



Law Society  
of Scotland

# Law Society Scotland

## Human Rights Act Reform: A Modern Bill of Rights – The Government's Proposals

March 2022



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law and Human Rights Sub-committee with assistance from our Immigration and Asylum Law, Employment, Equalities Law, Mental Health and Disability, Privacy Law and Obligations Subcommittees, welcomes the opportunity to consider and respond to the Government's consultation: Human Rights Act Reform: A Modern Bill of Rights. The sub-committee has the following comments to put forward for consideration.

## General Comments

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### Introduction

#### A Modern Bill of Rights and Convention Rights in Scotland

We are reassured that the consultation *Human Rights Act Reform: A Modern Bill of Rights* makes it clear in paragraph 183 that: Under these proposals, the *UK would remain party to the Convention, with the rights in the Convention sitting at the heart of a Bill of Rights* and in paragraph 184 that: *The rights as set out in Schedule 1 to the Human Rights Act will remain.*

This will go some way to respecting the rule of law and help to ensure that the UK complies with its international obligations under the ECHR and the Trade and Cooperation Agreement between the UK and the EU articles 524 and 763. However, the repeal of the Human Rights Act 1998 is likely to cause confusion as to the respect which the UK accords human rights and to create a lack of clarity and coherence in the application of the law.

We do not however agree with the conclusion expressed in paragraph 184 that: *The key problems have arisen from the way in which those rights have been applied in practice, at both the Strasbourg and domestic levels.*

Given that there is no intention to withdraw from the Convention, a major cost of making it harder to secure a domestic remedy which appears to be an objective of the consultation will be increased recourse to and possible success to some litigants at Strasbourg.

It is important, however, to point out in relation to the application of Convention Rights in Scotland that questions as to whether Acts of the Scottish Parliament ("ASP") or subordinate legislation or other

executive acts by Scottish Ministers are incompatible with Convention rights, are usually not dealt with under the Human Rights Act (HRA) (although they could be) but under the Scotland Act 1998 (SA).

Under section 29(1) and (2) (d) of the SA, a provision in an ASP is “not law” if it is incompatible with any of the Convention rights. Accordingly, any challenge to a provision in an ASP on the grounds that it is incompatible with a Convention right is a “devolution issue” and, as such, requires to be brought under the SA. This is so even although an ASP also is included in the definition of “subordinate legislation” in section 21 of the HRA and so could also be regarded as unlawful under section 6(1) of that Act

Similarly, under section 57(2) of the SA, a member of the Scottish Government has “no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights.” Accordingly, any challenge to such an act on that ground can be brought under the SA even although that act is also unlawful under section 6(1) of the HRA.

It was originally held by the Judicial Committee of the Privy Council that the challenge to executive acts by a member of the Scottish Government had to be brought under the SA ( see R v HMA 2002 UKPC D3 Lord Rodger at para 128 ) but it was later held by the Appellate Committee of the House of Lords that it could be brought under either Act but, if it was brought under the Scotland Act, it was not subject to the procedural restrictions in the HRA, such as the time bar for claiming damages in section 7(5) of the HRA ( Somerville v Scottish Ministers 2007 UKHL 44).

The specific point in issue of this decision has been resolved by amendment of the SA which has harmonised the time bar provisions between the two Acts. However, the key point is that under the SA the Scottish Ministers have no defence to a breach of Convention Rights under the SA as they do under section 6(2) of the HRA

There have been five cases to date in which Scottish Parliament legislation has been held to be ‘not law’. These cases all relate to specific provisions within the statutory scheme rather than to the statute itself or the overall policy objectives. Christopher McCorkingdale, Aileen McHarg and Paul Scott in *The Courts, Devolution and Constitutional Review 36 U. Queensland L.J.289 (2017)* identify that this is so because “the Supreme Court has so far adopted something of a ‘dialogic’ remedial approach as opposed to a rigid and final strike down”.

18 ASPs have been subject to judicial review. 12 on the basis that incompatibility with Convention rights was the dominant ground of challenge. Five cases succeeded on Convention rights grounds: *Cameron v Cottam 2013 JC 12*; *Salvesen v Riddell 2013 SC (UKSC) 236*; *Christian Institute v Lord Advocate 2017 SC (UKSC) 29*; *P v Scottish Ministers 2017 SLT 271*; *AB v HMA 2017 SLT 401*. In two of the three successful civil challenges, Salvesen and Christian Institute, the Supreme Court exercised its discretion under section 102(2)(b) of the Scotland Act 1998 to suspend the effect of its decisions (that section 72(10) of the Agricultural Holdings (Scotland) Act 2003 and the information sharing provisions of Part 4 of the Children and Young People (Scotland) Act 2004 respectively) were incompatible with Convention rights. This allowed an opportunity for the Scottish Parliament and the Scottish Ministers to take measures in order to remedy the incompatibilities. McCorkingdale, McHarg and Scott argue that this dialogue between the Court and the devolved institutions is clear in the Christian Institute case in which the Court felt it ‘inappropriate to

propose particular legislative solutions' but warned the executive and legislature that minimal amendments that failed to address the breach would run the risk of further judicial sanction.

In the criminal cases *Cameron* and *AB*, each of which raised 'compatibility issues' relating to criminal procedure – the decisions that section 58 of the Criminal Justice and Licensing (Scotland) Act 2010 and section 39(2)(a)(i) of the Sexual Offences (Scotland) Act 2009 respectively were 'not law' were returned to the High Court of Justiciary (Scotland's supreme criminal court) for it to determine whether or not to suspend or to vary the effects of the resulting invalidity.

Another feature which the consultation does not address is that of legislative consent. This was referred to in the Joint Committee on Human Rights Third report of session 2021-2022, *The Government's Independent Review of the Human Rights Act* at paragraph 253 which acknowledges:

"It has also been argued that amending the HRA would require the consent of the Scottish Parliament. Section 28 of the SA states that "it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament". This is the statutory expression of what is known as the Sewel Convention. Although in *Miller 1* the Supreme Court found that the convention was not legally enforceable despite its statutory entrenchment, they emphasised that the convention has an important role in facilitating harmonious relationship between the UK Parliament and the devolved legislatures.

254. There is no clear consensus as to the extent to which human rights are a devolved matter. The SA specifically prohibits the Scottish Parliament from amending the HRA. However, whilst the conduct of international relations is reserved, "observing and implementing ... obligations under the Human Rights Convention" is specifically excluded from this. Thus, it is argued that responsibility for the observation and implementation of human rights is at least to some extent devolved to the Scottish Parliament."

We endorse the position that if a Modern Bill of Rights affects the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers the consent of the Scottish parliament will be necessary.

There is a further matter to be taken into account, namely that the jurisdictions of the Court of Session and the High Court of Justiciary are matters of constitutional significance. This can be seen from Article XIX of the Acts of Union of 1706 and 1707, whose opening provision states:

"That the Court of Session or College of Justice do after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same Authority and Privileges as before the Union subject nevertheless to such Regulations for the better Administration of Justice as shall be made by the Parliament of Great Britain." And in relation to the High Court "And that the Court of Justiciary do also after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same Authority and Privileges as before the Union subject nevertheless to such Regulations as shall be made by the Parliament of Great Britain and without prejudice of other Rights of Justiciary". We take the view

that any change to Human Rights law resulting from the Modern Bill of Rights must respect the fundamental precepts of the Scottish Legal System.

## Specific Questions

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### Respecting our common law traditions and strengthening the role of the UK Supreme Court

- 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.**

### Our Comment

The Scottish domestic courts are already able to draw on a wide range of legal sources including legislation, legal precedent arising from court cases, academic writings published by 18th and 19th century lawyers known collectively as the Institutional Writers and Custom. Scottish courts can and do draw on sources of Roman law, decisions of Commonwealth courts, and other relevant jurisdictions dependent upon the issues involved.

In light of the above, we wish to take the opportunity here to re-emphasise that Scotland has a distinct legal system, derived from a number of sources and with its own court structure, procedures and institutions. Moreover, at the heart of the modern Scots legal system is the devolution settlement, as set out in the Scotland Act. Amongst other provisions that in effect defines the legislative competence of the Scottish Parliament and the executive competence of Scottish Ministers by reference respectively to legislation or actions not being incompatible with “Convention rights”. These distinct features of our legal system need fully to be taken into account if the Government intends to apply its proposed legislation to Scotland.

Options 1 and 2 of the draft clauses make it clear that what is intended is that a court must follow domestic decisions and not Strasbourg decisions. Courts therefore would be able to overturn HRA and ECtHR precedents (incidentally creating uncertainty and lack of clarity in the law). Courts may also take account of judicial decisions in other countries or on international law.

In relation to options 1 and 2 we have the following comments to make:

- a. These clauses simply reinforce the domestic order of precedent and reinforce that a domestic court is not required to follow Strasbourg case law. Is this necessary? Section 2 at present does not require that case law to be followed but merely that account should be taken of that law. It is the courts which have indicated that in certain circumstances it should be followed. Is that not sufficient?

- b. **Option 1.** The drafting of option 1 is unnecessarily complex. Why is the title of option 1 “interpretation of rights and freedoms” whereas option 2 concerns “interpretation of rights” alone? Declaring decisions under the HRA non-binding in particular seems to run contrary to the claimed Page 6 intention of the Act to increase legal certainty and reduce judicial discretion. By treating all decisions made under the HRA as non-binding, this provision creates considerable legal uncertainty, which is unnecessary given that it is and always has been open to parliament to reverse particular decisions that it disagrees with.
- c. In subsection (2) the phrase, “is not necessary” will create a lack of clarity in the law. Subsection (2) impinges on judicial discretion and fails to provide adequate guidance to the court when interpreting the Bill of Rights.
- d. Subsection (4) seeks to create binding precedent in relation to the Bill of Rights which would apply across all UK Courts and Tribunals. This provision fails to acknowledge the provisions of the Acts of Union 1706 and 1707 which preserve the distinct legal system in Scotland. At present the decisions of English or Northern Irish Courts are not binding in Scotland although they may be highly persuasive.
- e. Will the reference to “judicial authority” in subsection 5 also include decisions of treaty bodies under various international treaties?
- f. How does subsection (6) apply in face of the provisions of Article 46 ECHR? Is the UK derogating from that provision? This subsection will require to acknowledge the different arrangements for courts in Scotland.
- g. Subsection (8) refers to following precedent required “by any law”. What is meant by this phrase? Does it include case law? This, alongside subsection (4) is very confusingly drafted. Unless it is intended to change the order of precedence, it seems unnecessary to state it. For example, subsection. (4) seems to require courts to follow decisions of other courts on the same level, but these are not usually binding, so it appears to be immediately negated by subsection (8). The same applies to the point about decisions from other legal systems within the UK
- h. **Option 2.** With regard to Option 2 see our earlier comment regarding the title of the draft section. This provision fails to acknowledge the provisions of the Acts of Union 1706 and 1707 which preserve the distinct legal system in Scotland in particular in relation to criminal law issues.
- i. In subsection (3) what does it mean to have particular regard?
- j. The policy aim is presumably to exclude the ‘living tree’ conception of the ECHR. But is the intention to exclude the rights of those with protected characteristics
- k. The express provision that account may be taken of the preparatory work of the European Convention is intended to inhibit a court from having regard to any development in its case law. Is this also necessary?

- l. Subsection (4) seeks to create binding precedent in relation to the Bill of Rights which would apply across all UK Courts and Tribunals. This provision fails to acknowledge the provisions of the Acts of Union 1706 and 1707 which preserve the distinct legal system in Scotland. At present the decisions of English or Northern Irish Courts are not binding in Scotland although they may be highly persuasive.
  - m. What is a “similar” right or freedom?
  - n. Does this imply that there is one common law in the UK?
  - o. Limiting (5) (b) to “a common law jurisdiction outside the United Kingdom” fails to respect the distinctive traditions of the Scottish legal system. This would appear to exclude for example comparative jurisprudence from the South African Supreme Court.
  - p. There may be a need for an amendment, in the interests of clarity, if a situation arises where a UK court has made a ruling, and an inconsistent decision is subsequently issued by the European Court of Human Rights in Strasbourg. However, is there an instance where domestic courts have refused to follow higher domestic courts by adopting inconsistent decisions from the European Court of Human Rights in Strasbourg?
- 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?**

### **Our Comment**

We question the need for any clarification of the role of the UK Supreme Court.

We agree that the Supreme Court is the final court of appeal for all United Kingdom civil cases and for criminal cases from courts in England, Wales and Northern Ireland. It cannot consider a case unless a relevant order has been made in a lower court. Its jurisdiction comprises appeals on arguable points of law of general public importance.

The Supreme Court is the highest court of appeal in Scottish civil cases. An Appellant must obtain permission to appeal from the Court of Session or if permission is refused, from the Supreme Court. Civil appeals may involve an issue of human rights law, which may be a ‘devolution issue’

In Scottish criminal cases, the High Court of Justiciary sitting as an appeal court is the final court of appeal. Its decisions are not subject to review by the Supreme Court. This reflects Scotland’s distinctive tradition of criminal law and procedure. There is one exception to this rule: the Supreme Court can consider ‘devolution issues’ arising from Scottish criminal cases. Some criminal case devolution issues are compatibility issues under the Scotland Act 2012

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

**Our Comment**

In the Scottish context there is no “right” to trial by jury whether “qualified” or not and accordingly, this question is irrelevant.

This proposed provision would appear to undermine the universality of the Bill of Rights as it would not apply in Scotland. Furthermore, the proposal will not create any new rights beyond what the law already recognises, and therefore seems to be redundant. There would appear to be no need to include such a right in the Bill of Rights.

**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?**

**Our Comment**

The protections under section 12 of the Human Rights Act 1998 are already robust. In the context of restraining the freedom of expression, this is generally achieved through injunctions (in England and Wales) and interdicts (in Scotland). Section 12(3) applies to such relief: *“No such relief is to be granted so Page 8 as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.”*

Unlike actions for interdict in contractual matters, the party seeking interference in a case engaging article 10 rights requires to plead not only a prima facie case but show that the party is *“likely to succeed at proof”*. In practice, this means that at any interim orders hearing to be fixed, there may be a mini-proof with submissions based on various documents lodged with the court.

Without reaching a final conclusion on those matters, the court assesses the strength of the cases pled by the parties at that early stage.

The court must also consider the “balance of convenience” in determining whether or not to impose an order which interferes with article 10 rights. Following the case of *Massie v McCaig [2013] CSIH 14*, the court should consider the status of the publications in dispute and carry out a balance of the article 8 rights asserted by the party seeking to prevent publication, and the article 10 rights of the party seeking to protect publication.

These considerations are enshrined in statute, with section 12(4) containing a specific requirement to consider the strength of the right of expression, particularly where the material is already public or where there is a strong public interest.

Article 10 is therefore already protected by the mechanisms in section 12 and any party seeking to curtail the right to freedom of expression requires to show that they are likely to prevail in their action. One might speculate that if the balance of rights, on current analysis, would lead to a publication being restricted, then any legislative interference would require greater weight to be placed on article 10 rights from a statutory perspective. In other words, article 10 automatically carries greater weight than article 8.

If there is a concern about the way the courts have been approaching the tension between Articles 8 and 10, and the resulting development of a privacy jurisprudence, the more appropriate response may be for Parliament to legislate on privacy law rather than seeking to put greater weight on Article 10 in the hope that the jurisprudence will develop in a particular way.

The use of the word “injunctions” in the question indicates that the consultation was written from the point of view of the law of England and Wales.

- 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?**

### **Our Comment**

The consultation paper appears to conceive of the right to freedom of expression simply in negative terms, i.e. preventing interference with the right. However, this ignores the positive obligation inherent in Convention Rights, including the right to receive and impart information under article 10 ECHR.

We believe that it would be useful for the Government to clearly set out what its concerns are and what the desired outcome is. The following points arise:

1. Article 10 is not only about protecting freedom of expression, it seeks to protect freedom to receive information.
2. To strengthen rights to impart information, as well as strengthening rights to receive information from different sources, the positive obligations under Article 10 must be considered, i.e. what can be done to assist people to exercise their rights, beyond removing obvious obstacles.
3. The scope for interference with article 10 is already limited to exceptional circumstances, where the Pursuer’s article 8 rights outweigh a publisher’s article 10 rights. Giving article 10 “utmost importance” ought not to be equated with priority, over article 8 rights. Article 8 should also be viewed as of “utmost importance”. There are certain articles which, by their very nature, are of strong public interest. These articles invariably rely on the qualified privilege defences (such as the well-known “Reynolds” defence,

now codified as a public interest defence within the recent Defamation Act 2013 and Defamation and Malicious Publication (Scotland) Act 2021).

4. We are unsure that changing the courts' approach to Article 10 could simply be a matter of guidance. Article 10 is itself heavily qualified, and so may simply be incapable of providing the strong protection for freedom of expression that the Government seems to desire. If guidance would be an appropriate solution to concerns about Article 10 rights, the courts would not be the most appropriate recipient for that guidance. *Miller v College of Policing* [2021] EWCA Civ 1926 illustrates that police guidance and practice on matters impinging on freedom of expression can disclose misunderstandings about Article 10 protections. It is important that the police understand the extent to which they are required to respect freedom of expression. Guidance to the police could produce better results than any legislative changes.
5. Relevant to this are the points made later in our response, that the ECHR is a "floor not a ceiling" (at Q23) and so Parliament could make the right less qualified; that the ECHR took that lowest common denominator in order to encourage states with diverse legal traditions to accede (Q19); and that the UK approach to (at least) the conflict between Articles 8 and 10 is not out of line with other European models (Q5). These all suggest that Article 10 is not necessarily even intended to provide the level of protection that the Government appears to desire, regardless of any guidance that might be produced.
6. Strengthening the right may therefore require legislation to supplement Article 10. For example, legislation might more narrowly prescribe the circumstances in which Article 10 rights can be interfered with, given that concepts such as "necessary in a democratic society", "public safety", "prevention of Page 10 disorder", "protection of health or morals" and the "rights of others" (which are not limited to other Convention rights) are fairly elastic concepts that may be appropriately vague in an international treaty but need not be left so open to interpretation at the national level.
7. In any event, if the right is insufficiently respected the Government should not be limit the review to the Human Rights Act and Article 10. A general review of the legislation that criminalises expression would be important. For example, the Communications Act 2003 section 127, which the Law Commission has recommended be replaced, has been used in several recent cases to imprison people for posting comments and videos online. Such a review would probably be necessary to understand what existing legislation might be incompatible in the event that the scope for state interference with freedom of expression were to be limited, but (to the extent the Government is genuinely concerned about interferences with the right) would be a productive exercise in its own right.

There are other articles which are of lesser public interest, and do not contribute to a discussion of any interest in society. Gossip magazines are often categorised as being interesting to the public, but not of public interest. Guidance from the European approaches to the conflict between article 8 and article 10 suggest that our approach is in line with the European models for protecting free speech.

There are different qualities of publication, each of which attracts different protections under article 10. The same is true of article 8, and it is correct that cases should be assessed on their individual merits, rather than being automatically weighted by statute or guidance.

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

### Our Comment

The ability to receive information from a variety of sources is vital to protect freedom of expression, for all citizens. In the case of journalists, non-disclosure of information by Government and public bodies militates against freedom of expression in its true sense, particularly in relation to investigative journalism, which is key to democratic accountability of those in positions of power. Obtaining information is an essential preparatory step for journalists.

In the case of *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC], § 128* the judgment of the Grand Chamber set out the approach to the protection of freedom of expression, but also privacy, in terms of the balance to be found, along the lines of application of the public interest test under Freedom of Information law (where there is a requirement to balance the public interest against individual interests in respect of requests for third party personal data).

See also *Magyar Helsinki Bizottság v. Hungary (2016)[GC] No 18030/11*; *Guseva v. Bulgaria (2015) [GC]No 6987/07*; *Shapovalov v. Ukraine [2011] ECHR 1394*

Journalist's sources are already protected to a significant extent. Section 10 of the Contempt of Court Act 1981 states: *"No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."*

The practical effect of this is that even if a Pursuer required a publisher to disclose their source, or obtained a court order to that effect, the Publisher is not required to disclose the source. Whilst there is an exemption to that rule for "the interests of justice", the interests must be cogently stated and significant, to deviate from the statutory protection which is being provided. It is extremely uncommon for a source to be unveiled by court order.

GDPR and the Data Protection Act 2018 must also be considered when seeking to publish personal data, recognising that journalistic and literary purposes benefit from special conditions for processing personal data, including publication. The Courts may benefit from further guidance about where the balance lies when weighing the public interest in publication of information against the privacy of individuals and the factors to take into account, to bring consistency in decision making, with individuals treated equally before the law.

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

### Our Comment

For the reasons stated earlier in this response, the right to freedom of expression carries significant weight. It is not easy to obtain injunctory relief and a person seeking such an order must satisfy a court that their article 8 rights are unduly infringed by what is sought to be published, and that the balance of convenience falls in favour of restricting the publication. When considering whether that is the case, and the public interest is taken into account, the Pursuer's argument becomes more difficult and the balance falls towards the publisher. Generally, a publisher's reason for publishing is that there is a public interest in doing so, so the party seeking to interfere with the article 10 right requires first to upset that position. Article 10 need not be strengthened any further.

In terms of access to justice, steps could be taken to provide for any hearing to prevent publication of information to be dealt with speedily, given that parties seeking to prevent publication may attempt to string out proceedings over time, to control the timing of any subsequent publication. This could be used as a technique to 'kill' a story, but also to add to costs for those seeking publication. Consideration should be given to a quicker procedure and more accessible in terms of costs, to decide on whether information can be published.

Any steps to strengthen further the protection already afforded to freedom of expression should be mindful that this right can come into conflict with article 8 rights (as well as equality rights more generally) in situations other than those concerning freedom of the press. In employment, for example, employees and employers could seek to rely on freedom of expression rights as justification for actions which would Page 12 otherwise infringe the equality rights of others in the workplace. Any amendments which affect the weight to be afforded freedom of expression should, therefore, take into consideration the need to ensure a fair balance of rights in all contexts.

II. Restoring a sharper focus on protecting fundamental rights

## 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.

### Our Comment

We do not agree that creating a permission stage as proposed in Question 8 would be an effective way of making sure the courts focus on genuine human rights matters.

The HRA section 1(1) provides that:

*A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—*

- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
- (b) rely on the Convention right or rights concerned in any legal proceedings,
- but only if he is (or would be) a victim of the unlawful act.*

Section 7(7) provides that, a person is a victim of an unlawful act ‘only if he would be a victim for the purposes of Article 34 of the Convention...’

Article 34 states that:

*The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto*

Article 34 continues to set out that “The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”. If the proposal to require 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 constitute a hinderance of the effective exercise of their rights as victims of contraventions of human rights, that would of itself constitute a violation which would be actionable.

The Practical Guide on Admissibility Criteria published by the European Court of Human Rights notes that “victim”, in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly Page 13 affected by the alleged violation. Hence, Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end (*Vallianatos and Others v. Greece* (paragraph18) [https://www.echr.coe.int/documents/admissibility\\_guide\\_eng.pdf](https://www.echr.coe.int/documents/admissibility_guide_eng.pdf) .

See our comment in relation to Article 35 in our answer to Question 9 below.

Furthermore, the recent case of *R (on the application of Reprive and others) v Prime Minister [2021] EWCA Civ 972* provides useful guidance as to who is considered a victim for the purposes of a human rights claim.

Reprive, a non-governmental organisation, and two MPs judicially reviewed the Prime Minister’s decision not to hold a public inquiry into the alleged complicity of British state agents in the unlawful rendition, detention, and mistreatment of individuals by other states in the years following the 9/11 attack on New York. The Court of Appeal held that the claimants were not victims within the meaning of the Human Rights Act 1998 (HRA 1998) and that Article 6(1) of the European Convention on Human Rights (ECHR) therefore did not apply to the claim

This case clearly demonstrates that the courts are aware of what constitutes a genuine human rights case and who may bring such an action. Indeed, the current permission stage in Judicial Review proceedings should already filter out claims that are unmeritorious on the substance. The current approach to remedies allows discretion to take account of how ‘deserving’ an applicant for relief is.

**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.**

**Our Comment**

A permission stage is currently in place in cases of judicial review. In Scotland the tests to meet are that the applicant has sufficient interest and real prospects of success (Court of Session Act 1988 section 27B(2)). Creating a permission stage in human rights cases would be unreasonable especially if the test for granting permission was set too high. If the Government conclude that a permission stage is needed it should follow Article 35 which provides that an application to the European Court of Human Rights may be inadmissible if: (a) the application is incompatible with the provisions of the Convention... manifestly ill-founded, or an abuse of the right of individual application; or (b) the 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. As there is already the deployment of a significant disadvantage test in ECHR procedure

Richard Clayton QC makes clear in his UK Constitutional Law Association blog, Richard Clayton QC: The Government’s New Proposals for the Human Rights Act Part 2: An Assessment – UK Constitutional Law Association: “*The ECtHR has interpreted these amendments to Article 35 restrictively. The “significant disadvantage” test has not been applied to cases concerning Article 2 (Makuchyan and Minasyan v Azerbaijan and Hungary, 26 May 2020 §§ 72-73), Article 3 (Y v Latvia, 21 October 2014 § 44) or Article 5 (Zelčs v Latvia, 20 February 2020 § 44). The “significant disadvantage” criterion should take due account of the importance of the freedoms and be subject to careful scrutiny in relation to cases concerning Article 9 (Stavropoulos v Greece, 25 June 2020 §§ 29-30), Article 10 (Margulev v Russia, 8 October 2019 §§ 41-42; Sylka v Poland, 6 April 2021 § 28; Panioglu v Romania, 8 December 2020 §§ 72-76) and Article 11 (Obote v Russia, 19 November 2019 § 31; Yordanovi v Bulgaria, 3 September 2020 §§ 49-52)*”.

We believe the significant disadvantage test is fairly stringent but, if there is to be a permission stage, we agree that there should be an “overriding public importance test” for cases which fail it.

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

**Our Comment**

See our comment in relation to Question 8. This is a matter which should be left up to the courts who are well able to deal with such matters. The consultation paper lists examples of perceived ‘abuses’, but there is no way of quantifying how significant these are in terms of the overall HRA caseload, and therefore whether any new constraints would be proportionate

**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.**

## Our Comment

The Government should detail the positive obligations which concern it. The Bill of Rights should ensure that public authorities comply with the law as contained in the HRA. Acting compatibly with Convention Rights is the easiest and most cost-effective way to prevent human rights litigation.

### III. Preventing the incremental expansion of rights without proper democratic oversight

#### 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.*

## Our Comment

Section 3 of the HRA provides:

*(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*

*(2) This section—*

*(a) applies to primary legislation and subordinate legislation whenever enacted;*

*(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and*

*(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility*

Section 3 is not simply about the interpretation of legislation it encapsulates aspects of the separation of powers and Parliamentary sovereignty. Making changes to section 3 would raise the prospect of further constitutional change to the distribution of powers between the legislature, the executive, and the judiciary.

Section 3 requires the courts, so far as it is possible to do so to read and give effect to primary and subordinate legislation “in a way which is compatible with Convention Rights”. Page 16 Some cases appear to envisage a stronger role for section 3 than others. *Regina v A* [2001] UKHL 25 is the example usually cited as having gone too far. The approach of the majority in *Ghaidan v GodinMendoza* [2004] UKHL 30 seems more representative. The choice between using section 3 or section 4 turns not only on a question of what is linguistically possible, but rather involves a contextual assessment of the limits of judicial law-making in the context of each case. Similarly exercise of judicial deference involves a

contextual analysis of the court's institutional competence to make judgments about whether rights have been breached. This mirrors the nature of the margin of appreciation doctrine.

The courts acknowledge that section 3 will not allow them to interpret Convention Rights in such a broad or expensive way to touch on matters of policy. In such circumstances, they will leave Parliament to legislate on such rights in law.

As Lord Neuberger said recently to the Joint Committee on Human Rights, "As for the reading down point, Section 3 of the Act, as Dominic Grieve has said, enshrines a principle that is applied generally, but it ensures that judges are able to do their utmost to enable a statute to comply with the Human Rights Act. There is, of course, the protection of Section 4, the declaration of incompatibility, if it does not". (Joint Committee on Human Rights Oral evidence: The Government's Independent Human Rights Act Review, HC 1161 Wednesday 27 January 2021Q5 page 11)

The Government's objectives in relation to section 3 of the HRA are stated in the Consultation Paper to "prevent the incremental expansion of rights without proper democratic oversight, including by limiting the duty on UK courts to reinterpret legislation enacted by Parliament, and by clarifying restrictions on deportation, but also touching on other aspects of the rights framework."(paragraph 232).

[Section 3](#) gives courts the ability to adopt statutory interpretations that comply with Convention rights (as defined in Schedule 1 to the HRA), even where the ordinary, unambiguous meaning of a statute would result in a breach of Convention rights, as long as it is "possible" and not against the thrust of the legislation. [Professor Richard Ekins and Professor Graham Gee](#) have stated that section 3 "authorises judicial lawmaking". [Professor Ekins](#) has suggested that "section 3 should be amended to specify that it does not authorise courts, or anyone else, to read and give effect to legislation in ways that depart from the intention of the enacting Parliament.

Florence Powell and Stephanie Neddleman in their Constitutional Law Association Blog: [Florence Powell and Stephanie Neddleman in their Constitutional Law Association](#) analysed these assertions.

This research found that relatively few cases in which section 3 was decisive to a case's outcome. However, when it was, its use, although important, was not radical. The courts have been vigilant to not undermine Parliament's intention.

Powell and Neddleman found that "Section 3 is used infrequently. When the courts have relied upon s.3, its use is generally neither radical nor contrary to Parliament's intention. In practice s.3 is not regularly being used by the courts to "unsettle the legal meaning and effect of legislation" as Professor Ekins suggests, rather we found that s.3 was often used to address unforeseen drafting issues or factual situations that clearly fell within the overall intention of the legislative scheme. This is not the same as interpreting statutes in a manner inconsistent with Parliament's intention and can in fact ensure that Parliament's overarching intention is realized."

They go on to state that the section has "been crucial in protecting Convention rights and realising Parliament's overarching intention. The cases identified above, although not radical, arguably depended on

s.3 to protect important rights. Under the common law principle of legality, a rights-compatible interpretation is not possible in the face of clear unambiguous language (see *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, [157] (Lord Diplock.)). However, s.3 has allowed courts to interpret such language, the Convention-breaching consequences of which Parliament could not have intended, in a rights compatible manner.” Lord Diplock’s famous dictum: “Parliament makes the laws, the judiciary interpret them” applies.

Furthermore, Powell and Neddleman identified 34 cases where section 3 was used to support an interpretation that was reached using normal principles of statutory interpretation. They state, “In about two-thirds of these cases the court reached a conclusion using a common law method, and then either considered how the application of section 3 and the Convention to the legislation would reach the same result (see for example *Re X (A Child) (Parental Order: Time Limit)*), or recognised that their conclusion was also Convention-compliant. For instance, in *R. (on the application of Stern) v Horsham DC* the court’s conclusion was “powerfully reinforced” by Article 6”.

We take the view that this research demonstrates that section 3 does not pose a threat to the rule of law. Instead, section 3 is an interpretative tool that is rarely relied on by the courts, but when it is used, the courts have done so to protect Convention rights in way which maintains the constitutional separation of power. In the Scottish context section 101 of the Scotland Act 1998 provides guidance to the court to read Acts of the Scottish Parliament “as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly”. This has not presented the courts with any significant problem and serves the devolution arrangements well.

Accordingly, we do not agree with either option 1 or 2. In our view the proposed alternative clauses would create new uncertainties and are not well drafted.

We have the following points to make on the draft clauses:

- a. **Option 2A** The inclusion of (1)(a) and (b) introduce a lack of clarity in interpretation. The Law Commissions in their Report on Interpretation of Statutes (1969) note that when faced with a difficult problem of interpretation “the courts may be too readily attracted to the apparently simple course overlying on what is said to be the plain and ordinary meaning of particular words without sufficient weight to other considerations which might suggest a different meaning”. The use of the phrase “an ordinary reading of the words used” appears to rely on the use of literalism in statutory interpretation. This was a doctrine which even in 1969 had been repudiated by the courts.
- b. The reference to the 1978 Act should include section 21(1) of that act. c. Option 2B Our earlier comments on literal interpretation apply. Why is the wording of (1)(a) different in each option? d. The reference to the 1978 Act should include section 21(1) of that ac
- c. **Option 2B** Our earlier comments on literal interpretation apply. Why is the wording of (1)(a) different in each option?
- d. The reference to the 1978 Act should include section 21(1) of that act.

Our view, therefore, is that on the whole the courts are aware of where the limits lie when determining rights and applying section 3 acknowledging the broad context, the role of Government and the concept of Parliamentary sovereignty. Accordingly, we do not agree with either option in question 12 of the consultation.

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

#### **Our Comment**

We agree with the IHRAR Panel's recommendation to improve Parliament's role, that "Parliament could and should take a more robust role in rights protection, a role which could sensibly be reinforced via an enhanced role for the JCHR" (Chapter Five, paragraphs 7 and 120) [The Independent Human Rights Act Review 2021 \(publishing.service.gov.uk\)](#)

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

#### **Our Comment**

We agree that a new database should be created to record all judgements which rely on section 3. Parliament's ability to reverse unwanted section 3 interpretations might be limited in practice by lack of knowledge. It could be a separate database maintained by the Ministry of Justice or included in notes relevant to section 3 being added to [www.Legislation.gov.uk](http://www.Legislation.gov.uk) Such a database should also include decisions which involve section 4. Such a database will also be of benefit to legal advisers advising and representing clients involved in cases in which section 3 is relevant.

### **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**

#### **Our Comment**

No. Under section 4(2) the court has a discretion to make a declaration of incompatibility if it is satisfied that a provision in an Act of Parliament is incompatible with a Convention right. Section 4(6) preserves parliamentary sovereignty by providing that a declaration of incompatibility does not affect the validity, operation, or enforcement of the law to which it refers. The law is not affected by the declaration. It is a matter for Parliament to change the law. Furthermore, the declaration is not binding on Ministers.

An example which shows how section 4 is designed to operate and how the court and Parliament dealt with it in practice is the case of *Bellinger v Bellinger (2003) UKHL 21*. As a result of this Page 19 decision Parliament enacted the Gender Recognition Act 2004 which provides legal recognition for those who have undergone gender reassignment. decision Parliament enacted the Gender Recognition Act 2004 which provides legal recognition for those who have undergone gender reassignment.

In the light of the operation of section 4 since the HRA came into effect, we take the view that the HRA section 4 should not be amended to protect secondary legislation from invalidation on the grounds of incompatibility with convention rights. See further, (Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law making?', U.K. Const. L. Blog (22nd Feb. 2021) (<https://ukconstitutionallaw.org/>)).

This power over secondary legislation as Tatiana Kazim, Mia Leslie and Lee Marsons point out in their Constitutional Law Association Blog comes from the common law, not the HRA: [The government's Human Rights Act consultation: divergence, context and evidence - The Constitution Society \(consoc.org.uk\)](https://www.consoc.org.uk/blog/the-government-s-human-rights-act-consultation-divergence-context-and-evidence). Kazim, Mia and Marsons identify that [Research](#) shows that, of the 14 successful challenges to secondary legislation between 2014 and 2020, "the court quashed or otherwise disapplied the offending provisions in just four of them".

Secondary legislation, even if subject to affirmative resolution, is a ministerial act which does not engage the protection of parliamentary sovereignty. It is entirely appropriate to distinguish primary and secondary legislation. It would not be appropriate to bring all secondary legislation within the purview of section 4, especially where there has been no meaningful parliamentary scrutiny.

If secondary legislation is struck down because it is ultra vires or for some other reason Ministers can always bring a revised instrument back to Parliament. A declaration of incompatibility would mean that the instrument continued in effect even if it was recognized as having no legal basis, this would be contrary to the rule of law and result in a lack of clarity about what the law is.

We also note that this would not apply to subordinate legislation made by Scottish Ministers unless the Scotland Act were to be amended in a significant way.

**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.**

**Our Comment**

No, a suspended or protective quashing order assumes that the legislation will otherwise be struck down. We take the view that the Judicial Review and Courts Bill will apply in any Human Rights cases in which secondary legislation could be struck down. Therefore, further proposals for suspended and prospective quashing orders would be unnecessary.

We note that section 102 of the Scotland Act 1998 already gives the courts power to suspend or vary the retrospective effect of their decisions when declaring subordinate legislation made by Scottish Ministers outwith competence because it is incompatible with Convention rights.

## 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.

### Our Comment

We note how infrequently the remedial power has been used, and primary legislation in general is to be preferred. There might be a case for some variant of (c) – urgent cases, and perhaps minor changes where no suitable alternative legislative vehicle is available.

We note that HRA schedule 2 makes provision which applies to Scottish ministers and the Scottish Parliament.

Therefore, we consider that if there is to be a Bill of Rights option c should be adopted.

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

### Our Comment

We believe that the ministerial statement of compatibility required by Section 19 is a key component in ensuring that compliance with the convention rights is a focus of Government when making the law. The statement which must be made before second reading in either House together with explanatory memorandums and human rights memorandums and scrutiny by MPs and Peers all provide a significant opportunity for Parliament to consider whether the measure is compatible or not.

The only change which we suggest would be to require the Minister making subordinate legislation to certify whether or not it was compatible with Convention rights as under section 19 of the UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill (see [United Nations Convention on the Rights of the Child Incorporation Scotland Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](#))

## 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?

### Our Comment

The concept of a Bill of Rights which reflects the range of different interests, histories, and legal traditions of all parts of the UK will be challenging to formulate in statutory language. We have already noted the inclusion in the Bill of Rights of the right to trial by jury as a “right” which is not of universal application throughout the UK. The distinct court systems in each jurisdiction with varying structures, powers, and laws to interpret are not easy to reconcile with the ambition to apply the Bill of Rights across the UK. Different

legal traditions which rest on distinct jurisprudential origins create laws and practice which are not harmonized. These legal traditions are closely linked to the community identity of those who live in the jurisdictions where they apply.

The current arrangements of the HRA apply with relative ease because the ECHR was designed as a treaty to which states with diverse legal traditions could accede. The ECHR allows the legal systems in which it applies to retain their legal traditions and laws and changes to those law must be made by the democratic institutions in each state signatory.

The Bill of Rights will require to respect the role of the Devolved Legislatures and Administrations and of the courts and legal professions which apply and administer the laws which apply in those jurisdictions. See our comment on the application of the legislative consent convention in the introduction to this response.

## **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.**

### **Our Comment**

Parliament's intention was that a wide range of bodies performing public functions would fall under section 6 to act compatibly with "Convention rights". The HRA came into effect when privatisation and contracting had increased the private and voluntary contribution to public services. It was envisaged that the HRA would apply beyond activities undertaken by purely State bodies to private or voluntary sector bodies, acting under statute or contract. The Act was designed to apply human rights guarantees beyond the obvious governmental bodies. Section 6 identified two distinct categories of "public authorities" which would have a duty to comply with the Convention rights.

Section 6(3)(b) has been highly problematic in practice. There might be a case for a hybrid approach – i.e., a listing of particular service providers/functions in a schedule plus a residual general definition to deal with failure to update the schedule.

## **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.

### **Our Comment**

Section 6(2) only protects where there is a clear duty or clear authorisation to act in a convention non-compliant manner. Will option 1 differ from section 6(2)? Where there is a statutory discretion, section 6

means that the public authority must act compatibly with the convention. So, this would be a further narrowing of the scope of HRA protection beyond the narrowing of the interpretive obligation. We do not agree that the case has been made out for such a change.

**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.**

**Our Comment**

Mr Dominic Grieve's opinion <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/written-briefings/derogation-from-human-rights-briefing-paper/> identifies that "There has been a number of cases which established that the ECHR and the HRA will apply in certain circumstances outside of the territory of the UK".

Al-Skeini [2007] UKHL 26 where the House of Lords decided that the HRA could apply to the actions of British forces abroad where this occurred on a British Army base, but not more generally in Southern Iraq as the UK in practice did not exercise control there.

When the case went to the ECtHR in Al-Skeini v UK (2011) 53 EHRR 18, it was held that the UK Government had a duty to conduct an effective investigation into the deaths of all civilians killed by British soldiers, in Southern Iraq because the UK had assumed responsibility for the maintenance of security there and was therefore exercising "control and authority" over Iraqi civilians.

In Al-Jedda v Sec of State for Defence [2007] UKHL 58, the House of Lords had held that the indefinite detention without charge of a dual British/Iraqi national in a Basra facility was lawful because the UK had been authorised to act by UN Security Council Resolution 1546 on which the UK was entitled to rely and which took precedence over any ECHR obligation. When the case went to the Grand Chamber (Al-Jedda v UK 2011 ECtHR), it held that the Security Council Resolution did not displace the Government's obligations to protect the right to liberty under Article 5 of the ECHR and where no derogation under Article 15 had taken place, such a system of detention was a breach of Convention rights.

Since then, the case law has developed further in a manner that emphasises that the Convention and the HRA can apply to UK actions abroad in varied forms.

Smith v MOD [2013] UKSC 41 the Supreme Court held that claims under Article 2 (the Right to Life) brought by relatives of some British soldiers killed in Iraq, on the grounds of inadequate equipment and training, should not be struck out and could proceed to trial, as Article 2 applied, and they were entitled to argue Article 2 rights had been breached. It also declined to rule that the principle of "combat immunity" from negligence claims was absolute in a number of cases that relied on claims of negligence alone. It allowed for the possibility of the claims being considered on factual merits that took account of the legal principles involved.

So far there has been no successful claim in court either under Article 2 or for negligence following these cases.

We also draw attention to section 7AHRA which was inserted (30.6.2021) by the [Overseas Operations \(Service Personnel and Veterans\) Act 2021 \(c. 23\), ss. 11\(2\), 14\(2\); S.I. 2021/678, reg. 2](#). Given that this provision was only given effect in June 2021 too short a time has been allowed to assess its effectiveness. We take the view that before making any changes to the law on extraterritorial jurisdiction this provision should be allowed to operate for a reasonable period of time. If necessary, after this provision has been in operation for some time the most appropriate approach for addressing the issues surrounding extra territorial jurisdiction may be in Strasbourg.

### **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.

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

### **Our Comment**

The options do not take into account the interaction of ECHR qualified rights such as Article 8 (respect for private and family life), Article 9 (freedom of religion or belief), Article 10 (freedom of expression) and Article 11 (freedom of assembly) and can in certain circumstances be balanced against the rights of society at large.

The state or a public authority can interfere in the exercise of such rights when there is a legitimate interest in doing so. Legitimate interests are limited by both the ECHR and the HRA and include, public safety, the prevention of crime, the protection of health, national security or the protection of other people’s rights.

Any interference with an individual’s rights must be in accordance with the law. It must also be necessary in a democratic society. This is where proportionality comes into play. Even if the reason for interfering with a human right is legitimate, it must correspond to a pressing social need and it must be proportionate to the aim pursued: *The Sunday Times v. The United Kingdom* - 6538/74 [1979] ECHR 1

Proportionality means that the interference has to be only what is absolutely necessary to achieve the objectives of the ECHR/HRA. The impact of the restriction on the individual must not be excessive in relation to the legitimate interests pursued. In other words, the state must not use a sledgehammer to crack a nut: [Proportionality Principle - SHRC - Equality & Human Rights Impact Assessment](#)

[scottishhumanrights.com](http://scottishhumanrights.com)). The more severe the interference with an individual's rights the more is required to justify it

A proportionality analysis was relevant in the conjoined cases of *Eweida & others v UK* 2013 ECHR 37 concerning manifestations of religious belief in the workplace and alleged interferences with article 9 rights. Determining Eweida's complaint, the ECtHR held that the domestic courts had breached Eweida's article 9 right when it prioritised the interests of her employer (British Airways) to present a corporate image over Eweida's interest in the visible display of a cross around her neck. Although the proportionality analysis is difficult, it is considered that the courts are best placed to perform it in each case in the context of the factual circumstances at hand and in line with domestic, Strasbourg and, where relevant, foreign jurisprudence.

This is how the law finds a balance between the wider rights and interests of society and conflicting rights of individuals.

The ECtHR has ensured that restrictions on individual's rights are proportionate whilst recognising that states may have different views as to when it is appropriate to restrict a right. The court does this through the doctrine of the margin of appreciation. The "margin of appreciation" is described by the Council of Europe as the space for manoeuvre that "the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention). The legal basis of the doctrine may be found in jurisprudence, not only that of the French Conseil d'état, which has used the term "marge d'appréciation, but also that of the administrative law system within every civil jurisdiction" : [https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp) . Because each Member State has different cultural and legal traditions uniform European standards of human rights are not easy to articulate.

The ECHR is a "lowest common denominator" – a floor not a ceiling -- of those human rights. The Council of Europe acknowledges that "enforcement of the Strasbourg organs' undertaking ultimately depends on the good faith and continuing cooperation of the Member States". The Council states "The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Member States and enables the Court to balance the sovereignty of Member States with their obligations under the Convention". It could be argued that it has no relevance in domestic law, but that the doctrine of deference plays a similar, albeit not identical role. Alternatively, the margin of appreciation may apply between the three UK legal systems. In other words, if there is a margin of appreciation, the Supreme Court should apply that where different approaches are adopted within the UK.

As Professor Ed Bates states, "Part of the criticism directed at Strasbourg from the UK was based on a perception that the former was too often dictating policy preferences, failing to apply the margin of appreciation appropriately, and micro-managing UK law. Related to that, there may also have been a perception that the UK Supreme Court was not in an equal relationship with Strasbourg...". Whether these perceptions were valid or not, they would seem hard to sustain when one looks at the record of UK[1]Strasbourg relations over recent years (see <https://ukstrasbourgsplight.wordpress.com/> Principled Criticism and a Warning from the 'UK' to the ECtHR? Page 241, also discussed at a Public Law Project event Unpacking the Human Rights Act Review <https://vimeo.com/manage/513937442/general>) .

Recent consideration of the relationship between the UK and Strasbourg courts focusses on the limitations of ECtHR's role taking into account the margin of appreciation and subsidiarity which is influenced by more "robust and critical positions adopted by the UK courts". Professor Bates' analysis that the UK courts have "been respectful of Strasbourg's positions (although there may be a debate about McLoughlin and aspects of Nealon/Hallam), but also willing to test and interrogate them if they do not fit the UK context, with the interactions that have followed demonstrating that Strasbourg has been very receptive to the UK critique" (op cit. page 241) is very persuasive.

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Starting with the speech by Lord Irvine, in 2011 who suggested: '[a]n appropriately critical, but respectful, approach [...] [would] have [a] positive influence in encouraging Strasbourg to observe the appropriate limitations inherent in its own role, and to respect the State's margin of appreciation'. Professor Bates ventures the opinion "If the UK Supreme Court has decided to take on board this advice, it seems to have had effect: indeed, for some the question today could even be whether it is now Strasbourg that is being 'rolled over' too easily by the UK Supreme Court, in some cases at least". (op.cit page 241) Such views together with the Conference declarations at Interlaken (2010), Izmir (2011) and Brighton (2012) such as "The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity" make it clear the extent to which subsidiarity is recognised under the ECHR caselaw

[https://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf)

Protocol No. 15 amending ECHR introduces a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It will enter into force as soon as all the States Parties to the Convention have signed and ratified it: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>

Notwithstanding criticism of the ECtHR from Lord Judge 'Constitutional Change — Unfinished Business' (3 December 2013) and Jack Straw (Hamlyn Lecture 2012

<https://www.cambridge.org/core/series/hamlyn1lectures/75134AF22A92EB13326CFFAA4592FDD3>),

Professor Bates has expressed the view that "even if there may have been doubts in the past, the Court's recent jurisprudence evidences that it is very alert to being accused of not respecting its subsidiary position, and very anxious to be seen to respect the democratic legitimacy of national authorities. This deference point may offer no guarantees, but it is of great relevance to the validity of concerns about Strasbourg's purported illegitimate domination of UK law when issues of national interest are at stake" (The UK and Strasbourg: A strained relationship – The Long View, in Katja S Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart, 2015) page 65).

We have the following points to make on the draft clauses:

### Option 1

Both optional draft clauses are vague and lack clarity

Subsection (2) is very confusing, for example what does "great weight to Parliament's view of what is necessary in a democratic society " in subsection (2) mean?

Is Option 1 just saying that, by enacting legislation, Parliament must be taken as considering that the legislation pursues a legitimate aim, and is suitable and necessary to achieve that aim, and therefore a court should be slow to reach a different conclusion. Or is it going further to say that Parliament is to be taken as having reached a view that any interference with rights is justified (i.e. the final stage of the proportionality analysis) and that a court should be slow to disagree with that?

The problem with the second interpretation is that there might well be a case in which the alleged rights infringement has not been considered at all in the legislative process, in which case, it's hard to see how the enactment of legislation could itself be determinative of Parliament's view that the rights infringement is justified. If the former interpretation is correct, then (a) the words in brackets seem redundant and (b) the courts already show greater deference towards legislation.

In subsection (3)(b) the reference to the 1978 Act should include section 21(1) of that act.

### Option 2

Option 2 is clearer than option 1, but again 'great weight' is vague. In addition, not all limitations of rights involve protection of competing public interests. In some cases, they involve protection of other rights.

In subsection (3)(b) the reference to the 1978 Act should include section 21(1) of that act.

**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 imprisonment;*

*Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights; and/or*

*Option 3: provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.*

### Our Comment

The suggested options would not be compatible with the UK's obligations under the European Convention on Human Rights as interpreted by both the ECtHR and domestic courts.

In order to assess whether a decision to deport is compatible with the convention all of the circumstances of the case need to be assessed. The assessment cannot be limited to length of imprisonment alone. The Nationality, Immigration and Asylum 2002 Act (as amended by the Immigration Act 2014) already includes extensive public interest considerations to be taken into account and states that where the length of imprisonment is 4 years or more then it will be in the public interest to deport unless there are very compelling circumstances. The domestic case law confirms that this assessment required a wide-ranging assessment of all of the facts in order to be compatible with Art. 8 ECHR (see: MS (s.117C(6): 'very compelling circumstances') Philippines [\[2019\] UKUT 122 \(IAC\)](#) (para 16) and Akinyemi v SSHD [\[2017\] EWCA Civ 236](#) (para 14).

**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?**

**Our Comment**

As with the case law on deportation, the law as contained in the Immigration Acts and the HRA as interpreted through domestic case law already provides for the balancing of the public interest against the rights under the Convention.

The challenges as suggested in the consultation document include; returning failed asylum seekers and addressing illegal migration by small boats.

Rather than seeking to alter the provisions of the Human Rights Act there are alternative ways in which this Government can address these issues.

For example, improving the decision making process for asylum seekers so that claims are processed timeously and correctly would reduce the length of time an asylum seeker resides in the UK whilst the claim is being processed. Improving decision making so that more decisions are made which comply with the UK's domestic legislation and international obligations would also result in more cases being filtered out at permission stage as unmeritorious, or otherwise disposed of more quickly.

Furthermore, as the consultation seems to focus on the issue of the cost of litigation to the Government, consideration should be given to the fact that the introduction of amendments to the existing legislation which do not comply with the UK's international obligations may lead to additional litigation and additional costs.

**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.*

### **Our Comment**

These considerations are unnecessary because damages are discretionary at the instance of the court. The general principle of damages is that the person who has suffered as a result of the unlawful act should Page 28 be made whole. Damages are not intended to be a punishment for the unlawful conduct of the authority, nor a reward for virtue or meritorious conduct on the part of the claimant.

The right to compensation under Article 5.5 is seriously under-exercised in relation to the volume of unlawful deprivations of liberty in Scotland. If there is any change, the right should be extended rather than limited.

### **IV. Emphasising the role of responsibilities within the human rights framework**

**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.**

*Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or*

*Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.*

### **Our Comment**

Article 17 is incorporated, and remedies are already discretionary. Is there is any justification for going beyond this, especially if talking about 'irresponsibility' which is unrelated to the subject matter of the claim? Fundamental rights apply to everyone, whether or not they are popular or seen as deserving, see our response to question 26.

### **V. Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role**

**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.**

### **Our Comment**

We believe that the current approach to judicial dialogue between domestic courts and the ECtHR allows domestic courts to raise concerns about the application of ECtHR jurisprudence and consequently adhere

to the terms of section 2 of the HRA. Recent case law indicates the UK courts can persuade ECtHR to interpret Convention standards to fit UK contexts. That having been said, there might be value in the draft clause in relation to the duty to notify parliament of adverse decisions.

As Professor Ed Bates states, “the boundaries of ECHR law can be adjusted such that UK law fits within them” see <https://ukstrasbourgsplight.wordpress.com/> Principled Criticism and a Warning from the ‘UK’ to the ECtHR? Page 232. Dialogue between the ECtHR and UK courts can be analysed as follows: a. The ECtHR approach when it addresses features of UK law for the first time, which law has already been upheld at the domestic level (under the HRA) as compatible with Convention rights; and b. The UK courts’ preparedness to use dialogue with ECtHR to seek a rectification of an ECtHR conclusion that a specific Page 29 feature of UK law is incompatible with the Convention. An example relating to Article 10 ECHR is *R (On the Application Animal Defenders International) v Secretary of State for Culture, Media, and Sport*, [2008] UKHL 15. In this case the House of Lords explained that a restriction on Article 10 ECHR was constitutionally important for the UK taking into account the parliamentary consideration when the Communications Bill was being considered. When the case reached the Grand Chamber: *Animal Defenders International v UK* [2013] 57 EHRR 21 the Grand Chamber noted the parliamentary consideration and held that UK law prohibiting political advertising on television did not breach Article 10 ECHR. When the Communications Bill 2003 was introduced into Parliament, the Government considered that it was not able to make a statement of compatibility under the HRA, in light of an ECtHR precedent against Switzerland, which had imposed a similar ban (see *Communications Bill Second Reading Hansard HL Deb 25 March 2003 col 658*). The UK Government believed, however, that if its legislation were to be challenged it would be able to show that its position was legitimate and respectful of human rights. Following such challenge, that was the position which the Grand Chamber later accepted (see also oral evidence by Baroness Hale JCHR HC 1161 3 February 2021 Q19 page 4). Although in the vast majority of instances UK judges will follow the relevant Strasbourg jurisprudence, the application of the Pinnock criteria and the development of the dialogue in *Animal Defenders International*, *Horncastle*, *Poshteh* and *Hallam* shows that the UK courts have indicated that they will not follow the ECtHR on the question of whether “a defined aspect of UK law is in fact a breach of Convention rights”.

We have the following comments on the draft clause:

The declaratory provision in subsection (1)(a) and (b) adds nothing to the existing law.

This reference to “any power” in subsection (3) is vague and lacks certainty. As drafted this provision lacks effectiveness – a definition of the powers which Ministers have to table motions would clarify what the draft clause means

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

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

## Our Comment

- a. We have no empirical data to offer on the costs and benefits of the proposed Bill of Rights. There likely to be additional costs to public funds in implementing any legislation which follows the consultation and educating: a. those who are elected, b. Judges, c. civil servants, and d. public authorities about their responsibilities to rights holders. There will also be a cost to public funds in respect of any public education campaign about the proposed Bill of Rights. The Government should produce their projections of these costs before introducing any bill to give effect to their proposals.
- b. We assume that the intention is to provide specifically that a domestic court is no longer required to adhere to Strasbourg case law. This will potentially have repercussions for domestic discrimination and equality laws where the application of the ECHR has resulted in more extensive protection for individuals with particular protected characteristics. For example, in a number of cases, the domestic courts and tribunals have read down parts of the Equality Act 2010 so that the legislation is compatible with Strasbourg case law on the freedom of religious believers in article 9 of the ECHR.

An illustration of this point is the case of *Mba v Mayor and Burgesses of the London Borough of Merton* [2014] 1 WLR 1501 that was decided by the Court of Appeal. On the face of the statutory wording of section 19 of the Equality Act 2010, any indirect discrimination claim based on the protected characteristic of religious belief that is raised by an individual is closed down if they are a solitary religious believer, i.e., where they adhere to a belief or engage in a particular practice or practices that is or are not a central tenet or requirement of that religion. In the Strasbourg case of *Eweida v UK* [2013] IRLR 231, the European Court of Human Rights held that solitary religious believers were entitled to protection from direct or indirect discrimination based on the freedom of religion in Article 9 of the ECHR. As such, in the subsequent case of *Mba v Mayor and Burgesses of the London Borough of Merton* [2014] 1 WLR 1501, the Court of Appeal followed *Eweida* and ruled that the statutory wording of section 19 of the Equality Act 2010 had to be “read down” in a way that did provide solitary religious believers with the legal entitlement to proceed with an indirect religious belief discrimination claim under section 19. As such, if the reformed law provides that domestic courts must not follow Strasbourg case law, this could potentially result in a paring down of discrimination and equality protections for individuals based on the protected characteristic of religious belief. The illustration provided by *Mba* is only one example of how this might be possible and there may be many others.

- c. We would refer to our comments in response to question 1 on option 1, to the effect that the potential negative impacts arising from any retrenchment from Strasbourg case law could be avoided by leaving the existing legislative wording in place, i.e., so that the domestic courts remain entitled to take account of that law.



**For further information, please contact:**

Michael P Clancy

Director Law Reform

Law Society of Scotland

DD: 07785 578333

[michaelclancy@lawscot.org.uk](mailto:michaelclancy@lawscot.org.uk)