

Submission: Joint Committee on Human Rights, Call for Evidence on the Government's Independent Human Rights Act Review

March 2021

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Contents

Introduction	3
Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?	3
How has the operation of the Human Rights Act made a difference in practice for public authorities? Has this change been for better or worse?	5
What has been the impact of the Human Rights Act on the relationship between the Courts, Government and Parliament?	6
Has the correct balance been struck in the Human Rights Act in the relationship between the domestic Courts and the European Court of Human Rights? Are there any advantages or disadvantages in altering that relationship?	6
Are there any advantages or disadvantages in seeking to alter the extent to which the Human Rights Act applies to the actions of the UK (or its agents) overseas?	7
Annex: Significant Scottish Human Rights Act Cases	9

Introduction

1. Over the last 20 years the Human Rights Act (“the Act”) has engendered significant developments for people across the UK including in relation to: children, disability, equality, health, justice, privacy, religion and belief, rights at work, seeking refuge, speech and protest and victims of crime.¹
2. The Commission is concerned that the questions of the Independent Human Rights Act Review infer the possibility of stripping away accountability, oversight and access to justice. Our submission to the Review sets out our concerns in detail.²

Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?

3. Prior to the Act it was not possible to enforce our rights before our national courts, as they were not part of our national law. The Act changed that and gave effect to our Convention rights in two key ways:
 - I. Public authorities and those carrying out public functions can be held to account before our national courts when they act in breach of our Convention rights.³

A number of important Scottish cases have led to significant changes in a range of areas, from fair trial requirements to private, home and family life, examples of which are included in Annex 1. Ensuring that people could enforce their rights in national courts has been transformative, but the purpose and effect of the Act has gone far beyond individual cases. Court decisions clarifying the scope of our rights and holding public authorities accountable have in turn promoted a human rights culture, increasing awareness of rights and obligations, and developing a human rights based approach to policy setting and decision making.

- II. Our national courts have duties and powers that help protect people from laws that breach our Convention rights. They must interpret legislation compatibly with Convention rights, where possible. This avoids laws being implemented in a way that would breach many people's fundamental rights.⁴ Where it is not possible to read legislation compatibly with Convention rights, courts can declare it to be incompatible. This puts considerable pressure on the UK Parliament to remedy the incompatibility, which it almost invariably does.⁵

In Scotland we have greater protection from laws that breach our Convention rights, as the Act is embedded into devolution through the Scotland Act 1998. From day one, the Scottish Parliament has been precluded from acting inconsistently with Convention rights, along with all public institutions in Scotland, Scottish Ministers and the Scottish Government. An Act of the Scottish Parliament is "not law" so far as it is incompatible with any of the rights contained in the Convention. Therefore, an Act of the Scottish Parliament found by a court to be incompatible with Convention rights can be, in effect, struck down or prevented from coming into force. In this way, people in Scotland enjoy stronger protection from laws that breach their Convention rights.⁶

4. As a consequence of the position of the HRA within the devolution arrangement, Convention rights have become part of the fabric of Scotland's laws, judicial analysis. 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.⁷
5. 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.
6. There is widespread, cross-party, support in Scotland for stronger human rights laws that provide greater protection.⁸ While there

remains much to be done, Scotland is on a progressive path and has taken some very notable steps, building on the success of the Act, by initiating the incorporation of other international human rights treaties.⁹ 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.

7. While the Act markedly improved enforcement of Convention rights by ensuring they could be enforced in our national courts, there are well known barriers to access to civil justice domestically and work to address that in Scotland is ongoing.¹⁰ Most people are not able to pursue a remedy in court, which makes it all the more essential that we develop a human rights culture, embedding human rights into decision-making, policy setting and budget allocation.
8. It is also important that rules are changed to enable public interest litigation, so that claims can be raised by non-governmental organisations, charities and others, on behalf of victims of human rights failures, securing structural remedies benefitting many people.¹¹

How has the operation of the Human Rights Act made a difference in practice for public authorities? Has this change been for better or worse?

9. The Act's requirement that all public authorities comply with Convention rights¹² has fostered an ever evolving human rights culture in Scottish public bodies. 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 encouraged public bodies to mainstream human rights considerations throughout their decision making.
10. The Commission has supported a wide range of public bodies and providers of public services to take a human rights based

approach to processes and decisions. This has ranged from local authorities,¹³ the police,¹⁴ prisons,¹⁵ health and social care providers¹⁶ and monitoring and inspection bodies.¹⁷

What has been the impact of the Human Rights Act on the relationship between the Courts, Government and Parliament?

11. The Act struck a careful balance of responsibilities between the executive, legislature and judiciary, maintaining the separation of powers and parliamentary sovereignty. Judicial protection of Convention rights complements the primary responsibility of the executive and legislature for fulfilling Convention rights.¹⁸ National courts have been very careful in the delineation of their role, avoiding making decisions that would involve them making choices on matters of public policy that are appropriately for the legislature.¹⁹ However, it is entirely appropriate for courts to ensure accountability for breaches of fundamental rights, including where they arise in relation to matters of public policy.²⁰
12. The Scottish Parliament has noted its support for the Act on a number of occasions, most recently on 4 March 2021.²¹ It is notable that the Scottish Government “strongly supports” the combined effect of the Act and the Scotland Act, including the power of courts to effectively strike down incompatible Scottish legislation.²²

Has the correct balance been struck in the Human Rights Act in the relationship between the domestic Courts and the European Court of Human Rights? Are there any advantages or disadvantages in altering that relationship?

13. The relationship between the domestic courts and the ECtHR is working well. The overall relationship is premised on subsidiarity; national authorities, including national courts, have the primary role in protection of Convention rights, while the ECtHR provides oversight and authoritative interpretations.

14. The ability to claim the full extent of our Convention rights in national courts, without having to pursue claims all the way through national courts and then to the ECtHR, is essential. In order for this to work effectively, it is vital our courts take account of ECtHR case law.²³ This secures necessary alignment in the protection of our rights with our international obligations.²⁴ This is particularly 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.²⁵ It is essential that national courts apply this evolving jurisprudence.
15. Courts have however interpreted this duty flexibly and national courts have been able to reach particular outcomes based on an understanding of the national domestic context, which has then been accounted for and ultimately upheld by the ECtHR.²⁶

Are there any advantages or disadvantages in seeking to alter the extent to which the Human Rights Act applies to the actions of the UK (or its agents) overseas?

16. If 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. 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. It also requires the state to conduct an effective investigation into deaths abroad. Our military and their families may lose these protections if the extra-territorial reach of the Act is curtailed.
17. It would also seriously undermine the Convention system as a whole, and may encourage other countries to be selective in their recognition of Convention rights. 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.”²⁷

Annex: Significant Scottish Human Rights Act Cases

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.²⁸

Ending degrading prison conditions: *Robert Napier v. The Scottish Ministers*²⁹

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*³⁰

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.³¹

Strengthened independence and impartiality of judiciary: *Stars v. Ruxton*³²

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*³³

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.

¹ See: [50 Human Rights Cases That Transformed Britain | EachOther](#)

² [Submission: Review of the Human Rights Act \(scottishhumanrights.com\)](#)

³ The Human Rights Act 1998 requires public authorities and those carrying out public functions to comply with the rights set out in the European Convention on Human Rights (“Convention rights”); it is unlawful for them to act incompatibly with those rights. [Human Rights Act 1998](#), Section 6(1).

⁴ An example of this is the case of *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. 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.

⁵ For example, in the case of *Bellinger v Bellinger* [2003] UKHL 21 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. 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. [Gender Recognition Bill \(Hansard, 23 February 2004\) \(parliament.uk\)](#) Declarations are a rare occurrence however, with just over 30 declarations of incompatibility made in 20 years of operation of the Act. ‘[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.

⁶ An example of this was the Children and Young People (Scotland) Act 2014 named person scheme, which had the laudable aim of protecting children but required information sharing which the Supreme Court found breached the Convention right to private and family life. The legislation was declared to be outside the competence of the Scottish Parliament under the Scotland Act and so was not brought into force. *Christian Institute & Ors v Lord Advocate (Scotland)* [2016] UKSC 5. The 2014 Act assigned a “named person” to every child and young person in Scotland, who would be responsible for exercising certain functions related to their welfare. The Supreme Court found that the information sharing provisions were incompatible with Article 8 of the Convention (respect for private and family life). Under the Named Person Scheme confidential information about the child could be disclosed to authorities without the child or their parents being aware of it. The Court found that the interference with private and family life was not justified. Therefore this aspect of the Act was incompatible with Convention rights, which made it outwith the competence of the Scottish Parliament and the provisions relating to named persons were not brought into force. This illustrates how the Scotland Act operates to protect Convention rights as defined through the HRA.

⁷ 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. See: ‘[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.

⁸ The Scottish Parliament passed motions in support of the Act in 2014, 2017 and again on 4 March 2021: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10722&i=98397> ; <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9616&i=87353>; <https://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5M-24291&ResultsPerPage=10> 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/> Increased focus on international human rights standards has also been reflected in references to international human rights instruments in Scottish domestic legislation. 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](#).

⁹ Building on the success of the Act, a dialogue has been taking place in Scotland for a number of years looking at the importance of international human rights standards. Following recommendations from the First Minister's Advisory Group on Human Rights Leadership in 2018 that Scotland should introduce new human rights framework legislation, incorporating into Scots law a number of international human rights treaties, including economic, social, cultural and environmental rights, 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. [National Taskforce for Human Rights Leadership - gov.scot \(www.gov.scot\)](#) The Scottish Government has noted that "the resulting proposals ... are expected to be agreed and published before the end of the current session of the Scottish Parliament." [UK Independent Human Rights Act review: our response - gov.scot \(www.gov.scot\)](#) at para 21. The First Minister's Advisory Group on Human Rights Leadership ("FMAG") ([First Minister's Advisory Group on Human Rights Leadership Home](#)), 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". See: FMAG produced its report in 2018: '[Recommendations for new human rights framework to improve people's lives: Report to the First Minister](#)' (10 Dec 2018)

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. See [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#). 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. See SHRC [submission](#) on the UN CRC (Incorporation) (Scotland) Bill consultation and SHRC [briefing](#) for Stage 2 of the Bill. 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. The Scottish Government has also tabled an amendment to the Bill to widen the definition of public functions. [UN Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill as amended at stage 2](#). This amendment will seek to hold private companies delivering public services to the same human rights standards as public bodies. See: '[Signed Away: Privatisation and human rights](#)', Deeming, E., Law Society of Scotland Journal (Dec 2020). The Scottish Government has noted that the Bill is expected to be passed before the end of the current parliamentary session. [UK Independent Human Rights Act review: our response - gov.scot \(www.gov.scot\)](#) at para 22.

¹⁰ While some changes have been made following reviews into Scotland's civil justice system, outlined below, much work remains to be done in terms of access to civil justice. In the context of the National Taskforce work referred to above (n.9) the Human Rights Consortium Scotland and the Scottish Human Rights Commission, both members of the National Taskforce, ran the All Our Rights in Law project, through which we heard from people and communities across Scotland, including about barriers to access to justice. These conversations are now complete, and we are gathering the responses into a report for the National Taskforce, which will inform their recommendations to the Scottish Government. The report from All Our Rights in Law is expected to be published on Friday 12 March 2021: <https://www.allourrightsinlaw.scot/>

A full review of the Scottish civil justice system was carried out by Lord Gill in 2007 – 2009, through which extensive evidence was obtained from a range of interested parties. [Report of the Scottish Civil Courts Review: Volume 2, Chapters 10 – 15](#). The report concluded that there were many barriers to access to justice including: complexity and inaccessibility of civil procedure; absence of public education; lack of free information; barriers to securing legal advice and representation; limits to access to Legal Aid; risk of adverse expenses (costs) orders if unsuccessful; length of proceedings; restrictive rules on legal standing preventing public interest litigation, and restrictive rules on multi-party actions. While a number of years have passed since those recommendations were issued,

many of the most significant barriers remain.

The Review of the Expenses and Funding of Civil Litigation in Scotland carried out by Sheriff Principal James Taylor in 2013 focused on this area of Lord Gill's recommendations.

<https://www.webarchive.org.uk/wayback/archive/20160105185842/http://www.gov.scot/About/Review/taylor-review/>;

<https://www.webarchive.org.uk/wayback/archive/20160108155936/http://www.gov.scot/About/Review/taylor-review/Report>

Sheriff Principal Taylor noted: "The key issue for me was how to improve access to justice in a meaningful way; in many cases, "meaningful" means being affordable for the private individual. However, access to justice is a wider concept. It embraces the ability for any legal persona, be they individuals or commercial enterprises, to have access to the courts in order to attempt to vindicate their legal rights. Obstacles to access to justice can extend beyond the issue of affordability. Recoverability and predictability of expenses can be just as important."

<https://www.webarchive.org.uk/wayback/archive/20160114004748/http://www.gov.scot/About/Review/taylor-review/Report/Statement>

In relation to Legal Aid, the Scottish Government set up an independent review of Legal Aid which produced recommendations in February 2018: [Rethinking+Legal+Aid+-+an+independent+strategic+review.pdf \(www.gov.scot\)](https://www.gov.scot/publications/scottish-government-response-independent-review-legal-aid-scotland/), to which the Scottish Government responded in November 2018: <https://www.gov.scot/publications/scottish-government-response-independent-review-legal-aid-scotland/> The recommendations included: establishing a legal assistance line to direct people to services; embedding paid legal assistance into certain organisations; replicating the Edinburgh Sheriff Court office across all Sherriffdoms; establishment of a publicly funded Scottish Legal Assistance Authority which would promote information to the public.

¹¹ See: <https://hrcscotland.files.wordpress.com/2018/11/final-overcoming-barriers-to-pil-in-scotland-web-version.pdf> It is positive that the UNCRC Bill includes provision for the Children and Young People's Commissioner and the Scottish Human Rights Commission to raise proceedings.

¹² [Human Rights Act 1998](#), Section 6(1).

¹³ See for example, <http://eqhria.scottishhumanrights.com/eqhriapilotstudies.html>

¹⁴ See for example, [Commission welcomes progress on stop and search \(scottishhumanrights.com\)](#)

¹⁵ 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. See '[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.

¹⁶ 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." See: [New Care Standards | Review of Scotland's National Care Standards](#) 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. See: [Submission from NHS Health Scotland.pdf \(parliament.scot\)](#)

¹⁷ For example Audit Scotland explicitly recognises the connection between financial accountability for public funds and the protection and promotion of human rights in Scotland. It is working to improve how it embeds human rights into public sector audits, recognising that the public bodies they audit are "primarily responsible for the protection and promotion of human rights in Scotland." See Audit Scotland submission to inquiry of Equalities and Human Rights Committee of the Scottish Parliament http://www.parliament.scot/S5_Equal_Opps/Submission_from_Audit_Scotland.pdf

This work has been further strengthened through Scotland's National Action Plan on Human Rights which 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. [Scotland's First National Action Plan for Human Rights](#) 2013-2017.

¹⁸ “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.” Lord Bingham of Cornhill in *Brown v Stott* [2003] 1 AC 681 at 703.

¹⁹ See for example *Se Smith v Scott* 2007 SC 345, where the court declined to interpret legislation banning all convicted prisoners serving custodial sentences from voting in a way that would have been compatible with Convention rights, instead leaving the decision on how to address the incompatibility to Parliament. See also *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Rodger of Earlsferry at para 121.

²⁰ For example, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. 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. See e.g. *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27.

²¹ See *n. 8* above.

²² [UK Independent Human Rights Act review: our response - gov.scot \(www.gov.scot\)](#) at para 118. See also para 123 where the Scottish Government notes: “In relation to Scotland, the Scottish Government is entirely happy that the courts can in fact go further, by virtue of the Scotland Act, and declare incompatible legislation to be outside legislative competence and therefore “not law”. That approach is consistent with mainstream international constitutional practice.”

²³ 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 look to the authoritative interpretation provided by ECtHR decisions. For example, ECtHR decisions have expanded on the Article 2 Right to Life, confirming that public authorities are obliged to: (1) take appropriate positive steps to safeguard lives and prevent a person's life being avoidably put at risk, and (2) undertake an effective investigation where the right to life may have been breached, which should be independent, prompt and completed within a reasonable time, with involvement of the deceased person's family. Reference to these more specific requirements will be critical as we move forward to an investigation into the circumstances that resulted in the high numbers of deaths in care homes during the pandemic. See *LCB v UK*, no. 23413/94, 9 June 1998; *Lopes de Sousa Fernandes v Portugal*, no. 56080/13, 19 December 2017; *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. For more information, see Scottish Human Rights Commission briefing [COVID-19: Care homes and human rights](#), 14 July 2020.

²⁴ In particular the requirement under Article 1 to secure to people in the UK their rights under the Convention, and Article 13 which requires the UK to provide people who have their Convention rights breached with an effective remedy before a national authority.

²⁵ 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.

²⁶ For example, *R v Horncastle* [2009] UKSC 14. 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 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. *Horncastle and Others v UK*, 4184/10.

²⁷ The UK Government's White Paper, [Rights Brought Home: The Human Rights Bill](#) (Cm.3872, 1997).

²⁸ ['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).

²⁹ *Napier v. The Scottish Ministers* [2005] CSIH16.

³⁰ *Cadder v. Her Majesty's Advocate* [2010] UKSC 43.

³¹ See [The Criminal Procedure \(Legal Assistance, Detention and Appeals\) \(Scotland\) Act 2010](#).

³² *Starrs v Ruxton* 2000 JC 208.

³³ *HM Advocate v Little* 1999 SCCR 625.