicating that legislation passed by Parliament is generally compatible with Convention rights. However, the ability of courts to notify Parliament where there is a breach is important in allowing courts a dialogue with Parliament, highlighting where issues have arisen, which generally results in parliament taking steps to remedy the incompatibility

In the case of ***Bellinger v Bellinger,***[94] a transsexual woman who was registered as male at birth was unable to have her marriage declared valid under the Matrimonial Causes Act 1973, as she was not considered female within the meaning of the Act. The House of Lords decided that the legislation was incompatible with Convention rights (Article 8 the right to a private and family life and Article 12 the right to marry) and made a declaration of incompatibility. However, they said that the issues raised regarding recognition of gender reassignment were a matter for Parliament consider as a whole and to resolve, rather than the courts dealing with this in a piecemeal fashion. [95]

In this case, the court highlighted the incompatibility of legislation to Parliament. Following this there were extensive debates in Parliament as to the appropriate remedy to resolve the issue and the Gender Recognition Act 2005 was subsequently passed.[96]

Risks of amending this approach

103. It is not clear from the Call for Evidence what change is being contemplated to Section 4 of the Act. However both Sections 3 and 4 of the Act must be seen as working together to provide the most effective means of addressing Convention breaches where they occur.

104. It is noted that under Section 5 of the Act, courts must give the UK Government (or in devolved matters, the Scottish Government) notice, where they are considering making a declaration of compatibility. This allows the Government to intervene, if not already a party to proceedings, and address the court regarding compatibility and the relative merits of using Section 3 or 4.[97] It is our understanding that the court gives considerable weight to the preference of Government when considering whether section 3 or section 4 is more appropriate.[98] This allows the courts to consider Section 3 and 4 together, and is evidence of the enhanced role that the government plays in the selection of the appropriate remedy. How courts consider Sections 3 and 4 should be left to their discretion as mandated by the Act. It is an important principle in our constitutional landscape that the judiciary remains independent.

105. It is unclear from the Call for Evidence what enhancement to the role of Parliament is contemplated. Parliament already has the primary role in

considering whether legislation is compatible with Convention rights. This is demonstrated by the requirement for a Minister of the Crown to confirm that a Bill is Convention-compliant when passing an Act.[99] In addition to this, the Explanatory Notes accompanying the Bill generally include a detailed consideration of any Convention issues which might arise. It is then open to Parliament to debate whether the legislation is compatible with Convention rights as part of its usual scrutiny. This demonstrates that Parliament is involved in the initial process of ensuring compliance with Convention rights. In cases where legislation has been subsequently declared incompatible, Parliament already has the primary role in determining how to address the incompatibility. Even in rare cases where remedial orders are used (discussed below), these require to be approved by Parliament. Parliament can also at any time choose to amend, repeal or clarify legislation where it becomes aware of an issue which might result in an incompatibility with Convention rights. With such extensive powers, it is difficult to envisage how these could be enhanced.

***Recommendation*:** There should be no change to the courts' discretion to make a declaration of incompatibility under Section 4 if it decides that legislation is incompatible with Convention rights. The Act was carefully drafted to ensure that Parliamentary sovereignty was maintained. The declaration does not affect the continuing operation of the legislation and it is a matter for Parliament to decide how to address the incompatibility.

courts' ability to protect rights.

Derogation orders

> Q: "What remedies should be available to national courts when considering challenges to designated derogation orders made under section 14(1)?"

How do designated derogation orders operate?

106. The rights set out in the Convention are essential to human dignity and justice. In recognition of the importance of upholding these rights, States may avoid their application in only extremely limited circumstances. Only

"in time of war or other public emergency threatening the life of the nation" can a State party to the Convention derogate from obligations under the Convention. To derogate is to officially state that a law no longer needs to be obeyed due to extreme circumstances. The State may derogate only to the extent strictly required by the emergency.[100] Some Convention rights cannot be derogated from, including the prohibition of torture and the right to life, except in respect of deaths resulting from lawful acts of war. States seeking to derogate must inform the Secretary General of the Council of Europe of the measures they are taking and the reasons for doing so.[101]

107. When the UK Government decides to derogate from Convention rights the Home Secretary designates a derogation with a derogation order, a Statutory Instrument, which is a piece of secondary legislation.[102] The designated derogation order takes effect immediately but expires after 40 days unless both Houses of Parliament pass a resolution approving it. The order sets out the terms of the proposed notification of the UK's derogation from Convention rights, which is sent by the Home Secretary to the Secretary General of the Council of Europe.[103] In the notification the Secretary of State describes the circumstances that the UK Government has decided amount to a public emergency, the measures they are taking to address the emergency and the Convention rights those measures conflict with and which they are derogating from.

Strengths of Court's supervisory role

108. It is critically important that our national courts play a supervisory role in relation to derogations, as they do in relation to executive power generally. The power of the Government to disapply Convention rights, with Parliament's approval, must be subject to judicial oversight, as required by the UK's constitutional separation of powers. The Council of Europe Commissioner for Human Rights put is as follows in an Opinion regarding UK derogations:

> "The separation of powers, whereby the Government's legislative proposals are subject to the approval of Parliament and, on enactment, review by the courts, is a constitutive element of democratic governance.

> Effective domestic scrutiny must, accordingly, be of particular importance in respect of measures purporting to derogate from the Convention: parliamentary scrutiny and judicial review represent essential guarantees against the possibility of an arbitrary assessment by the executive and the subsequent implementation of disproportionate measures."[104]

109. The ECtHR will review a derogation for compliance with Article 15 where necessary. However, the ECtHR allows States a wide margin of appreciation in respect of derogations, in assessing both the existence of a public emergency and the strict necessity of the measures subsequently taken. National authorities are, "by reason of their direct and continuous contact with the pressing needs of the moment, […] in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of the measures necessary to prevent it".[105]

110. The Commissioner further explained that the scrutiny and oversight provided by national courts is a key reason for the ECtHR allowing States this margin of appreciation:

> "It is, furthermore, precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations."[106]

111. Our national courts have the power to quash or strike out derogation orders where they find them to be in breach of Article 15 of the Convention. The order may be in breach of Article 15 because there is no public emergency threatening the life of the nation, or because the measures introduced exceed those strictly required to address the emergency. As discussed above, secondary legislation does not go through the full parliamentary legislative process and so has not been scrutinised to the same extent as primary legislation. It is therefore appropriate that the courts can strike down the derogation order, rather than being limited to declaring it incompatible with the Convention.

112. In 2001 the UK Government sought to derogate from the Convention in order to pass legislation that would be incompatible with Article 5, the

right to liberty and security.[107] The Anti-Terrorism Crime and Security Act 2001 ("ATCS") allowed the detention of anyone reasonably suspected by the Home Secretary of being a risk to national security and of being an international terrorist, without a trial or any judicial process. The detention could be indefinite. The provision applied only to non-UK nationals. The UK asserted that the general threat of international terrorism constituted a public emergency threatening the life of the nation.

113. A number of people who were detained without trial under ATCS applied to our national courts asking them to find their detention in breach of the Act. Their claim was appealed up to the House of Lords,[108] which did not overrule the determination by the Government and Parliament that there was a public emergency, but did find that the measures did not rationally address the identified threat and were disproportionate. They also found the measures discriminatory, as only applying to non-nationals, whereas the threat of terrorism can also come from UK nationals. There had been no derogation from the Article 14 protection against discrimination. As the order did not comply with Convention rights they quashed it.

114. The Government had argued that it was for Parliament and the Government to determine what measures were necessary, rather than for the courts. The House of Lords rejected that argument. Lord Bingham noted that while it was true that judges are not elected, "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic State, a cornerstone of the rule of law itself".[109]

115. The House of Lords considered the derogation order alongside ATCS, the primary legislation bringing in the measures that would not be compatible with Convention rights. Having struck down the derogation order, it declared that ATCS was incompatible with the Convention rights to liberty and freedom from discrimination.[110] ATCS remained in force until 2005, when the Government introduced new anti-terrorism legislation.[111]

116. The above example illustrates the critical importance of judicial oversight to prevent the implementation of disproportionate and discriminatory

measures. As Lord Nicholls of Birkenhead put it: “The duty of the court is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely effected.”[112]

117. The power of our courts to review derogation orders will become all the more critical if the Government’s Overseas Operations Bill passes both Houses of Parliament. The Bill has been the subject of a great deal of criticism in relation to the limitation of prosecutorial discretion and the introduction of time limits on prosecutions, and the impact this may have on the UK’s compliance with its international obligations. In terms of the Review question, the Bill places a duty on the Secretary of State to consider derogation from the Convention for any significant overseas operation.[113] This appears to be a proposal for a general opt-out covering all Convention rights. No other Council of Europe state has adopted this approach to derogations. Human rights experts have called on the UK Parliament to reject the Bill for a number of reasons, including because the approach to derogations would be in breach of the Convention and set a dangerous precedent.[114] The Bill is now at the Committee stage of the House of Lords.[115]

Recommendation: There should be no change to the powers available to courts in considering designated derogation orders. It is essential that we have effective judicial oversight of this executive power.

Subordinate legislation

> Q: “How have courts dealt with subordinate legislation which is incompatible with the HRA? Is any change required?”

How does subordinate legislation operate?

118. Subordinate legislation is secondary legislation, such as regulations, statutory instruments (“SI’s”) or orders. It is created by Government Ministers (and other bodies) in an exercise of delegated authority under powers granted by Acts of Parliament.[116] Subordinate legislation is not subject to the same level of parliamentary scrutiny as primary legislation. The particular procedure followed in creating subordinate legislation will depend on the terms of the primary Act of Parliament.[117]

119. Around 80% of SI's are created following what is known as the "negative procedure".[118] Under the negative procedure the SI becomes law when it is signed by the Minister, without any parliamentary scrutiny.[119] It is only overturned if it is rejected by a Motion passed in Parliament within 40 days.[120] Successful motions to overturn SI's are extremely rare.[121] Due to the pressure on parliamentary time and the level of detail in subordinate legislation, the level of scrutiny can be weak.[122] Where the "affirmative procedure" applies to subordinate legislation, this may require approval of Parliament before the legislation becomes law, or it may become law upon being signed by the Minister, but expire after a set period if not approved by Parliament.[123] The degree of Parliamentary involvement therefore varies, but in all cases the level of Parliamentary scrutiny for subordinate legislation is considerably less than in the case of primary legislation.

How courts deal with incompatible subordinate legislation

120. The courts can quash, or strike down, incompatible subordinate legislation where they cannot interpret it compatibly with Convention rights. This is because public bodies, including government ministers and courts, are bound to act compatibly with Convention rights, and any action that does not comply with Convention rights is unlawful.[124] Subordinate legislation cannot be struck down where primary legislation prevents the removal of the incompatibility, in recognition of UK Parliamentary sovereignty and the scrutiny applied to primary legislation.[125]

121. It is worth noting that very few pieces of subordinate legislation have been successfully challenged in court, particularly when viewed in the context of the thousands of pieces of subordinate legislation which are made each year.[126]

122. In those cases where the courts find subordinate legislation incompatible with Convention rights, they do not necessarily quash the legislation. They make a careful judgement as to the appropriate order to make depending on the particular circumstances, including the degree to which parliamentary scrutiny was applied to the secondary legislation. The courts will often restrict their order to a declaration that the

secondary legislation is incompatible, leaving it to the Minister to decide how to address the incompatibility.[127]

123. In legislating through the Act, the UK Parliament carefully and appropriately distinguished between primary and secondary legislation, which is reflected in a number of provisions of the Act. Those carrying out public functions must comply with primary legislation, even if to do so would necessitate breaching Convention rights.[128] This appropriately does not apply to subordinate legislation, which is to be disregarded if to follow it would conflict with Convention rights.[129]

Strengths of this approach

124. Courts and public authorities must ensure they act in a way which is compatible with Convention rights. The courts provide an important role in keeping the Government's power in check, ensuring they cannot override fundamental rights through subordinate legislation.[130]

In the case of ***RR v Secretary of State for Work and Pensions***,[131] the Supreme Court was asked to decide if local authorities and Tribunals were required to follow secondary legislation to calculate housing benefits, where to do so would require them to breach Convention rights, or if they could disregard regulations which were incompatible with Convention rights on the basis of Section 6(1) of the Act.[132]

The regulations at issue were *Regulation B13 of the Housing Benefit Regulations 2006 (SI 2006/2013)*, which reduced housing benefit for claimants whose property was deemed to have more bedrooms than necessary; also known as the "bedroom tax." It had a particular detrimental impact on people with a medical need for an additional bedroom.[133]

Noting that the provisions of the Act were carefully designed to take into account the different status of subordinate legislation as compared to primary legislation, the court concluded:

"There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would

otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the Human Rights Act. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The Human Rights Act is an Act of Parliament and its requirements are clear…..the courts have consistently held that, where it is possible to do so, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded. There may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision."[134]

Risks of amending this approach

125. The discretionary power of courts to quash subordinate legislation is a reflection of the distinction in status between primary and secondary legislation, due to the comparable role of Parliament, as discussed above. To alter the court's power in relation to secondary legislation would undermine Section 6 of the Act, which is beyond the scope of the Review. Courts and other public authorities must act compatibly with Convention rights and where secondary legislation is incompatible they must be able to disregard it and act in a compatible way.

Recommendation: There should be no change to the discretionary power of courts to strike down subordinate legislation which is incompatible with Convention rights. The availability of this remedy allows courts flexibility in addressing incompatibilities. Any change may reduce the

Territorial extent of the Act

> Q: "In what circumstances does the Act apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?"[135]

126. The UK's human rights obligations do not cease to apply when we leave the territory of the UK, as explained below. This is true for the Convention as it is for other international human rights conventions the UK is a party to, such as the UN Convention Against Torture.

127. The Convention applies to UK activity beyond its territorial borders where UK state entities have control over an area, and where UK state agents have authority and control over individuals.[136] In order for Convention rights to apply the individuals must be under the continuous control of state authorities, in law and in fact. If UK authorities have "physical power and control"[137] over people, it is right and proper that those authorities must comply with Convention rights such as the prohibition on torture and the right to liberty.[138]

128. The ECtHR has followed the International Court of Justice in confirming that human rights applies along with humanitarian law in times of conflict, and so Convention rights apply to UK military personnel engaged in military conflict where they have authority and control.[139] The ECtHR rejected the UK Government's argument that in times of active military operations human rights law should not apply. Human rights also apply but are read with the backdrop of humanitarian law.

129. The ECtHR confirmed that the UK must comply with Convention rights in relation to detention centres its state agents were running in Iraq.[140] It also decided that the UK must comply with Convention rights in carrying out security operations in Iraq.[141]

Implications of current position

130. The UK is accountable for breaches of Convention rights committed abroad, to the extent that they have the requisite authority and control. This discourages conduct that would be unlawful at home, including the infliction of torture, inhuman and degrading treatment, and unlawful deprivations of liberty. It also protects our personnel from being pressured to act in breach of Convention rights abroad, and ensures that they can challenge the state for failures to fulfil their rights.

Risks of change

131. If the Act were to be restricted, and not to apply to UK activity abroad, this would go much further than the derogations discussed above. A blanket restriction on the applicability of Convention rights to overseas activity could cover non-derogable rights, such as the prohibition on torture, inhuman and degrading treatment and the right to life, except in

respect of deaths resulting from lawful acts of war. While other international conventions would continue to apply, including the UN Convention Against Torture, it is not incorporated into UK law and so cannot be relied upon in the same way before our national courts.

132. If the Convention rights do not apply to state activity abroad, the state would be able to behave in ways that would contravene the fundamental protections of the Convention, as long as that was done on territory belonging to another state. That would be in direct conflict with the ethos of international human rights law and with the purposes of the Act, one of which was to "put the promotion of human rights at the forefront of our foreign policy."[142]

133. A restriction to the applicability of the Act in the way that appears to be being considered would have severe consequences for our military personnel. They may find themselves under increased pressure to comply with orders that would involve them in conduct that would breach the prohibition on torture, inhuman and degrading treatment, or the right to life. They could be found criminally liable before the International Criminal Court, while the UK Government evades responsibility. The UK has made unsuccessful attempts to convince the ECtHR that the strict prohibition on torture, inhuman and degrading treatment under Article 3 of the Convention should not apply where a state has security concerns.[143]

134. The Act also protects our personnel in relation to state conduct, holding the UK Government to account for serious failures. The extra-territorial effect of Convention rights means British troops and their families can ask our national courts to determine if the Ministry of Defence took reasonable steps to protect their lives from foreseeable risks, such as through the procurement and deployment of appropriately armoured vehicles.[144] Article 2 of the Convention, which protects the right to life, also requires the state to conduct an effective investigation into deaths of armed forces and civilians abroad. Our military and their families may also lose this protection if the extra-territorial reach of the Act is limited.

135. In relation to the Overseas Operation Bill, the UK Government has argued that the promotion of blanket derogations from the Convention is

a means of fulfilling the Conservative's manifesto pledge to introduce legislation to protect UK troops from accountability for actions carried out overseas. However, derogations from the Convention benefit the state, not individuals. It is the state that has responsibility for compliance with the Convention, and the state that can be sued under the Act, not individuals. Similarly, restricting the territorial reach of the Act would benefit the state and not individuals.

136. Restricting the territorial application of the Act or Convention rights would require the UK to refuse to comply with very clear ECtHR decisions on the extra-territorial applicability of Convention rights.

137. The other way in which the Act and Convention rights have extra-territorial effect is in relation to extraditions and deportations to other countries when there is a likelihood that the person extradited or deported will be subjected to torture or killed. The ECtHR has rightly held that to deport someone where there is a real risk that they would face treatment that would be prohibited by the Article 3 protection against torture, would be in breach of Article 3.[145] The court rejected the UK Government's argument that the prohibition on torture should be qualified where national security concerns are in issue. The protection against torture is absolute.

Recommendation: There should be no change to the extra-territorial application of the Act. It is essential that the Act applies to UK activity abroad for the protection of UK personnel, as well as for non-UK citizens who are under the control of UK authorities.

Remedial orders

> Q: "Should the remedial order process (s.10 and schedule 2) be modified, e.g. by enhancing the role of Parliament?"

How does the remedial order process operate?

138. This is the process whereby, if there are compelling reasons to do so, a Government Minister (or in the case of devolved matters, a Scottish Minister) can amend incompatible legislation by way of a remedial order.[146] This allows the UK Government (or Scottish Government) the

flexibility to act quickly in order to resolve a human rights issue where a declaration of incompatibility has been made.

139. The remedial order process is set out in more detail in s.10 and Schedule 2 of the Act. The UK Government must set out the draft order to Parliament for 60 days, during which time this can be debated. The Joint Committee on Human Rights plays a key role in this process. The Government may then wish to make changes in light of discussions (though it is not obliged to do so), following which the order is laid before Parliament for a further 60 days. The draft legislation must then be approved by both Houses of Parliament. Alternatively, if the issue needs to be addressed urgently, the order is made without prior approval by Parliament for 120 days, during which time Parliament must decide whether to approve the order.

Strengths of this approach

140. It should be noted that this process has only been used 8 times since the introduction of the Act. On 15 occasions, declarations of incompatibility have been addressed by primary or secondary legislation (other than by remedial order).[147] This suggests that it is on occasion a useful tool for the Government to use to address a declaration of incompatibility.

141. Most importantly, the remedial order process has ensured protection of rights.

In the case of ***R (on the application of Reilly (no.2) and Hewstone) v Secretary of State for Work and Pensions***,[148] the court ruled that the Jobseekers (Back to Work Schemes) 2013 Act (which validated the use of sanctions for people on Jobseekers Allowance who failed to take part in certain "back-to-work schemes") was incompatible with Convention rights. This is because the 2013 Act removed the right of certain claimants (who had a pending appeal against benefit sanctions) to receive a decision in their appeal.[149]

Following this decision, a remedial order was laid before Parliament to resolve the incompatibility. This order restored the right to a fair hearing by ensuring the provisions in the 2013 Act did not apply to

Jobseeker's Allowance claimants who had a pending appeal of a benefits sanction before the 2013 Act was introduced. The order upheld the rights of benefits claimants by allowing those claimants who would have won their appeals against the benefits sanctions to receive the sanctioned benefit amount to which they were entitled.

Risks of changing this

142. It is unclear how the procedure could be modified to increase its effectiveness, or why this would be required. The process was included in the Act to provide a mechanism for urgent action to remedy a breach of Convention rights. Any change could remove this more efficient mechanism, resulting in incompatibilities, and so rights breaches, persisting for longer.

143. Parliament has a clearly defined role in the process and can debate the order and decide whether or not to approve it. Ultimately, Parliament remains the primary decision-maker when this process is used.

***Recommendation*:** There should be no change to the Act in respect of remedial orders. The remedial order process enables an incompatibility in legislation to be addressed more urgently than is possible through the full Parliamentary process for primary legislation. In some cases that will be important in order to protect rights.

[1] The UK Government's White Paper, Rights Brought Home: The Human Rights Bill (Cm.3872, 1997), at 1.19.

[2] The European Convention on Human Rights is a Council of Europe Convention, adopted in 1950 and entered into force in 1953.

[3] See: 50 Human Rights Cases That Transformed Britain | EachOther

[4] See for example: 'Getting Rights Right: Human Rights and the Scottish Parliament' (26 Nov 2018), SP Paper 341, 6th Report, 2018 (Session 5), The Equalities and Human Rights Committee, Scottish Parliament.

[5] Article 1 provides that state parties to the Convention shall secure to everyone within their jurisdiction the rights and freedoms contained in the Convention.

[6] Article 13 requires the UK to provide people who have their Convention rights breached an effective remedy before a national authority.

[7] Article 46 requires state parties to abide by final judgments of the ECtHR.

[8] Section 2 requires national courts to take into account relevant decisions of the ECtHR when considering matters concerning Convention rights.

[9] Section 3 requires national courts to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights so far as it is possible to do so.

[10] European Convention on Human Rights, Article 1.

[11] *Ibid.* Article 13.

[12] A short time before the enactment of the Act the Scottish courts began to accept the Convention as an informal source of law to a limited extent: *Anderson v HM Advocate* 1996 JC 29, at 34; *T, Petitioner* [1997] SLT 724.

[13] Rights Brought Home: The Human Rights Bill, Preface by the Prime Minister.

[14] Scotland Act 1998.

[15] *Ibid.* see sections 29 and 57 (as amended by the Scotland Act 2012).

[16] Human Rights Act 1998, Section 6.

[17] *Ibid.* Section 4.

[18] Scotland Act 1998, Section 29(1).

[19] *Ibid*. Schedule 5, Part 1, Section 7.

[20] *Ibid.* Section 28(8), as amended by the Scotland Act 2016.

[21] The Scottish Parliament passed motions in support of the Act in 2014 and 2017: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10722&i=98397 ; http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9616&i=87353; there have been many recent expressions of support for strengthening human rights in the Scottish Parliament, for example during consideration of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. 170 organisations from across civil society have signed the Scotland Declaration on Human Rights, expressing their united support for ensuring Scotland is a world leader in rights protection and implementation: https://humanrightsdeclaration.scot/

[22] 'Equality and Human Rights Commission reaches settlement on ending unlawful detention of adults with incapacity by NHS Greater Glasgow and Clyde', Press release (20 Nov 2020).

[23] *Napier v. The Scottish Ministers* [2005] CSIH16.

[24] *Cadder v. Her Majesty's Advocate* [2010] UKSC 43.

[25] See The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

[26] *Starrs v Ruxton* 2000 JC 208.

[27] *HM Advocate v Little* 1999 SCCR 625.

[28] 'What next for Prisons in Scotland? Reflections on five years as HM Chief Inspector of Prisons for Scotland' (2018) David Strang, HIMPS, referenced in 'Inquiry: 20 years of the Human Rights Act 1998 Written evidence to the Joint Committee on Human Rights' (2018), Scottish Human Rights Commission.

[29] See: New Care Standards | Review of Scotland's National Care Standards

[30] See: Submission from NHS Health Scotland.pdf (parliament.scot)

[31] Scotland's First National Action Plan for Human Rights 2013-2017.

[32] https://nationalperformance.gov.scot/

[33] 'Getting Rights Right: Human Rights and the Scottish Parliament' (26 Nov 2018), SP Paper 341, 6th Report, 2018 (Session 5), The Equalities and Human Rights Committee, Scottish Parliament.

[34] Examples include the Community Empowerment (Scotland) Act 2015; s. 1 of the Land Reform (Scotland) Act 2016; and the Social Security (Scotland) Act 2018, and s.1(1) of the Children and Young People (Scotland) Act 2014.

[35] See: First Minister's Advisory Group on Human Rights Leadership Home -

[36] ' Recommendations for new human rights framework to improve people's lives: Report to the First Minister' (10 Dec 2018) First Minister's Advisory Group on Human Rights Leadership.

[37] See United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

[38] See SHRC submission on the UN CRC (Incorporation) (Scotland) Bill consultation and SHRC briefing for Stage 2 of the Bill.

[39] In accordance with section 7(1) of the Act, only a person who is (or would be) a victim of the unlawful act of a public authority can raise proceedings or rely on Convention rights in any proceedings.

[40] UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill as amended at stage 2.

[41] In *YL v Birmingham City Council* [2007] UKHL 27, the House of Lords found that a private care home was not exercising functions of a public nature. The decision was by a 3-2 majority, and came under criticism. See: 'Signed Away: Privatisation and human rights', Deeming, E., Law Society of Scotland Journal (Dec 2020).

[42] For more information on how to take a Human Rights Based Approach, see: Human Rights Based Approach | Scottish Human Rights Commission

[43] The previous reviews are summarised in: The European Convention on Human Rights in the United Kingdom (parliament.scot). See also: ' UK Bill of Rights Commissions fails to reach consensus; 'Conservatives pledge powers to ignore European Court of Human Rights rulings; 'Commission must not compromise by recommending bill identical to Human Rights Act; The Scottish Human Rights Commission made submissions and commented on previous reviews: Human Rights Act | Scottish Human Rights Commission

[44] Independent Review of Administrative Law - GOV.UK (www.gov.uk); see also the Scottish Human Rights Commission's submission: Independent Review of Administrative Law SHRC (scottishhumanrights.com) (Oct 2020).

[45] See: 'Queen's Speech: Boris Johnsons promises 'radical overhaul' of constitution and justice system'. The Scottish Human Rights Commission commented on the announcement: 'Commission comments on plans for Constitution, Democracy and Rights Commission'

[46] Article 35 of the European Convention of Human Rights.

[47] Responding to Human Rights judgments - Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020 (publishing.service.gov.uk)

[48] https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=

[49] https://www.coe.int/en/web/portal/-/copenhagen-declaration-adopt-1

[50] *R (Ullah) v Special Adjudicator* [2004] UKHL 26 (17 June 2004), para. 20, where Lord Bingham noted that "The Convention is an international instrument, the correct interpretation of which can be positively expounded only by the Strasbourg court". See also *Opuz v Turkey*, No. 33401/02, 9.6.2009, para. 163 – 165.

[51] *Ibid*. *Ullah* at para 20.

[52] See *Manchester City Council v Pinnock* [2011] 2 AC 104, at para. 48. per Lord Neuberger.

[53] *R v Horncastle* [2009] UKSC 14 at para. 11 per Lord Phillips.

[54] *Ibid*.

[55] *LCB v UK*, no. 23413/94, 9 June 1998.

[56] *Lopes de Sousa Fernandes v Portugal*, no. 56080/13, 19 December 2017.

[57] See *Bajic v Croatia*, no. 41108/10, 13 November 2012; *Silih v Slovenia*, no. 71463/01, 9 April 2009; *Lopes de Sousa Fernandes v Portugal* 15 Dec 2015; *Oyal v Turkey*, no. 4864/05, 23 March 2010.

[58] For more information, see Scottish Human Rights Commission briefing *COVID-19: Care homes and human rights,* 14 July 2020.

[59] *Handyside v United Kingdom* (1976) A 24.

[60] *Axa General Insurance Ltd v Lord Advocate*, [2011] UKSC 46 at para. 131, in part quoting Lord Bingham of Cornhill in *Brown v Stott* [2003] 1 AC 681 at 703.

[61] *In Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, at para. 84.

[62] Human Rights Act 1998, Section 6(1).

[63] Subject to section 6(2) of the Human Rights Act 1998.

[64] The UK Government's White Paper, Rights Brought Home: The Human Rights Bill (Cm.3872, 1997), at 2.5.

[65] *A and others v Secretary of State for the Home Department* [2004] UKHL 56, para. 29 per Lord Bingham.

[66] *In Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, at para. 56.

[67] *Ibid*. Lord Hoffman stated at para. 37 that "The margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch".

[68] *Ibid* at para. 48.

[69] *Brown v Stott* [2003] 1 AC 681 at 703.

[70] *R v Director of Public Prosecutions, Ex p Kebeline* [2000] 2 AC 326, per Lord Hope of Craighead at 381.

[71] For example, in *Wilson v First Country Trust Ltd* (No 2) [2004] 1 AC 816 it was decided that the assessment of the advantages and disadvantages of consumer credit legislation alternatives was a matter for Parliament to decide.

[72] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

[73] This is evidenced by the requirement for a Minister of the Crown in charge of a Bill to make a statement confirming that in their view the provisions of the Bill are compatible with Convention rights in accordance with s.19 of the Act.

[74] *R v Horncastle & Others* [2009] UKSC 14, para 47.

[75] *Ibid.*

[76] *Ibid.*

[77] See e.g. *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27.

[78] Section 19 of the Act. In addition to this, the Explanatory Notes included with a Bill generally include a detailed consideration of any human rights issues and justifying the compatibility statement. A similar process is also used for subordinate legislation.

[79] *S v L* 2013 SC (UKSC) 20, at para. 15-17.

[80] *Ibid.*

[81] See *Smith v Scott* 2007 SC 345, where the court declined to read down legislation banning all convicted prisoners serving custodial sentences from voting.

[82] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Rodger of Earlsferry at para 121.

[83] Scotland Act 1998, Section 101.

[84] *S v L,* 2013 SC (UKSC) 20 at para 15-17.

[85] *Ibid*. Section 102.

[86] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

[87] In accordance with Section 10 of the Act.

[88] As required by Article 13 of the Convention.

[89] For an example of Scottish courts reading Scottish legislation compatibly with the Convention see *South Lanarkshire Council v McKenna,* 2013 SC 212.

[90] 'Responding to Human Rights Judgments: Report to the JCHR on the Government's response to human rights judgments 2019-2020' (Dec 2020), Ministry of Justice.

[91] Note that under Section 57(2) of the Scotland Act 1998, the courts can 'strike down' legislation of the Scottish Parliament where this is incompatible with Convention rights, as the legislation is outwith the competence of the Scottish Parliament.

[92] See: *Christian Institute & Ors v Lord Advocate (Scotland)* [2016] UKSC 5; *Salvesen v Riddell* 2013 SC (UKSC) 236, [2013] UKSC 22.

[93] See for example *Smith v Scott* 2007 SC 345, where the Court of Session declared that the Representation of the People Act 1983 was incompatible with Article 3 of Protocol 1 ECHR.

[94] *Bellinger v Bellinger* [2003] UKHL 21.

[95] Parliament had already committed to introducing legislation to rectify the incompatibility with the Convention, following a previous case at the ECtHR, *Goodwin v United Kingdom*, No. 28957/96 [2002] IRLR 664.

[96]Gender Recognition Bill (Hansard, 23 February 2004) (parliament.uk)

[97] See the Scottish case of *Gunn v Newman* [2001] SLT 776, per Lord President (Rodger) at para. 10-11.

[98] As explained by the Rt Hon the Baroness Hale of Richmond DBE in evidence before the UK Joint Committee on Human Rights: https://committees.parliament.uk/event/3562/formal-meeting-oral-evidence-session/

[99] Human Rights Act 1998, section 19.

[100] Article 15 of the Convention. Derogation measures must be 'a genuine response to the emergency situation ... and fully justified by the special circumstances … and … adequate safeguards .. provided against abuse.' A and Others v. United Kingdom, No 3455/05, 19 February 2009 at para. 184.

[101] Derogations are provided for in Article 15 of the Convention.

[102] Human Rights Act 1998, Section 14(1) and (6).

[103] See for example: The Human Rights Act 1998 (Designated Derogation) Order 2001 (legislation.gov.uk)

[104] 'Opinion 1/2002 of the Commissioner for Human Rights Mr Alvaro Gil-Robles on certain aspects of the UK 2001 derogation from Article 5 par. 1 of the European Convention on Human Rights' (Aug 2002), COE- see paras. 7 and 8.

[105] *Ibid.* para. 4 and see *Ireland v. UK*, judgment of 18.01.1978, Series A, N°25, para. 207

[106] *Ibid* para. 9

[107] The Human Rights Act 1998 (Designated Derogation) Order 2001 (legislation.gov.uk).

[108] Predecessor to the Supreme Court.

[109] *A v. Secretary of State for the Home Department* [2004] UKHL 56 per Lord Bingham at para 42.

[110] *Ibid.*

[111] The replacement legislation was also problematic and subject to challenge.

[112] *Ibid* para 79.

[113] Overseas Operations (Service Personnel and Veterans) Bill - Parliamentary Bills - UK Parliament

[114] See for example: ' Briefing: Overseas Operations (Service Personnel and Veteran) Bill, House of Lords, Second Reading' (Jan 2021), Equality and Human Rights Commission; See also 'Written Submission on the Overseas Operations Bill' (Oct 2020), Prof J. A Sweeney;

[115] We also note media reports indicating that the UK Government intends to bring forward a 'Sovereign Borders Bill' in the next few months. According to reports the Bill will seek to 'tighten up' interpretation of Article 3 of the Convention to make it easier to deport people convicted of crimes abroad, and alter the trigger for automatic deportation for people convicted to crimes in the UK, from those sentenced to 12 months or more in prison, to those sentenced to 6 months or more. Priti Patel looks to cut jail term needed for deportation | News | The Times

[116] https://www.parliament.uk/about/how/laws/secondary-legislation/

[117] *Ibid.*

[118] https://www.parliament.uk/site-information/glossary/negative-procedure/

[119] *Ibid.*

[120] *Ibid.*

[121] *Ibid.*

[122] Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making? Joe Tomlinson, Lewis Graham, and Alexandra Sinclair, UK Constitutional Law Blog, 22 Feb 2021.

[123] https://www.parliament.uk/about/how/laws/secondary-legislation/

[124] Human Rights Act, Section 6(1).

[125] *Ibid*. Section 4(3) and 4(4).

[126] Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making? Joe Tomlinson, Lewis Graham, and Alexandra Sinclair, UK Constitutional Law Blog, 22 Feb 2021.

[127] See for example *Regina (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57

[128] Human Rights Act, Section 6(2)(a).

[129] *Ibid*. Section 6(1).

[130] The UK Government has already sought to enhance their powers in this regard. The Internal Market Bill included provisions seeking to remove UK Government Ministers' obligation to act in accordance with Convention rights. It also tried to elevate the status of regulations made under the Bill to primary legislation, which would have meant they would not have been subject to the courts' power to strike down subordinate legislation. These provisions were not included in the Internal Market Act 2020 as passed.

[131] *RR v Secretary of State for Work and Pensions* [2019] UKSC 52.

[132] Article 6(1) of the Act states: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

[133] The Supreme Court had previously ruled that where there was "a transparent medical need for an additional bedroom" not catered for in the regulations, there was unjustified discrimination on the ground of disability and thus a violation of the claimant's rights under Article 14 read with Article 8 of the Convention. *R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58. Following that decision the Secretary of State for Work and Pensions created new regulations intended to address the court's declaration, however these regulations were not retroactive.

[134] *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, per Lady Hale at para 27.

[135] The footnote to this question states: "It is acknowledged that if the extraterritorial scope of the Act were to be restricted, other legislative changes beyond the Act may be required in order to maintain compliance with the UK's obligations under the Convention. As such changes would fall outside the scope of the Review, the panel is not asked to make specific legislative recommendations on this issue, but only to consider the implications of the current position and whether there is a case for change."

[136] *Al-Skeini v UK*, No. 55721/07, 7 July 2011 (Grand Chamber).

[137] *Ibid*.

[138] *Hirsii Jama and others v Italy*, No. 27765/09, 23 February 2012.

[139] *Hassan v UK,* No. 29750/09, 16 September 2014.

[140] *Al-Saadoon and Mufdhi v UK*, No. 61498/08, 2 March 2010.

[141] *Al-Skeini v UK*, No. 55721/07, 7 July 2011 (Grand Chamber).

[142] The UK Government's White Paper, Rights Brought Home: The Human Rights Bill (Cm.3872, 1997).

[143] *Chahal v UK*, No 22414/93, 15 November 1996.

[144] *Smith v MOD* [2013] UKSC 41.

[145] *Ibid Chahal v UK*.

[146] https://www.parliament.uk/site-information/glossary/remedial-orders/ Similar powers apply in Scotland under the Convention Rights (Compliance) (Scotland) Act 2001.

[147] 'Responding to Human Rights Judgments: Report to the JCHR on the Government's response to human rights judgments 2019-2020' (Dec 2020), Ministry of Justice.

[148] [2016] EWCA Civ 413.

[149] The Department for Work and Pensions estimated that between 3789 and 4305 Jobseeker's Allowance claimants may be affected by the Declaration of Incompatibility, see 'Explanatory Memorandum to the proposed Jobseekers (Back to Work Scheme) Act 2013 (Remedial) Order 2018'.