SHRC

Scottish Human Rights Commission

# Submission: UK Government Consultation to reform the Human Rights Act 1998, proposals for "A Modern Bill of Rights"

**March 2022**

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# Table of Contents

Introduction and Executive Summary....................................................4
Context of the UK Government's proposals.......................................4
False premises...........................................................................6
Flawed processes ........................................................................8
Regression of rights ....................................................................9
Access to justice .......................................................................11
Human Rights in Scotland - Devolution .............................................12
Conclusion ..............................................................................13

Theme One of the Proposals: "Respecting our common law traditions and strengthening the role of the UK Supreme Court." ..........................14
Question 1................................................................................14
Question 2................................................................................21
Question 3................................................................................26
Question 4................................................................................28
Question 5................................................................................30
Question 6................................................................................32
Question 7................................................................................32

Theme Two of the Proposals: "Restoring a sharper focus on protecting fundamental rights" ..................................................................33
Question 8................................................................................33
Question 9................................................................................38
Question 10...............................................................................38
Question 11...............................................................................40

Theme Three of the Proposals: "Preventing the incremental expansion of rights without proper democratic oversight."......................................43
Question 12...............................................................................43
Question 13...............................................................................48
Question 14...............................................................................49
Question 15...............................................................................49
Question 16...............................................................................52
Question 17...............................................................................54
Question 18...............................................................................56
Question 19...............................................................................57
Question 20...............................................................................65

Question 21 ....................................................................... 68
Question 22 ....................................................................... 71
Question 23 ....................................................................... 74
Question 24 ....................................................................... 76
Question 25 ....................................................................... 78
Question 26 ....................................................................... 78

Theme Four of the Proposals: Emphasising the role of responsibilities within the human rights framework ....................................................... 80
Question 27 ....................................................................... 80
Question 28 ....................................................................... 82

ANNEX A ............................................................................. 85
Positive Impact of HRA ....................................................... 85
Significant Scottish HRA cases ........................................... 85

## Introduction and Executive Summary

The Commission welcomes the opportunity to respond to the UK Government's consultation on its proposals to revise the Human Rights Act and replace it with a new Bill of Rights. The Commission presents the following views:

1. The UK Government's plan to replace the Human Rights Act ("HRA") with a new Bill of Rights signals an intent to water down human rights protections, erect additional barriers to accessing justice, and equivocate on compliance with decisions of the European Court of Human Rights ("ECtHR").

2. It is a project based on **false premises**, employs a **flawed consultation process** and will deliver primarily **negative outcomes** for the people and institutions of the UK.

3. If passed, these proposals would undermine 20 years of human rights law and policy development across the UK, making it harder for people to enforce their rights, and putting the UK in breach of its international law obligations. The Commission is strongly opposed to these regressive proposals.

## Context of the UK Government's proposals

4. The consultation paper offers a particularly negative perspective on the operation of the HRA and on the human rights project more generally. Like many others, we take a more positive view, recognising that for more than twenty years, the HRA has made it possible for individuals to enforce their rights under the European Convention on Human Rights ("the Convention")[1] in national courts and that incorporation of Convention rights through the HRA 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.[2]

5. We recognise the HRA'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 people are being treated in hospitals, and that any deaths in care homes must be properly investigated.

6. As Scotland's National Human Rights Institution ("NHRI") we have consistently advocated the benefits of the HRA. We will continue to make this positive case, and have set out in Annex A a number of the important HRA cases which have advanced human rights and had a positive impact on people's lives in Scotland. However, much of the present response addresses the specific threats posed by the proposals contained in the consultation.

7. The overall objectives of the proposal are at odds with the UK's international legal obligations and the widespread support for the HRA, particularly in Scotland.

8. The proposals fail to consider or discuss the incorporation of any other international human rights standards into UK law. As such, they strongly diverge from the widespread, cross-party, support in Scotland for stronger human rights laws that provide greater protection, including by incorporating other international human rights standards, particularly economic, social, cultural and environmental rights. The Scottish Government has committed to introducing a Bill incorporating these rights in this Scottish parliamentary term and much work has already been done by civil society in Scotland towards that Bill.

9. 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 important steps, building on the success of the HRA, 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.

10. The proposals also have to be read alongside the parallel legislative processes pursued by the UK Government that similarly seek to reduce accountability, restrict access to justice and limit rights protection, including the Judicial Review and Courts Bill; the Police, Crime, Sentencing and Courts Bill and the Nationality and Borders Bill. The judicial review reforms limit the extent to which rights holders in the UK can challenge state failure in the courts.[3] In contrast, it is notable that the Scottish Government has explicitly restated its support for legal accountability at all levels of government.[4]

11. It is incumbent upon the UK Government to ensure fuller compliance with its obligation to respect, protect and fulfil Convention rights, not introduce barriers to justice so as to avoid accountability. These proposals are contrary to the development of a human rights respecting culture, which should be the overall aim of a government seeking to comply with its international human rights obligations.

## False premises

12. The UK Government's proposals rest upon unsubstantiated claims and lack evidential support. We have analysed the Government's case for change in respect of each proposal in answering the specific questions posed in the consultation paper. The arguments advanced in support of change are based on a small selection of court decisions which have been 'cherry-picked' and do not accurately reflect the body of domestic and international case law.

13. It is concerning that the Consultation paper fails to consider how the HRA has positively developed the common law and provided effective human rights protection.[5] The UK Government attempts

to draw a stark distinction between the common law of the UK and the Convention. In fact, the common law is closely intertwined with Convention rights. The UK played an important role in shaping the Convention, and was the first state to ratify it in 1951. Following ratification, the common law has in turn been strengthened by the application of Convention rights, particularly following their incorporation through the HRA. Any suggestion of a clear distinction between our common law and Convention rights ignores this interrelationship.

14. Far from undermining the common law, in Scotland the application of Convention rights has strengthened it in a number of ways.[6] For example, in relation to the right to legal representation; independence of the judiciary; freedom from inhuman or degrading treatment; and protection of children against violence, as set out in Annex A.

15. Throughout the Consultation paper the UK Government expresses its frustration with the HRA, and claims that “common sense” is required to redress what it sees as human rights having gone too far. However, human rights are an essential check on the power of the state, requiring that rights are respected even where the government of the day may consider it inconvenient to do so. This is especially the case with respect to minority groups and those most marginalised in society. The Commission does not accept the premise that there is lack of “ownership” of human rights or a general view that the HRA is viewed as reflecting rights that are “European rather than British.”

16. In Scotland, there is longstanding support for human rights. Over 200 civil society organisations have signed the Scotland Declaration on Human Rights, expressing their united support for ensuring that Scotland is a world leader in rights protection and implementation. The 2012 Commission on a Bill of Rights found that: *“There was little, if any, criticism of the Strasbourg Court, of the European label of the Convention, or of human rights generally in Scotland, Wales or Northern Ireland” and that “Calls for a UK Bill*

*of Rights were generally perceived to be emanating from England only."*[7]

17. There is no sound basis for replacement of the HRA, which has worked well for over 20 years.

## Flawed processes

18. The UK Government has disregarded the outcome of its own Independent Human Rights Act Review ("IHRAR"). The IHRAR took evidence from across the UK for nine months, producing a detailed, lengthy report analysing how the HRA works in practice, concluding there is no case for the kind of widespread reform the UK Government has put forward. The Commission and many civil society organisations and individuals engaged in that process in good faith, devoting scarce resources to responding to highly technical questions, and attending roundtables to provide oral evidence. Overwhelming support for the HRA was demonstrated.

19. Yet, most of the findings of the IHRAR are ignored; proposals that were completely rejected by the IHRAR are restated, and a range of additional proposals are introduced that the IHRAR was not given an opportunity to consider. That the UK Government has disregarded the IHRAR findings, without explanation, raises serious questions about the legitimacy of this process.

20. Such a fundamental piece of legislation should not be introduced without direct, active participation of rights holders, those who will be most affected by any changes. The Commission notes that the Consultation largely concerns wide-ranging, vague proposals, in relation to which presumptive and leading questions are asked.

21. We note the difficulties and delays in providing accessible versions of the consultation paper. Despite granting a short extension, this has nonetheless adversely impacted upon the participation of disabled rights holders, and we share the view of many disabled peoples' organisations that the content of the Easy Read document has not adequately facilitated the participation of disabled rights holders.[8] We also consider that the complexity of

the proposals, the general lack of evidence provided and the imprecise way in which consultation questions were framed has failed to enable all right holders to understand and make informed representations on what is being consulted upon.

22. Beyond the publication of this paper and a small number of largely tokenistic stakeholder events, we are not aware of any other engagement activities which the sponsoring department used to secure the participation of rights-holders and would welcome publication of full details, including analysis of stakeholder events.

23. To date, the paper's claim that the Bill of Rights "presents an opportunity for people in all parts of the UK to look afresh at what rights mean for them, and how they would like to see those rights reflected and applied" (para 34) appears to lack substance.

24. A Bill of Rights aspires to be a constitutional document which frames the relationships between individuals and the pillars of state. More than any other legislation, its development requires a truly participative process. Unless shaped by the voices of rights-holders themselves, it cannot adequately reflect the views of society as a whole. It must not be a narrow or doctrinal political project.

25. In the absence of a truly participative process, the Commission considers the Consultation exercise to be flawed.

26. Based on analysis which is set out in the question responses below, we consider that these proposals will deliver primarily negative outcomes, including (but not limited to) regression of rights standards, erecting barriers in accessing justice and unsettling devolution arrangements.

## Regression of rights

27. The central aim of the HRA was to bring the protections of the European Convention on Human Rights ("the Convention") into domestic law, making them directly applicable to public authorities (and others providing public services), and enforceable in our

national courts. Under the UK Government's proposed Bill of Rights, that objective would be severely undermined.

28. The Commission rejects the suggestion that the interpretation of Convention rights by national courts be explicitly decoupled from that of the European Court of Human Rights ("ECtHR"). The "living instrument" approach is integral to the development of international human rights law and ensures that rights keep pace with societal progress.

29. As discussed further in answering Question 1, weakening or removing 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 consistent. 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 different outcomes than the ECtHR.

30. If national courts do not keep pace with the ECtHR in interpreting rights, this risks creating a situation in which rights-holders will no longer be able to access their Convention rights in full before national courts.

31. Restricting positive obligations would also be regressive. These obligations include the positive duty to properly investigate deaths involving state entities, which the ECtHR interpreted as part of the right to life. In answering Question 11 below, we have set out the benefits of positive obligations, which have been repeatedly demonstrated through high-profile cases. The proposed restriction of positive obligations will impact significantly on victims' rights, including the rights of victims of violence against women and girls, which the UK Government are otherwise seeking to promote and protect.[9]

32. Positive obligations have also produced incremental and structural changes such as those recommended in the Scottish Government's recent review of Deaths in Custody[10].

33. Convention rights may technically remain incorporated into national law if listed in a new Bill of Rights. However, if national courts must interpret them distinctly from the ECtHR, the result will be legal conflict, confusion, uncertainty, and a likely increase in successful referrals to the ECtHR. The additional proposal of a "democratic shield," expressly permitting the UK to decline to implement ECtHR decisions against it, would put the UK in clear breach of the Convention and undermine the rule of law.

## Access to justice

34. The Commission is concerned that the proposals would lead to stripping away accountability, limiting judicial oversight and restricting access to justice.

35. As a signatory to the Convention the UK is required to secure the Convention rights to everyone in the UK,[11] and to ensure that adequate remedies are available in the event of breach. By proposing to decouple national courts' interpretation of Convention rights from the ECtHR, the UK Government's proposals risk taking us back to a situation where those whose rights are infringed must pursue claims all the way through national courts and then to the ECtHR to access their full rights. The present incorporation of Convention rights has broader structural benefits since by making Convention rights directly enforceable, decisions are issued by our national courts clarifying the scope of our rights and holding organisations carrying out public functions accountable. This in turn promotes a human rights culture, increasing awareness of rights and obligations, and developing a human rights based approach to policy setting and decision making.

36. Additional proposals would add a number of significant hurdles to accessing justice, compounding existing barriers related to the complexity of law and procedure, the cost of securing legal advice and the lack of legal aid.

37. The overall effect of a new permission stage and tests relating to exhaustion of remedies and 'clean hands' in relation to prior

conduct would be to limit routes to remedy, preventing and/or dissuading people from pursuing valid claims, and designating some breaches of rights “insignificant”, and some holders of rights “undeserving”. The overall message would be that rights are optional or negotiable, partial or exclusive to only certain people, rather than universal, international legal standards that protect everyone and in relation to which we all must have access to an adequate and effective remedy.

## Human Rights in Scotland - Devolution

38. We note that some of the concerns expressed in our response resonate in the other devolved nations. For example, in a recent joint letter to the Lord Chancellor, the Scottish and Welsh Governments made clear their shared view that “under the current constitutional settlement the interests of the peoples of Scotland and Wales are best protected by retaining the Human Rights Act in its current form.”[12]

39. We note the concern expressed by our sister National Human Rights Institution, the Northern Ireland Human Rights Commission, to the IHRAR,[13] that it is vital to ensure protection of human rights in Northern Ireland is not diminished through changes to the machinery of the HRA, and concerns expressed regarding the Good Friday Agreement and the UK Government’s commitment to non-diminution. We further note they express concern regarding compliance with Article 2 (1) of the Ireland/ Northern Ireland Protocol.

40. A key concern flagged by many Scottish organisations during the IHRAR process was the additional complexity arising from the interrelationship between the HRA and devolution. The HRA and Convention compliance is embedded into the Scotland Act 1988 (“SA”). 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 and Scottish Government. Over 20 years of jurisprudence and practice has evolved in Scotland on the basis of that legal underpinning. 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.[14]

41. As discussed further in our response to Question 19, and in responses to Questions 8, 9, 10, 26 and 27, the Commission is concerned that replacing the HRA will unsettle current devolution arrangements. This is all the more pertinent in view of Scotland's decision to incorporate four further international human rights treaties into Scots law. We urge the UK Government to limit any legislation to avoid any interference with the devolved arrangements in Scotland, ensuring that any changes do not affect the Scotland Act, devolved areas, Scottish Parliament legislation or the administration of justice in Scotland.

## Conclusion

42. The Commission is opposed to these proposals. We reject the false premises behind them, the aims and objectives they rest upon and the flawed consultation process adopted. We have set out above our general concerns and have noted below additional specific concerns related to each of the proposals under the individual questions set in the Consultation paper.

43. We strongly urge the UK Government to comply in full with its obligations under the Convention and retain the HRA in its current form. 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.

44. We further urge the UK Government to limit any legislation to avoid any interference with the devolved arrangements in Scotland, ensuring that any changes do not affect the Scotland Act, devolved areas, Scottish Parliament legislation or the administration of justice in Scotland.

## Theme One of the Proposals: "Respecting our common law traditions and strengthening the role of the UK Supreme Court."

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

45. It is the view of the Commission that the current approach works well in practice and change is unnecessary.

46. In proposing to amend Section 2 of the HRA, the UK Government is proposing to interfere with an integral part of the incorporation of Convention rights into national law.

47. 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.

48. It is important that national courts follow the authoritative interpretation of the ECtHR so that people can access their full rights without having to take their claim all the way to the ECtHR. This helps to ensure that the UK is acting in compliance with its obligations under the Convention.15

49. This is all the more important because the Convention is a "living instrument". The living instrument doctrine is well established in international human right law and allows the Convention to be interpreted in light of changing conditions in society.

50. The HRA was carefully drafted to retain the independence of the UK courts. 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."[16] In general, UK courts follow the ECtHR where there is a "clear and constant" line of authority[17] 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.

51. It is well established that UK courts can 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. For example, in the case of *R v Horncastle* concerning the use of hearsay evidence the UK Supreme Court took a different approach, which was later endorsed by the ECtHR in the case of *Al-Khawaja*. There are many other examples of such constructive dialogue between national courts and the ECtHR.[18]

52. The duty to take account of ECtHR jurisprudence is also important as it ensures cases are decided with consistency throughout Europe, and that people in similar circumstances throughout the Council of Europe have a minimum level of protection. This approach ensures that individuals have the same level of protection in national courts as they would going to the ECtHR itself.

53. We have set out in Annex A a number of important Scottish cases where reliance on Convention rights through the HRA and the jurisprudence of the ECtHR has had a significant positive impact on people's lives. However, the impact of the national courts following the developing case law of the ECtHR goes beyond the courtroom and has influenced the development of a human rights compliant culture more widely.

54. It is important that there is one clear line of judicial authority, with consistency between national courts and the ECtHR, in order that public service providers have clarity and certainty as to the scope of Convention rights and how they apply in practice.

55. 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 look to ECtHR decisions, which 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 in circumstances that may engage state responsibility.[19]

This includes the obligation to undertake an effective investigation where the right to life may have been breached.[20] 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.[21] 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.[22] This has been important in pressing governments to launch independent inquiries into deaths in care homes, and other aspects of the handling of the pandemic. In Scotland an independent, judge led, public inquiry was established at the end of 2021. As a public entity it will be required to comply with the HRA, including the Article 2 investigation of deaths requirements.

56. It is the view of the Commission that the relationship between the domestic courts and the ECtHR is working well. The overall relationship is premised on the principle of subsidiarity, with national authorities, including national courts, having the primary role in the protection of Convention rights.

57. Since the HRA 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 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.[23]

58. 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 member state conferences through which the ECtHR has been reformed,[24] and has signed declarations, including the most recent, the Copenhagen Declaration 2018[25]. The Declaration stressed the importance of shared responsibility for improved protection of rights and effective remedies at national level; noted the centrality of the principle of subsidiarity; and called on states parties to the Convention to improve effective domestic remedies. The Declaration also stressed that policies and legislation should comply fully with the Convention, including by checking the compatibility of draft legislation and administrative practice in the light of the ECtHR's jurisprudence.

59. We also recognise the value of the 'margin of appreciation', which gives discretion to states in interpreting treaty obligations.[26] The principle asserts 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, including, for example, the nature of the Convention right and the degree to which the issue is one of social policy.

60. Weakening, or removing 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 national courts did not have to take into account relevant ECtHR decisions in the way they currently do, they may apply different reasoning and produce different outcomes than the ECtHR. This has the potential to undermine legal certainty, create confusion and make efforts to develop a human rights based culture more difficult.

61. The Commission is concerned that the suggested approach could create a situation in which individuals may no longer be able to access Convention rights in full before national courts.

62. There is a risk that victims of human rights breaches would have to take their case all the way through our national courts and then make an application to the ECtHR to determine an outcome. This would signify severe regression on rights protection, accountability and access to justice. The consideration of Convention rights in the national courts has also recently been affirmed by the ECtHR as essential in order to exhaust domestic remedies and thus be able to take a case to the ECtHR.[27]

63. It is the Commission's view that should the case law of national courts diverge 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.

64. We consider that the proposed model clauses will create practical and operational difficulties in the delivery of frontline services. 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. This would undermine one of the stated aims of the UK Government, to reduce the cost of human rights litigation.

65. We further reject the premise that the application of Convention rights has undermined the "common law tradition". The common law of UK nations is closely intertwined with Convention rights: it played an important role in shaping the Convention itself and, following ratification, it has in turn been strengthened by the application of Convention rights, particularly following their incorporation through the HRA. It would be extremely challenging to attempt to unravel domestic common law from Convention rights.

66. The Consultation paper fails to address the ways in which the HRA has had a positive impact on the development of the law. In Scotland, far from undermining the common law, Convention rights have strengthened it, including in relation to: the right to legal representation; independence of the judiciary; freedom from inhuman or degrading treatment; protection of children against violence, and many other areas (see cases in Annex A). The HRA has played an instrumental role where there has not been a remedy in common law.[28]

67. The proposal that UK courts should be required to consider firstly domestic statutes and the common law, only considering Convention rights and ECtHR decisions if no solution is available under national law, is highly problematic, including in that it: (i) ignores the interrelationship between Convention rights and national law; (ii) ignores the adversarial nature of our judicial system, whereby parties put forward the bases of their claims, the judiciary does not determine which law to apply to a set of facts; and (iii) restricts the judicial function and interferes with the separation of powers. This risks adding complexity and uncertainty, time and cost to court proceedings.

68. **The Commission expresses its concern that a change to Section 2 could potentially interfere with the administration of justice, which in terms of devolution and the Act of Union is a matter for the Scottish legal system and the Scottish Parliament.** The proposals are contradictory in stating an aim of strengthening the role of the UK Supreme Court on the one hand, and on the other hand expressing a desire to prevent the UK Supreme Court from developing the common law as they see fit (e.g. by perhaps going further than the ECtHR has yet gone). A 'modern' Bill of Rights is proposed while at the same time suggesting that the scope of Convention rights should be determined by debates underlying the final text, the travaux préparatoires, drafted in the 1950s.

69. We oppose any changes that allow the jurisprudence of the ECtHR to operate as a ceiling preventing further development of national

common law, while at the same time directing national courts to take less account of decisions of the ECtHR.

70. A further contradiction in the proposals presents itself in the suggestion that, on the one hand, national courts should give less regard to decisions from the ECtHR and, on the other hand, that they should refer to wider common law principles and perspectives from other common law jurisdictions in interpreting rights. Reference to a much wider range of influences risks increasing uncertainty, inconsistency, and judicial discretion and appears to conflict with the stated aim of the UK Government, to prevent national courts from going further than the ECtHR in protecting rights.**.**

71. **The Commission supports the existing approach of 'having regard to' the decisions of the authoritative court interpreting a human rights treaty to which the UK is a party and with which it has a legal obligation to comply.**

72. **We specifically oppose the proposal to legislate to prevent national courts from going further than the ECtHR in protecting rights, turning the extent to which the ECtHR has interpreted and applied rights into a ceiling for judicial rights protection.** National courts already apply judicial restraint and the importance of incremental development in applying the principles of the ECtHR has been noted by the UK Supreme Court.[29] The proposal to legislate to prevent national courts from ever going further than the ECtHR in protecting rights would be an inappropriate interference with the role of the judiciary, contrary to the separation of powers, and the UK Government has made no case for such a change.

73. In addition to undermining the stated aims of increasing legal certainty and limiting judicial development of rights, the proposal could in fact undermine the stated aim to "reinforce the supremacy of the UK Supreme Court", by increasing the regularity of its decisions being overturned by the ECtHR. The Commission

considers that the proposals therefore lack coherence and will create unnecessary confusion and complexity in the law.

## Question 2

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

74. We reject the premise of this question. It is the view of the Commission that there should be no change to the role of the Supreme Court in relation to human rights issues. We do not support the proposal to exclude certain areas from the remit of the national courts.

75. The principle of subsidiarity and the margin of appreciation already mean that national courts have primary responsibility for upholding Convention rights in the UK, as discussed in more detail in answer to Question 1.

76. The proposal lacks coherence. The UK Government does not propose to withdraw from the Convention, therefore the UK remains subject to the framework of the Convention, including the role of the ECtHR. As such, in cases concerning Convention rights, the UK Supreme Court cannot be "the ultimate judicial arbiter." If the UK breaches Convention rights and if the national courts, including the UK Supreme Court, fail to provide a remedy for that breach, the claim may be taken to the ECtHR, as the subsidiary court in terms of the Convention framework, but also as the authoritative interpreter of Convention rights.[30] The UK also must comply with judgments of the ECtHR in cases to which it is a party.[31]

77. In our view, it is not possible for the UK to both remain a party to the Convention in good standing, and decouple human rights from the Convention framework. If the UK Government proceeds with its plans to create a new Bill of Rights, victims of human rights

violations will need to pursue their claims in the national courts in terms of both that new Bill of Rights and the Convention in order to preserve their right to pursue their claim before the ECtHR, for which they have to show that they exhausted domestic remedies. This will lead to additional complexity, time and cost, again in conflict with the stated aims of the UK Government.

78. While on the one hand the UK Government suggests that the UK Supreme Court should be the "ultimate judicial arbiter of our laws in the implementation of human rights", on the other hand they assert that certain matters should be excluded entirely from the remit of national courts in legislation.

79. Reference is made, in paragraph 201, to "moral or ethical issues, national security, diplomatic relations, resource allocation or where there is no social consensus" being excluded entirely from the competence of UK courts, on which views are invited. We strongly oppose this proposal, which would substantially reduce rights protection, accountability and access to justice.

80. We note that in making this proposal the UK Government is going against the advice of its own Independent Review of the HRA, which considered and rejected the suggestion.

81. This is not a measure that would promote judicial restraint, rather it would exclude whole areas of policy from the judicial branch entirely, interfering significantly with the separation of powers, curtailing accountability for the executive branch, and removing the possibility of a remedy for breach of rights in these areas in breach of their duty to provide an effective remedy at the national level.

82. National courts already exercise judicial restraint in relation to areas better suited to other branches of government. 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."[32]

83. It is well established that public authorities must act compatibly with Convention rights. Parliament legislated, in Section 6 of the HRA, 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.[33] Parliament had intended that judges "would be able to contribute to [the] dynamic and evolving interpretation of the Convention".[34] In forming their view of the content of Convention rights, national courts are guided by the general principles and approach taken by the ECtHR.

84. 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".[35]

85. Recognising their relative institutional competence, 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. However, there is no hard and fast delineation of areas of law and policy that are more suited to the legislator than the courts, and vice versa, and there should be no attempt to legislate for this. Protection of human rights and the separation of powers requires that our national courts retain their essential role as a check against the other branches of government, the executive and the legislator, where they consider appropriate to their role, including in areas the UK Government may consider to be areas of social policy.

86. The courts have exercised their role responsibly and with caution, ensuring that they do not 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. It is essential that this judicial role is not interfered with.**

87. 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".[36] 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.[37] 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. Human rights are universal and are there to protect everyone, including against the will of the majority.

88. The more legislation relates to matters of social policy, the less ready our national courts will be to intervene.[38] 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.[39] 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.

89. In our view, curtailing the role of the courts as proposed would interfere with the careful balance of responsibilities as between the executive, legislature and judiciary. It is not the function of Parliament to set out in detail how the law should be applied. Rather, it is for judges to apply, in particular cases, the general principles set down.

90. It is our position that the proposed change could lead to a failure to provide an adequate and effective remedy, as required by Article 13 of the Convention. 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.

91. This would also increase complexity and uncertainty, with courts having to determine if a particular claim engaged an area that was excluded from their remit or not, which would result in additional

court procedure, raising the possibility of satellite litigation (on the parameters of the excluded areas), adding time and cost. This would again conflict with the stated aims of increasing clarity and certainty and reducing the cost of litigation.

## Question 3

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

92. It is welcome that the Consultation paper recognises that there is no general right in law to a trial by jury in Scotland.[40] It also notes that this proposal would only apply insofar as the right to trial by jury is prescribed by law in the devolved nations (para 203). It therefore appears that Scotland is not intended to be covered by this aspect of the proposals, although this is not stated explicitly. It will be important to make this explicit, given that this proposal relates to the administration of justice, which in terms of devolution and the Act of Union is a matter for the separate Scottish legal system and the Scottish Parliament.

### Questions 4, 5, 6, and 7

93. Questions 4 to 7 deal with freedom of expression, which is protected by Article 10 of the Convention. This article protects the right to hold opinions and to express them freely without government interference. It includes the right to express views through speech, public protest and demonstrations or by other means such as publication, broadcast, internet or social media.

94. Public authorities may restrict this right, under Article 10(2), if they can show that their action is lawful, necessary and proportionate in order to meet a legitimate state aim, specifically: protecting national security, territorial integrity or public safety; preventing disorder or crime; protecting health or morals; protecting the rights and reputations of other people; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of judges.

95. It must be established that the restriction on freedom of expression is necessary in a democratic society to achieve the legitimate aim. Necessity is a high test, which the ECtHR has said must be convincingly established.[41] The restriction must also be proportionate, going no further than is necessary to achieve the pressing social need identified. In applying this test, the courts already undertake a careful balancing exercise which takes into account a range of relevant factors, weighing the interest in freedom of expression against the rights of others and the general public interest.

96. It is important to note that 'public interest' in such cases may be multi-faceted and that competing priorities and outcomes may all serve the public interest in different ways. As discussed further below, it is an oversimplification to suggest as the paper implies that public interest always favours freedom of expression over other rights such as privacy.

97. The current legal framework, underpinned by Convention rights, attaches considerable importance to protection of the media, which is considered a vital feature of democracy[42]. Journalists are recognised as playing a vital role in contributing to public discussion and debate. This is reflected in Section 12 of the HRA which, in appropriate circumstances, protects the publication of material that might otherwise be subject to an injunction or other court order restraining publication.

98. As a result, courts have held that the "most careful scrutiny under Art 10 [is] required where measures imposed on press are capable of discouraging participation of the press in matters of legitimate public concern" and that '"particularly strong reasons required for any measure limiting access to info which public has a right to receive"[43]

99. It is unclear what evidence underpins these proposals. No basis has been set out in the Consultation paper for the UK Government's view that the existing framework is failing to adequately protect freedom of expression. We note that this issue

was not put to the IHRAR, therefore they did not take evidence on this, nor make any findings relevant to this proposal. **Any suggestion that the existing framework is inadequate and that a different approach ought to be adopted, replacing the well-established test applicable to all qualified Convention rights, would need to be put to the most careful examination, with evidence obtained from experts.**

100. We further note that Chapter 3 of the Consultation paper ('The Case for reforming UK Human Rights Law') makes no reference to freedom of expression. Criticism of existing arrangements is limited to the claims that "the case law of the Strasbourg Court has shown a willingness to give priority to personal privacy," in paragraph 206, and that "Section 12(4) has not had any real effect on the way such issues have been determined by the courts," at paragraph 213. Other than citing a single ECtHR Chamber decision, neither claim is evidenced or substantiated.

101. We therefore reject the premise of the proposals in Questions 4-7. The UK Government has failed to make a case for reforming the existing legal framework. Moreover, as noted below, proposed changes will upset the careful balance of existing arrangements, risk undermining other Convention rights, and may well produce unintended consequences.

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

102. The Commission does not support any change to Section 12.

103. As noted in the Consultation paper, the effect of Section12(3) is that a person applying for an interdict to stop publication of material must, on a preliminary basis, satisfy the court that in a subsequent trial it would be 'likely' that they would establish that

the publication should not be allowed. The separate and broader ‘balance of convenience’ test must also favour the applicant.

104. In considering whether a higher threshold should be required, it must be remembered that Section 12(3) guides the court when dealing with the case on a preliminary basis and in advance of a full examination of the evidence. There will therefore be many significant matters – such as the credibility of witnesses – which the court cannot assess when applying this test. It is therefore unrealistic to expect the court to be able to reach a finer assessment of the merits of an application than the existing test requires. A ‘higher threshold’ than ‘likely’ seems likely to be unworkable and could lead to unintended negative consequences.

105. In respect of Section 12(4), the government proposes ‘a stronger and more effective provision’, which would make it clear that “the right to freedom of expression is of the utmost importance, and that courts should only grant relief impinging on it where there are exceptional reasons.”

106. Such an approach over-simplifies the complex and nuanced decisions which courts must reach when protecting freedom of speech, weighed alongside other competing rights. The Consultation paper equates non-disclosure with narrow interests in individual privacy and fails to recognise the various situations where there may be strong public interest grounds to limit freedom of expression by preventing disclosure or publication of information, as set out in Article 10(2) of the Convention and applied in the domestic case-law on privacy since the passing of the Human Rights Act.

107. For instance, where the information concerned is the subject of a duty of confidence, a significant element to be weighed in the balance is the important public interest in the observance of such duties. Public confidence in the courts’ power to protect confidential information underpins effective whistleblowing measures, as well as the protection of journalist’s sources, discussed at Q6 below.  Similarly, there are a range of

circumstances where the publication of personal information may conflict with others' fair trial rights, leading to risk of prejudicing a criminal prosecution.[44]

108. In the context of Article 10 litigation, these do not represent 'exceptional reasons' but instead reflect broad categories of situations where there may be grounds to restrict freedom of expression. **The proposed reform fails to recognise the range of factors to be weighed, that there are various circumstances in which the public interest may be served by non-disclosure of information, and that effective protection of rights requires that courts retain the power to reach fact-sensitive decisions, taking full account of context and nuance.**

109. The Consultation paper acknowledges that "the criminal law … sets out circumstances in which the freedom of expression is limited in order to protect people from harm," at paragraph 216, but does not acknowledge the elements of civil law which similarly may restrict freedom of expression, for example section 26 of the Equality Act 2010, which prohibits harassment.

110. In our view, the Consultation paper does not adequately recognise the differences in the criminal law as it applies to Scotland, particularly since the passage of the Hate Crime and Public Order (Scotland) Act 2021. Current initiatives such as the Misogyny and Criminal Justice in Scotland Working Group may result in further devolved legislation, for example making misogyny a criminal offence. **It is important that the UK Government does not alter the existing protection of freedom of expression in a way that cuts across protections in Scotland.**

> ### Question 5
> **"The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance**

> **attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?"**

111. As outlined above, the proposal to confine the scope for interference with Article 10 to limited and exceptional circumstances is misconceived, as the existing legal framework already places appropriate limits on interference with freedom of expression. Those limits reflect a carefully-crafted balance between the competing interests of individuals directly involved and the general public interest, as reflected in Convention case-law, and in legislation and the common-law.

112. Although the Consultation paper makes repeated reference to supporting and strengthening 'common law traditions' it is, at the same time, disparaging about the efficacy of the courts' approach to protecting freedom of expression, suggesting that it would be wrong that "such principles should be merely left to the courts to develop" (para 215). It is not clear what analysis or evidence underpins this position, which contradicts other elements of the proposals.

113. Given the comments above, we do not see how Ministerial guidance would improve on the approach currently taken by courts and are concerned that such guidance may prove a 'judicial straightjacket' which prevents the courts from considering all relevant factors and attaching appropriate weight to them. **We are further concerned that a change to the current approach could put the UK in breach of the Convention, if it represented a deliberate decision to depart from what is required under the Convention, requiring courts to give precedence to freedom of expression in a way that undermined other rights.**

114. In terms of deriving guidance from other international models, we note that the paper refers to "strong models of protection for free speech such as those found in the United States" (para 215). This apparently refers to the First Amendment of the Constitution of the United States, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

115. This largely unqualified protection is at odds with the more nuanced approach of most other open liberal constitutional democracies, such that the US has been described as a 'free-press outlier'[45]. For example, whereas the First Amendment was used successfully to overturn government measures to restrict political campaign spending[46], UK courts held that a statutory ban on political advertising did not breach Article 10, such a ban being seen as necessary to prevent public political discourse being distorted by corporate interests or wealthy individuals.[47]

116. We note that certain actions or expressions which could currently be prosecuted as hate-speech in the UK could be protected under the First Amendment.[48]

117. There are clearly significant dangers in legislating to give 'free speech' primacy over other rights without paying sufficient regard to context. Adopting such an approach has the potential to bring a UK Bill of Rights into conflict with multiple aspects of the domestic law, not merely those derived from the Convention.

### Question 6

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

118. Journalists' sources are currently protected under s.10 of the Contempt of Court Act 1981. This and Article 10 of the HRA are said to have "common purpose in seeking to enhance the freedom of the press by protecting journalistic sources."[49]

119. There is nothing in the consultation paper to indicate how present protections are considered to be deficient, how it is proposed that these supposed deficiencies be remedied, or whether a Bill of Rights would be an appropriate way to make such changes.

### Question 7

> **“Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?”**

120. The Commission does not consider that the UK Government has made a cogent case for reform of the existing legal framework in which the HRA plays a significant role and we would again emphasise the dangers of attempts to constrict or redirect the balancing exercises currently undertaken by courts.

121. We note that others have questioned if the UK Government’s own legislative initiatives in other areas, such as the Police, Crime, Sentencing and Courts Bill (PCSC Bill) and the reform of the Official Secrets Acts (OSA), pose actual threats to freedom of expression, in contrast to the unsubstantiated claims about failures in the protections of the HRA.[50]

122. In our view, government dislike of some decisions of the courts is to be expected in a well-functioning democracy, and is not a legitimate basis on which to seek reform of the whole approach to rights protection. Altering the way in which freedom of expression is protected could have a detrimental impact on other rights, especially the right to private and family life, home and correspondence under Article 8 of the Convention, and unforeseen consequences.

## Theme Two of the Proposals: “Restoring a sharper focus on protecting fundamental rights”

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

123. We strongly reject the creation of additional criteria for bringing a human rights case to court. The effect of this proposal would be to deny a remedy to people who have experienced a violation of their

human rights, where it was considered that the negative impact on them was insufficiently severe. The introduction of this proposal would convey the message that some breaches of human rights are acceptable, which could have a severely negative impact on society and which is in stark conflict with fundamental principles of human rights law.

124. We are concerned that this proposal would exclude victims of human rights breaches from the possibility of securing an effective remedy, which would be in breach of Article 13 of the Convention:

> “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

125. It would similarly be in breach of the fundamental principle of international human rights law, that rights-holders must have accessible, effective remedies for breach of their rights.[51] Likewise, it undermines the fundamental common law importance of access to justice, as noted by the UK Supreme Court:

> “People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations."[52]

126. As this quotation highlights, it is also essential for the development of respect for human rights that duty bearers can be held to account for breach of those rights. Removal of that possibility for a raft of rights breaches would encourage disregard for human rights.

127. Just how severe the adverse effects of a breach would require to be in order to qualify for the possibility of securing a remedy is not made clear. Nor is any explanation offered as to how courts will be asked to apply a test of “significant disadvantage.” Whether or not

a disadvantage is considered "significant" is highly subjective and context specific. There would therefore be considerable uncertainty as to how courts would apply this test.

128. The vague nature of the test used for a permission stage is likely to give rise to satellite litigation. This will require further resource in time and money in order to establish whether permission should be granted.

129. **We have particular concern that such a test would impact disproportionately on already marginalised groups in society**. Adding a further procedural hurdle, which will put the burden on the rights-holder to demonstrate that the impact on them is severe enough, is likely to discourage victims of human rights breaches from pursuing a remedy for their rights, particularly those who are marginalised and disadvantaged generally.

130. This proposal would also undermine the principle of subsidiarity, in terms of which national authorities, including national courts, have the primary role in the protection of Convention rights, and the ECtHR plays a subsidiary role. In recognition of its subsidiary role, and the need to limit the volume of cases considered by the supra-national court, it has a threshold requirement and does not admit cases where:

> "an applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits."[53]

131. Whereas such a screening of cases may be appropriate for a supra-national court of last resort, it is entirely inappropriate for national courts, which under the Convention framework are primarily responsible for the protection of rights. It is also notable that application of the admissibility test by the ECtHR must not leave an applicant without any possibility of a remedy, as "a case must not be rejected on this ground which has not been duly considered by a domestic tribunal."[54] Therefore, if they can surmount the significant barriers - including cost, time and

emotional resources – victims of rights violations, whose claims are deemed inadmissible under the proposed test at the national level, may feel compelled to pursue their claim to the ECtHR in order to secure a remedy. The ECtHR may well find the claim admissible, given the failure to duly consider that claim before a national court or tribunal. The result, in terms of balance between national courts and the ECtHR could be the opposite to one of the UK Government's stated aims, to strengthen the role of national courts, and may well lead to an increase in negative judgments from the ECtHR against the UK.

132. A significant disadvantage test does not filter out unmeritorious or spurious claims. Such a test would screen out claims that *are* meritorious, where breach of rights could be established, on the sole basis that the negative impact on the person of that breach was not sufficiently grave, in the eyes of the court, to warrant accountability or remedy.

133. Claims taken under the HRA are already subject to the "victim test,"[55] which requires that they have been the victim of a violation of a substantive Convention guarantee by a state. The same test applies to human rights claims taken under the SA.[56] In addition, human rights claims pursued through Judicial Review are also subject to a permission stage procedure. The UK Government does not explain how the proposed additional hurdle to accessing courts where human rights have been breached would sit alongside these existing requirements. It also does not explain why human rights claims in particular ought to be made subject to additional barriers to accessing justice, compared to other claims against the state, whether under public law principles or in delict / tort. **It seems highly anomalous and contrary to fundamental principles to administer justice in such a way as to set the highest barriers for fundamental human rights claims.**

134. The introduction of the proposed test could also further hamper public interest litigation, whereby organisations raise court cases in the public interest, seeking decisions which may benefit many people in society. In Scotland restrictive rules on standing have

stymied the development of public interest litigation, but more recent case law has opened up the possibility of organisations taking test cases to court. It is important that the UK Government does not introduce any changes which may cut across that positive development.

135. No case has been made for the introduction of a further, significant barrier to accessing a route to remedy for breaches of human rights. The UK Government has offered no evidence for the assertion that courts are not focussing on genuine claims, or that there are high numbers of "spurious" claims, either for the UK or specifically for Scotland.

136. The Commission expresses its disappointment that the UK Government is considering introducing barriers to justice which enable it to avoid accountability instead of working to ensure fuller compliance with its obligation to respect, protect and fulfil Convention rights. These proposals are entirely contrary to the development of a human rights respecting culture, which should be the overall aim of a government seeking to comply with its international human rights obligations.

137. We are particularly concerned that the proposal, along with those covered by Questions 9, 10, 16, 26 and 27, relates to the administration of justice, which in terms of devolution and the Act of Union is a matter for the separate Scottish legal system and the Scottish Parliament.

138. The Consultation paper acknowledges that there are "distinct legal traditions" across the devolved nations (para 262) and that under the HRA, although the substantive rights are the same, the procedural application is distinct in Scotland. They go on to note that they propose a Bill of Rights for the whole of the UK, but "allowing for difference in the application and implementation." (para 263 and 264)

139. We seek clarification as soon as possible that the UK Government does not propose to introduce a Bill that would purport to make changes to the administration of justice in Scotland.

### Question 9

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

140. The Commission does not support the introduction of a permission stage for the reasons set out above in response to Question 8.

141. The inclusion of a second limb introducing a further test, which might be satisfied by a victim in order to secure permission to access a route to a remedy for that breach, would not significantly mitigate the severe negative impact of the introduction of a permission stage, discussed above. That would be the case no matter how the "highly compelling reason" test was applied, which would only be known once national courts developed jurisprudence in this area, adding yet further uncertainty, confusion and potential for satellite litigation.

### Question 10

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

142. We reject the premise of this question.

143. The UK Government has offered no evidence for the assertion that courts are not focussing on genuine claims, or that there are high numbers of "spurious" claims, either in the UK or specifically in Scotland.

144. We note that in the paragraphs preceding this question a further significant procedural hurdle is proposed for human rights claims, which would require victims of human rights breaches to exhaust other bases of claim before pursuing their human rights claim. The Consultation Paper asserts that such a requirement is necessary to prevent human rights claims from being used as a "fall-back route to compensation on top of other private law remedies" and that Section 8(3) of the Act, which requires other claims to be

considered when awarding damages, does not go far enough (paras 225-227). No explanation or evidence is offered as to why Section 8(3) and existing judicial discretion in the award of remedies are inadequate.

145. The introduction of the proposed requirement to exhaust other bases of claim would raise many of the same issues as set out in response to Question 8 above.

146. The legal and procedural landscape is already overly complex and confusing for rights-holders, who face significant barriers in time, money and emotional resources in order to pursue a remedy for breach of their rights. To add to that a requirement that they ensure that they pursue any other legal basis to secure a remedy before making a human rights claim would add significantly to that burden, and exacerbate procedural complexity.

147. For example, in order to ensure they will be in a position to satisfy the admission test for the ECtHR, should they be required to pursue their case to that extent, victims of human rights violations must ensure that they exhaust their domestic routes to remedy for breach of the Convention. We are concerned that the test creates a risk of a human rights claim becoming time-barred within the national court system, and thus being excluded from the ECtHR for failing to satisfy the exhaustion of domestic remedies test. This raises the prospect of victims having to raise protective proceedings to preserve their human rights claim, while exhausting other routes. Depending on the approach the national courts developed to the application of this test, they may have to pursue alternative claims even where the prospects of success were in doubt, returning to their human rights claim once they had exhausted their other claim. This would add significantly to the burden on the rights holder, and would again be likely to further deter victims of rights breaches from pursuing accountability and a remedy, particularly those who are already marginalised.

148. Adding this additional requirement would cause increased delay, time and expense, for the rights-holder, but also for the defending

party. Indeed, this is acknowledged in Appendix 3 of the Consultation Paper, where it is noted that: "additional costs to the justice system may result from a claimant pursuing an additional human rights claim in cases where the alternative cause of action has not provided a sufficient remedy. For example, litigants may have grounds to make a claim in both tort and human rights, which currently can be decided together." This would conflict with the stated aims of reducing uncertainty and the cost of litigation. The Commission again expresses its concern that this proposal, along with those covered by Questions 8, 9, 10, 16, 26 and 27, relate to the administration of justice, which in terms of devolution and the Act of Union is a matter for the separate Scottish legal system and the Scottish Parliament. It should be clarified as soon as possible that the UK Government does not intend to introduce a Bill that purports to introduce these requirements in Scotland.

### Question 11

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

149. We reject the premise of this question. It is the view of the Commission that there should be no change to the existing position.

150. The suggestion that positive obligations have arisen through judicial interpretation ignores the fact that the wording of many of the Convention rights themselves explicitly require positive measures to be taken by states, not only that they refrain from certain acts. For example, the Article 2 right to life expressly creates a positive obligation: "Everyone's right to life shall be protected by law," as does the Article 6 right to a fair trial: "Everyone charged with a criminal offence has [the right] to be given [legal assistance] free when the interests of justice so require."

151. The distinction between a positive and negative obligation is also often a false one. For example, the prohibition of torture is expressed in the negative: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." However, in practice compliance with this right can create positive obligations. For example, the important Scottish case of *Napier v Scottish Ministers*, discussed in Annex A.

152. It is also important to note that the approach of the ECtHR is directed at implementation of the overall positive obligation on the state, as a party to the Convention, under Article 1, that they "shall secure to everyone within their jurisdiction the rights and freedoms" in the Convention. The UK will remain a party to the Convention, and is bound by this overarching positive obligation.

153. As discussed in relation to Question 2, it is the function of the courts to interpret human rights, especially in relation to contexts where they are relevant but potential infringement may not have been foreseen. It would be impossible to draft international treaties, or domestic legislation, so as to cover all aspects of the implementation of a right, and all contexts in which it might foreseeably be relevant. It is right that the jurisprudence developed by courts provides further specification and clarification on the contextual application of rights. The ECtHR has developed a number of principles which guide its interpretation of the Convention, including the living instrument doctrine that rights must be "practical and effective". The ECtHR interprets rights as creating positive obligations only where necessary to ensure effective protection of the right. The fact that Convention rights create positive and negative obligations is recognised in the HRA. For example, in Article 6(6) where an act of a public authority includes a failure to act.

154. Even if it were possible to completely decouple national rights protection from the ECtHR framework (which, as discussed above, we strongly submit it is not) we could expect UK national courts to develop comparable principles of interpretation as those adopted by the ECtHR, to ensure that they could give effect to the rights

and keep pace with evolving social norms and other developments. The proposals appear to indicate a desire to legislate to prevent this, with some form of prohibition on the development of positive obligations. That would require extreme interference in the separation of powers, and a departure from the common law approach, which the UK Government says it wishes to reinforce. It would also further distance UK jurisprudence from that of the ECtHR. As with other proposals discussed above, this would put rights holders back in the position of having to pursue claims to the ECtHR and is likely to result in an increase in decisions against the UK.

155. In our view, the ECtHR's approach to interpretation of rights has led to positive clarification of the content and contextual application of rights. For example, in relation to the Art 2 right to life and the investigation of deaths where state responsibility may be engaged, as discussed in response to Question 1 above.

156. We note from the Consultation paper that the UK Government has a particular concern about the way in which the positive Article 2 requirements have been implemented by some police forces in the UK. However, this does not appear to be an issue that stems from the approach taken by the ECtHR, but instead the approach these particular public authorities have adopted. Whereas the UK Government frames this as a cautious approach in order to avoid being taken to court, it is notable that the Scottish Police Federation has entirely rejected this framing."[57]

157. Indeed, it was in the *Osman* case that the ECtHR was careful to note that the positive obligations covered by the Art 2 right to life, which are necessary to give practical effect to that right, should be "interpreted in a way which does not impose an impossible or disproportionate burden on the authorities," and therefore found that there was no breach of Article 2 in that case.[58]

158. The UK Government has made reference to the cost of defending human rights claims, without any specification of data. In fact it accepts that there is no comprehensive record of the volume of

domestic human rights litigation since the HRA was enacted, for Scotland or the UK (para 138).

159. The primary, and legitimate, way in which a state can avoid being held to account in court for breach of rights, is to take steps to ensure compliance with rights and to build a human rights respecting culture. In implementation of its overall responsibility to secure to people in the UK their Convention rights, we urge the UK Government to work to build respect for and compliance with Convention rights throughout the public sector, and beyond. Where there are breaches of human rights, the cost of defending court claims can be avoided through speedy resolution of the claim by taking immediate steps to fulfil their human rights obligations.

## Theme Three of the Proposals: "Preventing the incremental expansion of rights without proper democratic oversight."

> ### Question 12
> **"We would welcome your views on the options for section 3.**
>
> **Option 1: Repeal section 3 and do not replace it.**
> **Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.**
> **We would welcome comments on the above options, and the illustrative clauses in Appendix 2."**

160. We reject the premise of the question. We see no case for repeal or amendment of Section 3.

161. As we noted in our submission to IHRAR, repeal of Section 3 would remove important flexibility available to courts and risks reducing human rights protection.

162. In recognition of the UK's international legal obligation to comply with Convention rights, Section 3 requires primary and 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.

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

164. In interpreting legislation, courts firstly apply the ordinary rules of statutory interpretation.[59] 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.

165. 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.[60] 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.[61] 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.[62] For example, in *Smith v Scott*[63], the court declined to read down legislation banning all convicted people serving custodial sentences from voting.

166. 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. It would leave individuals whose rights have been breached without a remedy until the UK Government or Parliament decided to address the declaration of incompatibility.

167. It would also 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.

168. The case of *Ghaidan v Godin-Mendoza* provides an important example of how Section 3 has been used to protect human rights. The House of Lords determined that it was the intention of Parliament for legislation to be compatible with Convention rights. It therefore read relevant legislation as providing same sex couples with the same rights as a spouse or cohabitee to take over a tenancy in the event of their partner's death. It is clear that reading down is a form of structural remedy, resolving a Convention rights issue built into legislation which may affect a lot of people. In our view, 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.

169. As discussed in response to Q15, a declaration of incompatibility has no effect on primary UK legislation, it is a matter for Ministers and Parliament to decide what, if any, action will be taken to remedy the incompatibility. We note that this has led the ECtHR to find that declarations of incompatibility are not an effective remedy in terms of Article 13 of the Convention.[64]

170. The flexibility available to courts between Section 3 and 4 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.

171. 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. As well as risking the failure to provide a remedy, it is likely to lead to 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, as well as more cases being taken to the ECtHR.

172. The alternative option, of retaining the interpretive requirement, but limiting it to situations where there was ambiguity, would be a regression to pre-incorporation of the Convention. It would do little more than legislate for the common law presumption applied by national courts, that Parliament does not intend to legislate in breach of the UK's treaty obligations.

173. It is notable that the IHRAR considered and rejected both options for reform, finding: "The weight of evidence before the Panel supported the view that UK Courts have not, contrary to the [Policy Exchange] submission, misused Section 3 to misconceive Parliament's intention in enacting legislation[65]."

174. Professor Tom Mullen, Professor of Law at University of Glasgow School of Law, has also advised the Commission on this point as follows:

> "Both of the draft clauses suggested as possible replacements for section 3 HRA require the court to seek an interpretation which is compatible with the rights protected by the [proposed Bill of Rights]. However, they also seem to limit the interpretations that are permissible to interpretations which are "ordinary readings" of the legislation and are also compatible with the overall purpose of the legislation. This would give the courts less scope to reach rights-compatible interpretations than they now have as it is accepted that section 3 may require a

court to adopt an interpretation which is not an ordinary reading of the legislation (see, e.g., *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [2004] AC 557; *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264) in order to achieve compatibility."

175. 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.

176. We note from paragraph 8 of page 98 of the Consultation paper that the UK Government states that it is "open to views on whether the definition of legislation should be extended to legislation of the devolved legislatures."

177. In the devolved context, Acts of the Scottish Parliament are 'subordinate' legislation under the Act and must be interpreted in line with Section 3. 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 37 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."[66]

178. 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.

179. Repeal or limitation of the interpretative power in Section 3 could lead to more Scottish legislation being found to be incompatible with Convention rights. However, the Consultation paper assumes that the consequence of this will be Section 4 declarations, failing to acknowledge the particularity of the Scottish context, as it would lead to more Acts of the Scottish Parliament being struck down, requiring parliamentary time and resource to revise the offending measures.

### Question 13

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

180. We reject the premise of this question, for the reasons set out above responding to Question 12. No case has been made out for reform of Section 3.

181. It is important to reiterate that in requiring national courts to interpret legislation compatibly with Convention rights, where possible to do so consistently with the purpose of the legislation, the HRA took a cohesive, multi-institutional approach to compliance with the UK's obligations under the Convention.

182. The IHRAR's suggestion that expanding the role of the Joint Committee on Human Rights "could help to produce a more robust approach by Parliament to rights protection generally, and Section 3 interpretations of legislation specifically"[67] may be a point the Joint Committee wishes to consider further with a view to increased transparency and scrutiny of legislation. The Joint Committee already has a broad remit encompasses matters relating to human rights within the UK, as well as scrutinising every UK Government Bill for compatibility with human rights. However, it

is critical that any “democratic oversight”, (para 243), takes appropriate account of the UK Government’s obligation to secure to all in the UK the Convention rights, and does not interfere with the separation of powers.

183. We welcome consideration of an enhanced role for the Joint Committee on Human Rights given the high value we place on their work. However, this could be achieved through parliamentary process rather than legislative changes to the HRA.

> **Question 14**
> **“Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?”**

184. The Commission rejects the premise of the question. While added transparency and quality data collection and reporting are very important, and generally to be encouraged, here the proposal is based on the proposition that national courts are applying Section 3 inappropriately, which has not been made out.

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

185. It is the Commission’s view that there should be no change to the existing arrangements.

186. We note that while the question is phrased permissively (“should … be able to”), the proposal to which it relates is restrictive, suggesting that declarations of incompatibility become “the **only** remedy available to courts in relation to certain secondary legislation” (para 250). In referring to ‘certain secondary legislation’, it is not made clear which secondary legislation the proposal relates to.

187. Secondary legislation is created by Government Ministers (and other bodies) in an exercise of delegated authority under powers granted by Acts of Parliament.[68] Secondary 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.[69]

188. The courts can quash, or strike down, incompatible subordinate legislation where they cannot interpret it compatibly with Convention rights. This is important so that public bodies, including government ministers and courts, act compatibly with Convention rights. Any action that does not comply with Convention rights is unlawful.[70] 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.[71]

189. In legislating through the HRA, the UK Parliament carefully and appropriately distinguished between primary and secondary legislation, which is reflected in a number of provisions of the HRA. Those carrying out public functions must comply with primary legislation, even if to do so would necessitate breaching Convention rights.[72] This appropriately does not apply to subordinate legislation, which is to be disregarded if to follow it would conflict with Convention rights.[73]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.[74]

190. 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.[75]

191. In any event, the proposal that the only remedy for incompatible secondary legislation would be a declaration of incompatibility would be a substantial change. A declaration of incompatibility would not affect the status of the secondary legislation, which would remain in force, being applied in breach of people's Convention rights, unless and until the UK Government took steps to change it. For that reason, the ECtHR has found that declarations of incompatibility do not satisfy the Article 13 right to a remedy[76].

192. The power of our national courts to strike down secondary legislation that is incompatible with the Convention is a very important structural remedy for human rights breaches that affect many people. For example:

In the case of ***RR v Secretary of State for Work and Pensions***,[77] 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.[78]

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.[79]

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 HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament.

The HRA 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."[80]

193. Implementing this proposal would have considerable access to justice implications. It would remove a structural remedy, reducing Ministerial accountability and leaving people without a remedy for breach of their rights, potentially for years if Ministers did not take action. Once again, this could result in more claims to the ECtHR, as without a remedy nationally those who were able to surmount the considerable barriers to pursuing a claim all the way to Strasbourg.

194. Under the SA 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 HRA.

195. We note that the particular context for devolved legislation in Scotland has not been sufficiently addressed by the Consultation paper. Proceeding with this proposal would result in a highly anomalous situation, wherein legislation from the Scottish Parliament could effectively be struck down by the courts, as ultra vires in terms of the SA, whereas secondary legislation from UK Ministers, which had been subject to far less scrutiny by parliamentarians could not be struck out.

### Question 16

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

196. We understand that this question arises as a result of the IHRAR recommendation for "the introduction of an additional power to suspend quashing orders or make them prospective only, in this sphere as with judicial review generally".

197. Their discussion of quashing orders was informed by consideration of section 102 of the Scotland Act, an essentially permissive provision which enables a court to remove or limit the retrospective effect or suspend the effect of its decision when it finds that an Act of the Scottish Parliament is outside its competence or acts of the executive are ultra vires.

198. The proposal to introduce quashing orders to Judicial Review proceedings in England and Wales (referred to in this question) is contained in clause 1 of the Judicial Review and Courts Bill 2021. This clause appears to set out a more structured and prescriptive approach to their application, for instance by imposing a presumption in favour of their use.[81]

199. We note that s.1 of the Judicial Review and Courts Bill, which relates to judicial review proceedings, does not apply to Scotland.[82]. As a result, the present proposals would not achieve the consistent approach which the independent panel's recommendation hoped to achieve. This is because quashing orders would not be available in Scottish judicial review proceedings other than where legality was determined by reference to HRA or SA.

200. Arguably, the present proposal gives rise to inconsistency in that the court's powers to deal with secondary legislation found unlawful on Convention grounds will be weaker than in cases where such legislation is held unlawful on other public law grounds.

201. Moreover, we are concerned that the more prescriptive approach to quashing orders in the draft Bill may undermine the utility of the measures as contained in the Scotland Act, which was said to lie in their flexibility.[83]

202. Finally, we note the concerns of stakeholders that Section 1 of the draft Bill may mean that individuals could be found guilty of offences made under unlawful regulations or be unable to be compensated for the impacts of unlawful state action.[84] The Commission does not support the inclusion of such measures in a Bill of Rights which applies to Scotland.

203. In addition, as noted in our responses to Questions [8, 9, 10, 19, 26 and 27], we express our concern, and seek clarification, that the UK Government does not propose to introduce a Bill that would purport to make changes to the administration of justice in Scotland.

## Question 17

**"Should the Bill of Rights contain a remedial order power? In particular, should it be:**
**a. similar to that contained in section 10 of the Human Rights Act;**
**b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;**
**c. limited only to remedial orders made under the 'urgent' procedure; or**
**d. abolished altogether?**
**Please provide reasons."**

204. The Commission does not support any change to the existing remedial order process.

205. The remedial order process is set out in Section 10 and Schedule 2 of the HRA. It provides that, 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.

206. 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.

207. 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.

208. It should be noted that this process is rarely used[85] and that more commonly, declarations of incompatibility have been addressed by primary or secondary legislation (other than by remedial order). This suggests that it is on occasion a useful tool for the Government to use to address a declaration of incompatibility.

209. 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*, 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. 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.

210. 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. 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.

211. The current remedial order process ought to be retained.

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

212. It is the view of the Commission that there should be no change to the current arrangements.

213. We reject the premise set out in the paragraphs preceding this question, that there is a need to alter the "constitutional balance between government and Parliament" in relation to legislative compatibility with Convention rights. The reference to "creating space for innovative policies" is also concerning, given that all that a statement of compatibility does is confirm that in the view of the Minister introducing the legislation it is compatible with Convention rights.

214. When a Government Minister is introducing legislation to Parliament it is entirely appropriate, and in line with the Government's obligation to secure to everyone in the UK the rights under the Convention, that they take responsibility for confirming that the proposed legislation is compatible with Convention rights. Legislation that is not compatible with Convention rights can lead to breaches of human rights for many people, over a lengthy period, as incompatible legislation may remain in place and be implemented in breach of rights unless and until there is a successful challenge to the legislation or Parliament amends, repeals or replaces it.

215. For primary UK legislation, even a successful court challenge will not result in the incompatibility being addressed, as courts can only issue a declaration of incompatibility, leaving it for Parliament to decide if, when and how to remedy the issue. It is therefore of the utmost importance for respect for human rights that robust procedures are in place to ensure that new legislation complies with Convention rights. The current requirement on Ministers introducing legislation is a necessary step towards ensuring legislative compatibility. It could be strengthened by, for example by: (1) requiring that compatibility be further confirmed at later stages in the legislative process, taking into account amendments to a Bill; and (2) applying the same requirement to secondary legislation.

216. It is notable that the Scottish Parliament engages with questions of compatibility to a much greater extent than the UK Parliament, due to the provisions of the SA, in terms of which Acts of the Scottish Parliament that are not compatible with Convention rights are ultra vires, and therefore not law. The Scottish Parliament, and the Scottish Government, have expressed that they are comfortable with these compatibility requirements. This engagement has played a key role in the development of a human rights culture in the Scottish Parliament, raising awareness of human rights and deepening the understanding of parliamentarians. Strengthening the role of the UK Parliament in ensuring legislative compatibility could similarly have a positive effect.

### Question 19

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

217. The Commission is extremely concerned that the Consultation document does not acknowledge the specific and complex implications of the proposed reforms for the three devolved nations, Wales, Northern Ireland and Scotland. It fails to set out how the UK Government proposes to address those complexities,

and none of the draft clauses make reference to the devolved settlements.

218. We also note the concern expressed by our sister National Human Rights Institution, the Northern Ireland Human Rights Commission, to the IHRAR,[86] that it is vital to ensure protection of human rights in Northern Ireland is not diminished through changes to the machinery of the HRA. Given the concerns expressed regarding the Good Friday Agreement and the UK Government's commitment to non-diminution, it is very concerning that the UK Government has not carefully considered the Northern Ireland context and set out how it has taken the particular circumstances there into account and how it proposes to address those complex issues.

219. Similarly, the proposals fail to take account of the developments made in Wales to advance human rights; nor do they acknowledge the particularities of the access to justice context as set out in the Report of the Commission on Justice in Wales.[87]

220. The proposals risk unsettling the balance of Scotland's constitutional arrangement. The UK Government's inattentiveness to addressing the devolution context in Scotland is particularly concerning given that it was repeatedly highlighted in written and oral evidence to the IHRAR by many stakeholders, including the Commission, many civil society organisations and by the Scottish Government.[88]

221. The Commission is opposed to the proposals in general, as they would be highly regressive, reducing rights protection, accountability and access to justice across the UK. In addition, we consider that the proposals interfere with the particular rights framework in Scotland, undermining the additional protection afforded through the devolution arrangements, and the progression Scotland has made towards advancing human rights.

**The Scotland Act**

222. The HRA is a pillar of the constitutional framework of devolution in Scotland. In Scotland, Convention rights are protected under both the HRA and the SA 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 HRA would require very close consideration of the potential impact on the carefully crafted devolution arrangement, given the interplay between the two Acts.

223. The SA[89] created the Scottish Parliament and Scottish Government, and required that both act in compliance with the Convention.[90] Under the HRA, actions of public authorities that are incompatible with Convention rights are unlawful and can be subject to Judicial Review.[91] In addition, under the SA 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.[92] 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 SA. This stands in contrast to where UK legislative provisions are found to be incompatible with Convention rights. Under the HRA UK legislation can be declared incompatible but a declaration of incompatibility has no effect on the legislation, which continues in force unless and until the UK Parliament decides to amend, replace or repeal it.[93] 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.

224. Therefore, in relation to legislation and Acts of the Scottish Government, the SA affords greater rights protection for the people of Scotland than is available under the HRA. The proposals threaten to undermine that additional protection.

225. Amending the HRA is likely to require legislative consent from the Scottish Parliament. The SA 2016 put the Sewel Convention on a legislative footing, in terms of which the UK Parliament will not ordinarily legislate on devolved matters without consent from the Scottish Parliament.[94] Proposals to alter the HRA are being resisted across Scottish civil society, as can be seen from the submissions to the IHRAR and expressions of opposition since the UK Government announced its proposals.[95] To legislate on such an important matter as human rights without the consent of the Scottish Parliament would be highly contentious.

226. In addition, alterations to the way in which the HRA is implemented, after over twenty years, would introduce uncertainty, confusion and complexity, jeopardising the significant progress Scotland has made in developing a human rights culture.

**Progressive incorporation and promotion of human rights culture**

227. The HRA has contributed significantly to fostering 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. 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.

228. 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.

229. 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.[96] 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."[97] 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.[98]

230. 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.[99] Increased focus on international human rights standards has also been reflected in references to international human rights instruments in Scottish domestic legislation.[100]

231. 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[101]. Although economic, social, cultural and environmental issues can fall within the scope of the Convention, it is not primarily designed to deal with these matters. The Commission has long advocated for the incorporation into Scots law of other international human rights treaty standards.

232. Work is now well underway in Scotland to incorporate the human rights contained in a number other international human rights treaties, covering: economic, social, cultural and environmental rights, and stronger protections for women, disabled people, people from black and ethnic minorities, older persons and children. Following detailed work by the First Minister’s Advisory Group on Human Rights Leadership and the Scottish National Taskforce on Human Rights Leadership, the Scottish Government has committed to introducing a Bill during this term of the Scottish Parliament, incorporating these rights into Scots law.[102]

233. The Scottish Parliament has already unanimously passed a Bill to incorporate the United Nations Convention on the Rights of the Child into Scots law.[103] Incorporation 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.[104] While the Supreme Court found that certain aspects of the Bill fell outwith the competence of the Scottish Parliament - as the Bill did not sufficiently clearly delimit devolved legislation and public authorities – the Supreme Court also expressly recognised that the decision to incorporate international human rights standards is a matter for the Scottish Parliament. The Scottish Government has committed to addressing the issues identified by the Supreme Court and ensuring that a Bill is put to the Scottish Parliament that incorporates the UNCRC protections in a way that is within its competence.

234. There has been considerable progress in the development of a human rights culture in Scotland. The HRA and the SA have together played a key role in that progress. **It is critical that this progress is not undermined by proposals to reduce Convention rights protection, unsettling the devolution settlement and introducing confusion and uncertainty for Scotland's public authorities.**

**Impact of Proposals on Protection of Rights under Scottish Devolution**

235. While the UK Government has not set out how it proposes to address the Scottish devolution arrangement, making it difficult to analyse what precisely the impact would be in Scotland, it is nevertheless clear that the proposed changes could interfere with the parameters of the competence of the Scottish Government and Scottish Parliament, and with the legality of actions of Scottish public authorities.

236. The Commission has obtained advice from Professor Tom Mullen on the potential devolution related implications of the proposals. Professor Mullen observed that:

> “The combined effect of the reform proposals will be to reduce the power of the courts to protect the Convention rights as they have been defined and interpreted by the European Court of Human Rights. It is likely that some decisions and actions which today would be considered unlawful in terms of the HRA would instead be considered lawful in terms of the BRA.”

237. In terms of the SA, whereas currently the Scottish Government and Scottish Parliament cannot lawfully act in a way that is incompatible with Convention rights, the proposed change to Section 2 would mean that, in defining Convention rights when asked to determine if an act was within competence, Scottish courts could give more or less weight to decisions of the ECtHR than they currently do. Professor Mullen advised the Commission that: “it cannot be assumed that [Scottish courts] would continue to attach the same weight to the Strasbourg case law.” This would create considerable uncertainty as to the parameters of the competence of the devolved institutions, and of rights protection, potentially undermining over twenty years of jurisprudence that has helped to clarify both.

238. Professor Mullen has further noted:

> “Similar doubts arise as to the domestic case law which has accumulated under the HRA and SA. The consultation document does not make it clear the extent to which this case law will be relevant or the weight to be attached to it either in general or in the specific context of devolved competence.”

239. Professor Mullen has also noted that if the proposals were drafted to make it clear that in interpreting the SA the Scottish courts were to follow the new rules on interpretation of rights:

> “The effect would be to make the Convention rights a less stringent constraint on legislative or executive competence than is the case now. The courts would be obliged to take a different approach to case law of the

> ECtHR and probably also to the domestic case law accumulated under the HRA, and it is likely that some measures and actions which would be unlawful today might be considered lawful under the BRA. This would effectively expand the competence of the Scottish Parliament and the Scottish Government and might appear to create a greater risk of legislation by the Scottish Parliament or action by the Scottish Government being in breach of the ECHR. That risk could be reduced if the Scottish Government and Scottish Parliament were to continue to scrutinise Bills for compatibility with the ECHR as such rather than merely for compatibility with the requirements of the BRA."

240. This would interfere with the parameters of the competence of the Scottish Government and Scottish Parliament, and with the legality of actions of Scottish public authorities, thereby significantly undermining rights protection for people in Scotland under the SA, as well as under the HRA.

241. Should the UK Government proceed with these proposals in spite of overwhelming opposition, limiting the effect of the proposals to reserved areas would mitigate the negative impact in Scotland, avoiding regression on rights and access to justice and the introduction of considerable uncertainty and confusion, at least with respect to devolved competence and devolved areas of law and policy. As Professor Mullen has advised the Commission, if the UK Government cannot be prevented from reforming the HRA:

> "it would be appropriate for the reforms to proceed on the basis that they will apply only to reserved matters and do not affect the extent or limits of devolved competence or the interpretation and application of legislation enacted by the Scottish Parliament or subordinate legislation made by the Scottish Government. The provisions replacing sections 2, 3 and 6 HRA would apply to UK legislation and to decisions and actions taken under UK legislation but they would not apply to Acts of the Scottish Parliament or

> to subordinate legislation made by the Scottish Government within devolved competence. It should be entirely a matter for the Scottish Parliament and the Scottish Government to decide the extent to which the law within devolved competence complies with the ECHR. This approach would be compatible with the principles underlying the devolution of governmental power to Scotland."

242. While this would offer some mitigation, it would clearly be inadequate as the regression on rights, barriers to access to justice, reduced accountability, introduction of widespread uncertainty undermining rights and the development of a rights based culture for reserved areas would have a significant negative effect on people in Scotland. It would also add additional complexity to the human rights framework, impacting law, policy and access to justice. While on balance additional complexity is to be preferred to regression on rights and access to justice for devolved as well as reserved areas, additional complexity is not desirable and could be avoided by the UK Government withdrawing these proposals in their entirety.

243. In addition, as noted in our responses to Questions 8, 9, 10, 16, 26 and 27, we express our concern, and seek clarification, that the UK Government does not propose to introduce a Bill that would purport to make changes to the administration of justice in Scotland.

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

244. The Commission does not support any change to the existing legislative definition of public authorities.

245. It is well established in ECtHR case-law that a State cannot evade its responsibility to safeguard Convention rights by delegation to

private bodies or individuals.[105] Furthermore, where the State relies on private organisations to perform essential public functions, in particular those necessary for the protection of Convention rights, it retains responsibility for any breach of the Convention that arises from the actions of those private organisations. This is the principle underpinning the *Sodexo* decision[106] which the Consultation paper references at paragraph 267.

246. This principle also finds expression in other international human rights instruments to which the UK is party, including the International Covenant on Civil and Political Rights (ICCPR).

247. It is therefore essential that there is no dilution of the definition of public authorities. It is concerning that the UK Government refers, at (para 267), to it being desirable to clarify "what obligations the government is under" where a private company is acting as a public authority. As the state cannot contract out of its obligations, the government must remain bound by all of its obligations. The purpose of including private entities providing public services in the definition of 'public authority' is to ensure that those private entities are bound by the Section 6 duty to comply with Convention rights, and that rights-holders can enforce their rights directly against them. The effect of that is not to relieve the state of its overall obligation to secure to everyone in the UK their Convention rights. **To alter the definition of public authority, or the terms of Section 6, so as to remove responsibility for the government where it contracts out the provision of services would breach the UK's obligations under the Convention and other international obligations.**

248. The Consultation paper does not explain what amendment the UK Government is proposing, nor does it set out any case for change. Nor was this general proposal considered by the IHRAR.

249. The current definition of "public authority" includes "any person certain of whose functions are functions of a public nature" (s 6(3)(b)). The HRA therefore applies not only to "core" public

authorities, for example the NHS and the police, but also private parties when exercising functions of a public nature.

250. In seeking “a clearer definition of whether a body is a public authority or a function is of a public nature,” while ensuring that such definitions “should not add new burdens for private sector bodies and charities,” (para 269) the consultation paper implies that any new definition will be more restrictive in scope and potentially remove human rights obligations from Government contractors currently deemed to be exercising ‘functions of a public nature’. The Commission strongly opposes any such amendment.

251. The Commission has advocated for legislative guidance clarifying the scope of the definition of “public authority” to ensure that national courts interpret it sufficiently broadly to achieve its purpose.

252. The paper cites the case of *Ali v Serco Ltd,*[107] in which the Scottish Human Rights Commission intervened. Serco, a private company, was contracted by the Home Office to provide accommodation and essential services to people seeking asylum. The case concerned their policy of changing locks on the homes of occupants whom the Home Office deemed had reached the end of the asylum process. Evictions and lock changes were to be carried out without a court order and hence without a means for the occupants to challenge the decision to evict them.

253. The Commission’s intervention sought to establish that in accommodating people seeking asylum on behalf of the Home Office, Serco were exercising functions of a public nature and therefore they were required to comply with Convention rights in terms of Section 6. However, the Inner House of the Court of Session disagreed and found that Serco was not obliged to respect the occupants’ Convention rights in relation to this activity.

254. This reflects the restrictive interpretation of Section 6 that has been applied by the courts. We note that the Joint Committee on Human Rights has twice looked in detail at this issue[108], and found that this

central provision of the HRA had been significantly compromised, creating a gap in human rights protection.

255. Drawing on the JCHR recommendations, the Commission has consistently advocated for strengthening the definition of “public functions”, so as to explicitly recognise that functions are public when they are performed under contract or other agreement with a public body which itself is under a duty to perform that function. This would remove the uncertainty which led to the Serco litigation.

256. This approach was reflected in the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, Section 6(3A), passed unanimously by the Scottish Parliament, which stipulates that “’functions of a public nature’ includes, in particular, functions carried out under a contract or other arrangement with a public authority.”

257. Contractual terms may also aid certainty and the Commission has previously recommended producing separate public procurement guidance on the inclusion of explicit contractual terms in Government contracts, making clear where a private body is performing public functions.

258. If the Government decided to develop interpretative guidance to assist the courts, the Commission suggests that the dissenting opinion of Lady Hale in *YL*[109], which includes a list of factors that would be highly relevant in determining whether a public function is being performed, would form a strong basis for any such guidance.

### Question 21

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

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

259. It is the Commission's view that there should be no change to the existing provisions.

260. The Section 6(1) requirement that public authorities comply with Convention rights is a key provision of the Act. While the UK Government has ultimate responsibility for compliance with the Convention, and the Scottish Government in devolved areas, part of that responsibility is ensuring that all levels of government and all involved in the delivery of public services respect, protect and fulfil human rights. This is of critical importance to rights holders, who rely on public authorities (and those they contract out to) to respect their rights in delivering services. It would be wholly inadequate if responsibility for respecting, protecting and fulfilling human rights at the central government level was not filtered out through all branches of the state. It would make it less likely that human rights were respected by public authorities, undermining the development of a human rights culture and resulting in an increase in breaches of human rights, for which rights holders would have to pursue a remedy against central government.

261. While the UK Government does not propose to change the Section 6(1) duty, it does propose to substantially widen the exceptions to it. This would substantially weaken the duty, thereby undermining respect for human rights, increasing rights breaches and leaving victims without a route to remedy.

262. The existing exceptions provide that it is not unlawful for a public authority to act in breach of Convention rights, if they are required to do so by an Act of Parliament. This covers the limited situation whereby an Act of Parliament explicitly and without any doubt requires public authorities to act in breach of Convention rights,

and there is no room for interpreting the Act in way that is compliant with Convention rights. This is likely to arise rarely.

263. The proposal is to widen this exception significantly, so that a decision by a public authority will be lawful provided that it is giving effect to the will of Parliament, even if legislation being applied could have been read in a way that is compatible with Convention rights. As confirmed by Professor Tom Mullen to the Commission, there is a risk that actions by public authorities which would currently be considered unlawful might be considered lawful in the future if this proposal is implemented.

264. This would undermine the development of a human rights culture, and put up considerable obstacles to rights holders seeking to invoke their rights. They would be unable to assert their rights against the public authority directly, whether informally or through administrative or judicial action. Furthermore, in those rare cases where claims are made that challenge the lawfulness of legislation, the only remedy through domestic courts is a declaration of incompatibility, which may or may not be acted upon by Parliament.

265. It seems clear that the aim of the UK Government in proposing Option 1 (para 274) is to remove accountability from public authorities, and limit court action to declaring legislation to be incompatible, thereby leaving the victim of the breach without a remedy at a national level. **Once again, the proposals are directed towards reducing accountability and preventing access to justice, and would have the overall impact of undermining human rights in public life, and requiring rights holders to pursue their claim to the ECtHR.**

266. Option 2 would alter Section 6(2) to reflect the changes proposed to Section 3, discussed above in our response to Question 12. For the reasons set out there, the Commission opposes any such amendment to Section 3 and in turn Section 6(2).

267. Full compliance with the Convention and other international human rights treaties involves encouraging the development of a human

rights based society, adopting a multi-institutional approach, promoting, ensuring that respect for human rights is a requirement This is essential to the development of a rights respecting society. It is also essential that rights holders are able to assert their rights in relation to the service provider that is failing to uphold their rights, rather than having to direct any complaints or claims to the UK or Scottish Government.

268. Professor Tom Mullen has advised the Commission that the second proposal would: "broaden significantly what may lawfully be done under an Act of Parliament. A decision taken by a public authority will be lawful provided that it is giving effect to the will of Parliament even if (a) the decision is arguably incompatible with a Convention right and (b) the provision under which the decision is taken might have been interpreted differently and in a way which would not authorise a decision which is incompatible with a Convention right" which would "result in decisions that would be unlawful today being considered unlawful in future."

> **Question 22**
> **"Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict."**

269. We do not accept that the applicability of Convention rights to certain UK overseas activities is a problem requiring a remedy.

270. 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.

271. 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. 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” 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.

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

273. 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.

274. 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.

275. 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 HRA, one of which was to “put the promotion of human rights at the forefront of our foreign policy.”

276. A restriction to the applicability of the HRA 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.

277. The HRA 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. 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 HRA is limited.

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

279. The other way in which the HRA and Convention rights have extraterritorial 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.

280. We welcome the commitment that a Bill of Rights will “safeguard the vital protection for the right to life and the absolute prohibition on torture, confirming that people should not be deported to face torture (or inhuman or degrading treatment or punishment) abroad” (para 9). However, noting that the UK Government has previously argued (unsuccessfully) that the prohibition on torture should be qualified where national security concerns are in issue, we are mindful that even such apparently unqualified commitments may allow for differing interpretations.

281. 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.

282. 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.

283. **We are therefore of the view that there should be no change to the extra-territorial application of the HRA.** It is essential that the HRA 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.

### Question 23

**“To what extent has the application of the principle of ‘proportionality’ given rise to problems, in practice, under the Human Rights Act? We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.**
**Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is ‘necessary’ in a ‘democratic society’, legislation enacted by Parliament should be given great weight, in determining what is deemed to be ‘necessary’.**

**Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right."**

284. We reject the Consultation paper's premise "that the application of the principle of proportionality by the courts has created considerable uncertainty and impinged on the ability of elected lawmakers to balance individual rights with due respect for the wider public interest" (para 289).

285. The interpretation of Convention rights was not included in the matters put to the IHRAR. No case has been made by the UK Government for any change to the approach taken to assessment of proportionality. We note that the section of the Consultation paper preceding this question (paras 282-291) relies principally on a dissenting opinion in the judgment of *Quila*[110] to support the claim that there is an absence of clarity as to how qualified rights are protected under the present framework.

286. We set out again the following observation from the IHRAR report that "there is nothing remarkable with regard to concern as to individual decisions. From time to time, that is bound to happen – and, in a democracy, a degree of tension between the Branches of the State is not necessarily unhealthy. It is, indeed, inherent in a common law system."[111]

287. It is well established that, in the context of the qualified rights with which this section is chiefly concerned,[112] any interference must be proportionate to the legitimate aim pursued.[113] This places an onus on the state to provide justification for the measures concerned, as being relevant and sufficient to the legitimate aim they pursue and going no further than is necessary.

288. In this context, 'sufficiency' requires, first, a rational connection between the measures employed and the desired aim. It also requires a fair balance between the demands of the general interest and the protection of the individual's fundamental rights.

Furthermore, the ECtHR has recognised that ‘the search for this balance is inherent in the whole of the Convention’[114]

289. In the domestic context, the courts’ assessment of proportionality always takes into account the particular role of other branches of government, particularly Parliament.

290. 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. As discussed above, in response to Question 2, national courts already exercise judicial restraint in relation to areas better suited to other branches of government, recognising their relative institutional competence. The UK courts already give “great weight” to Parliament’s view, as demonstrated in the case of *SC*[115].

291. We note that the IHRAR recommended no change in this area and found that “the UK Courts have, over the first twenty years of the HRA, developed and applied an approach that is principled and demonstrates proper consideration of their role and those of Parliament and the Government.”[116]

292. By seeking to place further limits on judicial powers in respect of matters falling within the state’s margin of appreciation, the proposals imply that the margin of appreciation rests with the executive and the legislature and not the courts.

293. Rejecting similar proposals in a Policy Exchange response, the Panel concluded that “excluding the Courts from the margin of appreciation would amount to a striking change in the UK’s constitutional arrangements, which entail sharing the margin between all three Branches of the State.”[117]

### Question 24

**“How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of**

> **the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.**
> **Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of**
> **Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights.**
> **Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State."**

294. We understand that this question relates to the Government's stated aim of ensuring that the HRA cannot be used to frustrate the deportation of serious criminals and terrorists.

295. We do not accept the characterisation of 'human rights claims' as an unjustified barrier to lawful deportations or that there is evidence to support the Government's claim that the availability of these rights undermines public safety[118].

296. Nor do we accept the implication that such rights are only of benefit to "drug dealers and serious offenders,"[119] as consideration of the facts of the cases cited by the Government reveals.[120]

297. Over and above the flaws in the case presented for reform, these proposals are objectionable in principle. We recognise the universality of human rights as one of the core principles underpinning the Universal Declaration. By limiting or removing rights from categories of individuals based on their circumstances, the Government is threatening to undermine the principle of universality.

298. It is further undermining the structure of rights protection by preventing the courts from carrying out their role of conducting a

case-by-case assessment or balancing exercise where individuals suffer interferences in qualified rights like Article 8.

### Question 25

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

299. We note that this question and the paragraphs that precede it revisit and reprise a number of arguments and proposals which we have already firmly rejected as being unnecessary and unjust.

300. Our objections to the options outlined in Question 24 in respect of Foreign National Offenders are equally applicable in the context of the groups of rights-holders under consideration in this context, whether described as 'failed asylum seekers', 'over-stayers' or any other immigration status.

### Question 26

**"We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:**
**a. the impact on the provision of public services;**
**b. the extent to which the statutory obligation had been discharged;**
**c. the extent of the breach; and**
**d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.**
**Which of the above considerations do you think should be included? Please provide reasons."**

301. We do not support any of these proposals.

302. To the extent that any of these factors are relevant to a fair assessment of remedy, including damages, national courts already take them into account. The extent of the breach, factor (c), is most likely to be relevant in an assessment of the appropriate remedy.

The other listed factors do not appear likely to be appropriate considerations in the award of a remedy, including damages.

303. The impact on the provision of public services of an award of remedy, would be an entirely inappropriate consideration in most if not all cases. It is essential that claims can be made against the relevant public authority, for the reasons set out above in relation to Questions 20 and 21. Ultimately, however, it is the state and central government that has responsibility for complying with any order of the court. It is a matter for the central government to allocate its budget in order to ensure that public authorities have the resources they need to deliver public services in a way that respects, protects and fulfils people's rights, including providing remedies where those rights are breached. The suggestion that courts take this factor into account raises the prospect of central government avoiding its human rights obligations by starving public authorities of resources. That would breach the obligation of central government to secure to everyone the Convention rights, and the obligation to provide a remedy.

304. Factors (b) and (d) appear to be aimed at introducing arguments in mitigation on behalf of the state, whereby even although it has been shown that they breached the claimant's human rights, the remedy may be reduced from what would be appropriate restitution to something less than that, on account of the fact that the public authority could show that it had discharged other elements of its statutory obligations or that it was endeavouring to implement the purpose of legislation. That would be wholly inappropriate, contrary to the principles of justice, and in breach of the UK Government's obligation to provide a remedy for breach.

305. This proposal, along with those covered by Questions 8, 9,10, 16and 27, relate to the administration of justice, which in terms of the Act of Union and devolution is a matter for the separate Scottish legal system and the Scottish Parliament. There is some indication in the Consultation Paper the UK Government recognises this and may not be proposing that these elements of

the proposals to apply to Scotland. That ought to be clarified as soon as possible.

## Theme Four of the Proposals: Emphasising the role of responsibilities within the human rights framework

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

306. We are strongly opposed to this proposal, which would be contrary to the universality of human rights, a fundamental principle of international human rights law.

307. Human rights belong to everyone, without reservation. They do not have to be earned and you do not have to pass a test to qualify for them. The proposals set out on pages 84-85 of the consultation paper are therefore deeply concerning. This and other proposals related to deportations signal an intent to create tiers of people in society, with some deemed not deserving of full human rights protection and others excluded from rights protections altogether. This is entirely contrary international human rights law and to the development of a rights respecting society.

308. The proposals suggest that in deciding if someone's rights have been unlawfully breached their conduct, "the extent to which the person has fulfilled their own responsibilities," should be taken into account. That would be completely inappropriate, contrary to the universality of rights and to the way in which Convention rights are applied by the ECtHR. To the extent that conduct is relevant to the proportionality of interference with rights, it is already taken into account in the existing proportionality assessment. We reject any suggestion that the ECtHR adopts an approach whereby some applicants are considered "undeserving" of rights. If the UK were to

adopt such an approach that would again be likely to put it in breach of the Convention, resulting in more successful cases being taken to the ECtHR.

309. The proposals suggesting that the “wider behaviour of a claimant” should be considered in determining an appropriate remedy, “clearly linking the remedies available under the Bill of Rights to how the claimant has lived by its underlying principles” are similarly deeply concerning. The case referred to in support of this was exceptional, and is not representative of a general approach by the ECtHR.[121] The proposal raises the prospect of a victim of a breach of their human rights being subjected to examination, with evidence brought related to past conduct having no connection to the matters before the court.

310. The suggestion that how someone has lived their lives ought to be relevant in deciding if they deserve a remedy for breach of their rights, raises the prospect of someone in prison whose rights are breached bring denied any remedy. Such an outcome would be a grave breach of the UK’s international human rights obligations.

311. As the consultation document sets out, at paragraph 306, to the extent that the conduct of a claimant is relevant in awarding a remedy the courts can and do already take it into account. The HRA also says in Section 8(1) that a court is to make such order within its powers as it considers just and appropriate.

312. These proposals raise many of the same concerns set out above in response to Question 8. This would be a further barrier to access to justice, with claimants either excluded at a preliminary stage from proceeding with their claim, due to being deemed to be “undeserving” of rights, or proceeding all the way through the court process to successfully prove their claim, only to be denied an adequate remedy. Once again, this would discourage people from pursuing a remedy for breach of their rights, with the most disadvantaged most adversely affected. It is again unclear how the UK Government envisages this test being applied, what would amount to relevant conduct that courts were required to take into

account, what diminution in remedy would be required, or how this would be dealt with procedurally. This could add considerable judicial discretion and introduce another layer of subjective judgement. This would once again add uncertainty, time, cost, and complexity, raising the prospect of satellite litigation and an increase in successful claims to the ECtHR for those who do manage to surmount the significant obstacles. Again, this would put the UK in breach of its obligation to provide a remedy.

313. This proposal, along with those covered by Questions 8, 9, 10,16 and 26 , relate to the administration of justice, which in terms of devolution and the Act of Union is a matter for the separate Scottish legal system and the Scottish Parliament. It should be clarified as soon as possible that the UK Government does not intend to introduce a Bill that purports to introduce these requirements in Scotland.

### Question 28

**“We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2."**

314. It is the view of the Commission that there should be no change to the current approach.

315. As noted in the consultation document (para 309) Article 46 of the Convention requires states parties to comply with judgements of the ECtHR in cases in which they are party. As further noted, at paragraph 310, the UK Government is responsible for compliance with that requirement. It is therefore entirely appropriate that the UK Government takes ownership of ensuring that the necessary steps are taken to abide by the judgement. The consultation paper, at paragraph 310, acknowledges that where compliance requires legislative amendments the UK Government will propose legislation to the UK Parliament in the usual way. That “democratic responsibility for legislation…lies ultimately with Parliament,” as stated in paragraph 311, is therefore already reflected in existing

arrangements for responding to judgments from the ECtHR. No case for change has been set out.

316. The proposals (paras 313-316) and the draft clause on page 101 are concerning, as they indicate a move away from acceptance of the obligation to comply with ECtHR judgments against the UK, by putting decisions against the UK immediately up for general debate in Parliament, whether the remedy requires legislative action or not. The proposals, which are characterised in the Consultation paper as creating a "democratic shield," signal that compliance with a judgment is itself up for debate, whereas failure to abide by a decision of the ECtHR breaches the Convention.

317. This is of course not only a matter of the UK's standing in relation to compliance with its obligations under the Convention. Failure to comply with judgments of the ECtHR will have very real consequences for victims of human rights breaches. Unless and until the decision of the ECtHR finding that the UK is in breach of human rights is complied with, that breach continues and the very real negative impact on people's lives continues. Where the breach concerns legislation many people will continue to be adversely affected until remedial action is taken. It is essential that action is taken to comply with decisions of the ECtHR without delay.

318. **It is therefore essential that there is unequivocal recognition of the binding nature of ECtHR judgments where the UK is a party, and that the UK Government retains responsibility for ensuring compliance.**

319. Where compliance with ECtHR decisions against the UK requires that action be taken within the devolved competence of the Scottish Parliament, the UK Government can liaise with the Scottish Government in relation to compliance with the judgment, to confirm what steps are being taken including, where appropriate, legislative action through the Scottish Parliament. It is not clear what has prompted the UK Government to suggest that there is a need "to enhance the role of the devolved legislatures in

considering judgments directed at policy areas within their competence” (para 312).

320. It is noted that under Section 5 of the HRA, 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.[122] 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.[123] 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.

321. A Minister proposing a Bill confirms that it is Convention-compliant when presenting the Bill.[124] The Explanatory Notes accompanying the Bill generally include 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.

322. Even in rare cases where remedial orders are used 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.

# ANNEX A

## Positive Impact of HRA

323. The Human Rights Act ("the HRA") has been in force for over twenty years. The HRA made it possible for us to enforce our rights under the Convention [125] directly in our national courts. Incorporation of our Convention rights through the HRA 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.[126]

324. The impact of the HRA has been felt by people in many settings: 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 other 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 HRA to ensure domestic realisation and protection of Convention rights will be all the more vital going forward.

## Significant Scottish HRA cases

325. The Scottish courts have increasingly engaged with ECtHR jurisprudence over the past 20 years. This has had a positive impact in a range of areas, from fair trial requirements to private, home and family life. More broadly, the introduction of the HRA has encouraged a more general rights-based approach in the case law of the Scottish courts. The HRA 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.

326. A number of claims have been taken to the Scottish courts based on the HRA 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.[127]

**Ending degrading prison conditions: *Robert Napier v. The Scottish Ministers***[128]

Robert Napier was imprisoned in HMP Barlinnie, Glasgow while on remand (awaiting trial). 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 finally 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*[129]**

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.[130]

**Strengthened independence and impartiality of judiciary: *Stars v. Ruxton*[131]**

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*[132]**

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] The European Convention on Human Rights is a Council of Europe Convention, adopted in 1950 and entered into force in 1953.
[2] See: 50 Human Rights Cases That Transformed Britain | EachOther
[3] 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).
[4] For example, in responding to the IHRAR Call for Evidence, the Scottish Government indicated that they were "entirely happy that the courts can … hold incompatible [Scottish] legislation to be outside legislative competence and therefore 'not law'". UK Independent Human Rights Act review: our response - summary - gov.scot (www.gov.scot)
[5] Kanstantsin Dzehtsiarou et al (eds), Human Rights in Action: Assessing the Positive Impact of the Human Rights Act 1998 in the UK (Submission to the Independent Human Rights Act Review, March 2021).
[6] "The courts have emphasised on a number of occasions that the HRA did not replace the common law, which has remained in place through the HRA era; indeed, it may (and in some instances clearly has) developed under the HRA's influence, absorbing at least something of the rights and protective techniques contained in the ECHR." Elliot, M (11 Feb 2022) *'The common law and the European Convention on Human Rights: Do we need both?'* Constitutional Law Matters blog, available at: The common law and the European Convention on Human Rights: Do we need both? – Constitutional Law Matters
[7] A UK Bill of Rights? The Choice Before Us (Volume 1; December 2012) at paragraph 43, available at: [ARCHIVED CONTENT] (nationalarchives.gov.uk)
[8] Liberty-open-letter-to-the-Lord-Chancellor-Feb-22.pdf (libertyhumanrights.org.uk)
[9] See further the submission to this consultation by the Victims' Commissioner for England and Wales
[10] Death in custody review - gov.scot (www.gov.scot)
[11] European Convention on Human Rights, Article 1.
[12] Human Rights Act - joint letter to the Lord Chancellor with Welsh Ministers: March 2022 - gov.scot (www.gov.scot)
[13] Publication - NIHRC Submission to the Independent HRA Review Team's Call for Evidence | Northern Ireland Human Rights Commission
[14] 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.
[15] *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.
[16] *Ibid*. *Ullah* at para 20.
[17] See *Manchester City Council v Pinnock* [2011] 2 AC 104, at para. 48. per Lord Neuberger.
[18] Kaiyam v UK; S, V and A v Denmark where the Strasbourg court expressly adopted the UK approach in Hicks.
[19] *LCB v UK*, no. 23413/94, 9 June 1998.
[20] *Lopes de Sousa Fernandes v Portugal*, no. 56080/13, 19 December 2017.
[21] 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.
[22] For more information, see Scottish Human Rights Commission briefing *COVID-19: Care homes and human rights*, 14 July 2020.
[23] 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)
[24] https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=
[25] https://www.coe.int/en/web/portal/-/copenhagen-declaration-adopt-1
[26] *Handyside v United Kingdom* (1976) A 24.
[27] *Lee v The United Kingdom* ECHR 004 (2021).

[28] For example, the removal of sentencing discretion from the Executive, the lifting of the ban on homosexuals in the Armed Forces or, in a civil law context, the development of a law of privacy.
[29] *R (on the application of AB v Secretary of State for the Home Department* [2021] UKSC 28 as per Lord Reed at para 59.
[30] 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.
[31] ECHR Article 46(1).
[32] *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.
[33] Subject to section 6(2) of the HRA 1998.
[34] The UK Government's White Paper, Rights Brought Home: The Human Rights Bill (Cm.3872, 1997), at 2.5.
[35] *A and others v Secretary of State for the Home Department* [2004] UKHL 56, para. 29 per Lord Bingham.
[36] *Brown v Stott* [2003] 1 AC 681 at 703.
[37] *R v Director of Public Prosecutions, Ex p Kebeline* [2000] 2 AC 326, per Lord Hope of Craighead at 381.
[38] 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.
[39] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.
[40] Footnote 129 reads "Jury trials are a long-standing feature of Scottish criminal procedure, but there is no right to a trial by jury as such. Whether a trial will take place before a jury will generally depend on statutory provisions and the decision of the prosecutor."
[41] Vogt v Germany 1995 A 323, para 52
[42] *Goodwin v United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) at para 39
[43] (*Times Newspapers (nos 1 & 2) v UK* Applications 3002/03 and 23676/03 (ECtHR, 10 March 2009) at para 41
[44] For example, a far-right propagandist was charged with contempt of court after broadcasting footage of defendants in a sexual exploitation trial as they arrived at court. A defence based on freedom of expression was rejected, the court finding that the imposition of penalties for contempt of court represented a legitimate interference with the Defendant's Article 10 rights. (*Attorney General v Robinson,* [2020] Crim. L.R. 534 at para 91
[45] Schauer, Frederick, The Exceptional First Amendment (February 2005). KSG Working Paper No. RWP05-021, Available at SSRN: https://ssrn.com/abstract=668543 or http://dx.doi.org/10.2139/ssrn.668543
[46] *Citizens United v Federal Election Commission* 558 U.S. 310 (2010)
[47] *R(Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312
[48] In *R.A.V. v. City of St. Paul*, the US Supreme Court held that a prosecution for 'Bias-Motivated Crime' - based on the accused allegedly burning a cross on a black family's lawn - was held to be unconstitutional on the basis that "the First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *R.A.V. v. City of St. Paul* 505 U.S. 377 (1992) at 391
[49] *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033 [38]
[50] On the Police, Crime, Sentencing and Courts Bill, see JUSTICE House of Lords Report Stage Briefing on Part 3 (Public Order), available at: https://files.justice.org.uk/wp-content/uploads/2022/01/17145656/JUSTICE-PCSC-Bill-Part-3-Briefing-HoL-January-2022.pdf; On reform of the Official Secrets Acts, see *"Will Proposed Amendments To The Official Secrets Act Threaten Press Freedom?"* by Hannah Shewan Stevens (5 August 2021) available at: Will Proposed Amendments To The Official Secrets Act Threaten Press Freedom? | EachOther
[51] The right to an effective remedy is enshrined in many international human rights treaties, for example in Article 2.3 of the International Covenant on Civil and Political Rights.
[52] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 at para 71.
[53] ECHR Article 35(3)(b).
[54] ECHR Article 35(3)(b).
[55] HRA Section 7(2).

[56] SA Section 100(1)
[57] "*Police must not decide which criminals will be killed warns Union"*, The Times (Scotland), 24 February 2022
[58] *Osman v United Kingdom*, 1998-VIII, para 115.
[59] *S v L* 2013 SC (UKSC) 20, at para. 15-17.
[60] *Ibid.*
[61] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Rodger of Earlsferry at para 121.
[62] See *Smith v Scott* 2007 SC 345, where the court declined to read down legislation banning all convicted prisoners serving custodial sentences from voting.
[63] *Smith v Scott* 2007 SC 345
[64] *Burden v UK* App no 13378/05 (ECtHR , 12 Dec 2006)
[65] IHRAR see Chapter 5, paras 126
[66] *S v L,* 2013 SC (UKSC) 20 at para 15-17
[67] IHRAR, Chapter 5, para 200
[68] https://www.parliament.uk/about/how/laws/secondary-legislation/
[69] *Ibid.*
[70] HRA, Section 6(1).
[71] *Ibid.* Section 4(3) and 4(4).
[72] HRA, Section 6(2)(a).
[73] *Ibid.* Section 6(1).
[74] Does judicial review of delegated legislation under the HRA 1998 unduly interfere with executive law-making? Joe Tomlinson, Lewis Graham, and Alexandra Sinclair, UK Constitutional Law Blog, 22 Feb 2021.
[75] See for example *Regina (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57
[76] *Burden v UK* App no 13378/05 (ECtHR , 12 Dec 2006)
[77] *RR v Secretary of State for Work and Pensions* [2019] UKSC 52.
[78] 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."
[79] 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.
[80] *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, per Lady Hale at para 27.
[81] Current version of Bill includes new Section 29A(9) inserted into Senior Courts Act 1981 in following terms; "If— (a) the court is to make a quashing order, and (b) it appears to the court that an order including provision under subsection (1) would, as a matter of substance, offer adequate redress in relation to the relevant defect, the court must exercise the powers in that subsection accordingly unless it sees good reason not to do so." Judicial Review and Courts Bill (parliament.uk)
[82] See Annex A of the Explanatory Notes to the Bill Judicial Review and Courts (parliament.uk)
[83] See Lord President and Judicial Working Group Roundtable minutes, IHRAR Report, page 328
[84] Judicial Review and Courts Bill - JUSTICE
[85] According to the consultation paper, eleven remedial orders have so far been made under the Human Rights Act since it came into force in 2000
[86] Publication - NIHRC Submission to the Independent HRA Review Team's Call for Evidence | Northern Ireland Human Rights Commission
[87] The Commission of Justice in Wales Report, *Justice in Wales for the People of Wales* (October, 2019): https://gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL_2.pdf
[88] UK Independent HRA review: our response - gov.scot (www.gov.scot)
[89] SA 1998.
[90] *Ibid.* see sections 29 and 57 (as amended by the SA 2012).
[91] HRA 1998, Section 6.
[92] SA 1998, Section 29(1).
[93] *Ibid.* Section 4.
[94] *Ibid.* Section 28(8), as amended by the SA 2016.

[95] See for example our joint statement with Amnesty International Scotland, the Human Rights Consortium Scotland, JustRight Scotland and Making Rights Real (14 December 2021): Scottish human rights organisations unite to reject "unnecessary, regressive and divisive" plans to replace Human Rights Act. See also submissions to IHRAR from the Faculty of Advocates, the Law Society for Scotland, the Jimmy Reid Foundation, Scottish Care Alliance and the Scottish Alliance for Children's Rights, available at: Independent Human Rights Act Review - GOV.UK (www.gov.uk)
[96] '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 HRA 1998 Written evidence to the Joint Committee on Human Rights' (2018), Scottish Human Rights Commission.
[97] See: New Care Standards | Review of Scotland's National Care Standards
[98] See: Submission_from_NHS_Health_Scotland.pdf (parliament.scot)
[99] '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.
[100] 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.
[101] 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/
[102] See 'A fairer, greener Scotland - Programme for Government 2021-22' at page 35, available at fairer-greener-scotland-programme-government-2021-22 (3).pdf
[103] See United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill
[104] See SHRC submission on the UN CRC (Incorporation) (Scotland) Bill consultation and SHRC briefing for Stage 2 of the Bill.
[105] Van der Musselle v Belgium (1983) 6 EHRR 163; Costello-Roberts v UK (1993) 19 EHRR 112.
[106] *LW and others v Sodexo and Secretary of State for Justice* [2019] EWHC 367 (Admin), [2019] 1 WLR 5654
[107] Ali (Iraq) v Serco Ltd [2019] CSIH 54
[108] See JCHR Seventh Report of Session 2003–04 and Ninth Report of Session 2006–07
[109] *YL v Birmingham City Council* [2007] UKHL 27
[110] *R (Quila and another) (FC) v Secretary of State for the Home Department* [2011] UKSC 45
[111] IHRAR Report, Chapter 3, paragraph 44
[112] Articles 8-11 ECHR
[113] We note that in paras 290 and 291 the Government refer to limited rights, apparently failing to distinguish these from qualified rights. This difference is significant, especially in relation to the grounds on which interference with the rights may be permitted.
[114] *Sporrong and Lonnroth v Sweden* (1982) A 52, para 69
[115] *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26
[116] IHRAR Report at page 95
[117] IHRAR Report, Chapter 3, paragraph 50
[118] "Under our proposals, we will be able to prevent serious criminals from relying on article 8, the right to family life, to frustrate their deportation from this country." Domenic Raab, House of Commons debate, Tuesday 14 December 2021 Human Rights Legislation - Hansard - UK Parliament
[119] "If he [Steve Reid, Member for Croydon North] wants to come down hard on drug dealers and serious offenders whom we should remove from this country, he should back our proposals to allow them to be deported." Domenic Raab, House of Commons debate, Tuesday 14 December 2021 Human Rights Legislation - Hansard - UK Parliament
[120] For instance, in *AD (Turkey)* (cited on page 38), the Judge's findings included; that he entered a guilty plea (albeit at a late stage); that his actions in committing the index offence were very much out of character and he has expressed remorse; that he was a model prisoner and was on unconditional bail; that he lived in the UK for over 30 years and was socially and culturally integrated in the UK; that he had no ties with Turkey and would have start anew if sent there; that he has a genuine and subsisting relationship with his wife and has a close and supportive family unit with his adult children

and step-child and grandchildren; that the claimant's adult son, R, is unwell with Crohn's disease and is reliant on his father for assistance.

[121] *McCann v United Kingdom* [1995] 21 EHRR 1997.

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

[123] 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/

[124] HRA 1998, section 19.

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

[126] 50 Human Rights Cases That Transformed Britain | EachOther

[127] '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).

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

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

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

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

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