UK Parliament – Joint Committee on Human Rights Legislative Scrutiny: Bill of Rights Bill
Evidence submitted by the Scottish Government

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Scottish Government
Riaghaltas na h-Alba
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Abbreviations used in the text

- "ECHR" / "the Convention" – The European Convention on Human Rights
- "ECtHR" / "the Strasbourg court" – The European Court of Human Rights
- "HRA" – The Human Rights Act 1998

Summary

The Scottish Government is pleased to provide concise responses to the questions posed by the Committee and is happy to submit further evidence should this be of assistance. Previous statements relating to the UK Government's proposals include:

- Response to the UK Government's December 2021 consultation (March 2022)
- Scottish and Welsh Governments - letter to the Lord Chancellor (March 2022)
- Deputy First Minister's letter to the Lord Chancellor (December 2021)
- Response to the Independent Human Rights Act Review (March 2021)

The Bill of Rights Bill is ill-conceived and its overall effect is harmful and unwelcome. Some of its provisions are confusing and contradictory. A full exploration of the concerns and adverse consequences to which the Bill gives rise is not possible in this short response. However, the Scottish Government reiterates its strong support for the HRA in its existing form and would draw attention, *inter alia,* to:

- the restrictive and regressive effects of the Bill, including its insistence on a narrow and insular reading of the Convention rights and its reversal of the principle that the Convention provides a "floor" and not a "ceiling";
- the obstacles to access to justice created by the Bill and the extent to which it fetters judicial decision-making and micro-manages the work of the UK courts;
- the fact that the Bill substantively changes the meaning of the Convention rights as they currently apply in the UK and the attempt to give those rights a meaning which diverges from the Strasbourg court's authoritative interpretation;
- the likelihood that remedies may need, in future, to be sought in Strasbourg more frequently than at present, with an increase also in the number of adverse judgments against the UK;
- the impact on, and interference with, the constitutional settlement in Scotland, including by legislating for devolved matters and by changing both legislative and executive competence;
- the effect of repealing section 3 of the HRA, requiring legislation to be read and given effect in a way which is compatible with the Convention rights, and the practical and principled consequences of this change, including the loss of legal certainty which may result;
- the degree of "executive overreach" apparent in the Bill, including the power conferred on ministers to decide whether existing case law remains effective and provisions which seek to insulate government and public authorities from legitimate legal challenge;
- the removal of protections currently available to UK service personnel involved in overseas operations and the irresponsibility evident in clause 24;
- the Bill's overall inconsistency and illogicality, including the manner in which the status and functions of the UK courts and the legislature are diminished whilst asserting that the objective is to "strengthen domestic institutions".

Relationship between the UK courts and the ECtHR

1. Clause 3 of the Bill states how courts must interpret Convention rights, including by requiring them to have "particular regard to the text of the Convention right." What would be the implications of clause 3?

Scottish Government Response

The evident intent of the Bill is to impose a restrictive reading of the Convention rights[1].

This includes a rejection of the principle that the ECHR is a "living instrument", the interpretation of which is capable of evolving to reflect the norms and expectations of modern society. Instead, the Bill seeks to constrain the discretion available to the courts and to limit the meaning of the Convention rights as far as possible to a literal, "black letter" reading of the text of the Convention. Furthermore, the courts are encouraged to interpret that text by reference to the original *travaux préparatoires* undertaken in 1949 and 1950. This appears designed to exclude "expansive" interpretations of the Convention rights and, by extension, to benchmark human rights standards against the norms of the 1950s rather than the 2020s.

Significant concerns arise as a consequence. To take the most obvious example, Article 14 of the Convention makes no reference to prohibiting discrimination on the grounds of sexual orientation. This is because homosexuality was criminalised in most jurisdictions at the time the Convention was drafted. The "living instrument" doctrine has subsequently enabled that injustice to be corrected. But the restrictions imposed by clause 3 necessarily imply a desire to depart from modernised interpretations of this kind. Doing so risks undermining not only the practical utility of the Convention rights but also their relevance in modern society. The clause is self-evidently regressive in both its intent and effect.

[1] Paragraphs 2a and 6 of the Explanatory Notes to the Bill of Rights Bill.

2. Clause 3 also provides that the courts may diverge from Strasbourg jurisprudence but may not expand protection conferred by a right unless there is no reasonable doubt that the ECtHR would adopt that interpretation. What are the implications of this approach to interpretation of Convention rights?

Scottish Government Response

The Bill seeks to overturn the principle that the Convention rights provide a “floor” and not a “ceiling” [2]. At present the HRA ensures that the rights protected across the UK cannot sink below the threshold established by the ECHR. Indeed, they can in principle and where appropriate and consistent with domestic law exceed the minimum requirements set out in the Convention[3].

Clause 3(3) turns that “floor not a ceiling” principle on its head. In future the UK courts will be explicitly prohibited from interpreting any of the Convention rights in a way that might expand the protection it confers. The absolute upper limit is established by the position that the ECtHR might be expected to adopt, and UK courts are in practice encouraged (via clause 3(3)(b)) to diverge from the Strasbourg jurisprudence by adopting an interpretation that confers lesser protection.

This is a perplexing proposal[4]. The UK Government has asserted that its objective is to “strengthen domestic institutions”. But this clause explicitly constrains the discretion currently available to the UK’s own courts to consider the specific domestic context and establishes a new maximum extent to the Convention rights (as they apply in the UK) which depends entirely on decisions reached by the Strasbourg court. The proposal is also detrimental to the overall functioning and development of the Convention, in particular the principles of evolutive interpretation and living instrument doctrine.

The Scottish Government’s view remains that the framework provided by the HRA establishes boundaries within which it is properly for the courts themselves (and in particular for the Supreme Courts of Scotland and the UK Supreme Court) to chart a coherent long-term path[5]. In practice the courts have done so successfully and legislative change of the kind set out in clause 3 is neither necessary nor desirable.

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[2] Paragraphs 6, 50 and 51 of the Explanatory Notes to the Bill of Rights Bill.

[3] This principle was written in to the original text of the Convention via Article 53. There are nonetheless good legal and procedural reasons why the domestic courts should exercise caution and restraint in interpreting the Convention rights, and should avoid doing so in a way that runs too far ahead of Strasbourg jurisprudence. For example, while the victim of an alleged violation retains the right to apply to the ECtHR if the remedy provided by the domestic courts is felt to be inadequate, there is no mechanism by which a public authority can seek to reverse an unduly generous judgment by taking its case to Strasbourg. Such considerations have been the subject of close analysis by senior judges and they directly inform the approach which the UK courts have in practice adopted. In reality, there is no evidence to suggest that the UK courts have been inappropriately “expansive” in their interpretation of the Convention rights.

[4] In practice, the effect of the provision will be mitigated by the fact that the ECtHR is likely to continue to interpret and apply the Convention rights in a broadly progressive manner, in line with the “living instrument” principle. The principal effect of clause 3 will instead be to discourage the UK courts from developing the law in areas where UK practice and insights may in fact be beneficial to the ECHR system as whole. It will also constrain the scope for UK interests to be defended by means of domestic judgments which constructively challenge the position reached by the Strasbourg court and facilitate a process of “judicial dialogue”.

[5] See for example paragraphs 104 to 112 which also address this issue in Scottish Government Response to the UK Independent Human Rights Act Review - gov.scot (www.gov.scot).

Interim measures and the UK's international obligations

3. Clause 24 would affect how UK courts and public authorities take account of interim measures of the ECtHR, prohibiting them from doing so in many circumstances. Is this compatible with the UK's obligations under the ECHR and international law?

Scottish Government Response

Interim measures are binding in international law on the state concerned[6].

Clause 24 explicitly directs the UK courts (without any scope for judicial judgement or discretion) to have *no* regard to *any* interim measure. Such decisions properly reside with the judiciary and must be exercised independently and in light of all the relevant facts[7].

Clause 24 is therefore difficult to reconcile with the UK's obligations as a State Party to the ECHR. It is also potentially incompatible with respect for the rule of law and with the principle that state institutions should comply with decisions reached by properly-constituted courts of law, and is profoundly disrespectful of the functions and professional expertise of both the domestic courts and the ECtHR.

Interim measures are of course also issued in relation to prospective breaches of the Convention rights by other states. These include the measures issued by the ECtHR in June in respect of two UK citizens currently held by Russian forces in the Donetsk region of Ukraine[8]. In that context it is singularly ill-judged and irresponsible for the UK Government to bring forward legislative proposals which seek to ensure that such interim measures are disregarded. The UK Government should make an immediate statement confirming that clause 24 will be removed from the Bill at the earliest opportunity.

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[6] The Grand Chamber of the ECtHR has held that a failure to comply with interim measures would amount to a violation of Article 34 of the ECHR, as it would "hinder… the effective exercise" of the right of applicants under Article 34 to bring their claims before the ECtHR – see more at Council of Europe: Requests for interim measures (coe.int). This point has already been made in the Committee's letter to the Lord Chancellor on 30 June 2022.

[7] Interim measures apply only in exceptional cases, where there is a real risk of serious, irreversible harm. If statutory clarification of the effect of interim measures is in fact required as a matter of domestic law, it should instead take the form of a positive duty requiring the UK courts to have appropriate regard to interim measures when hearing any case to which such measures apply.

[8] See more in Urgent measures in cases lodged by two British prisoners of war sentenced to death in the so-called Donetsk People's Republic (coe.int).

Parliamentary scrutiny of human rights

4. The Government's consultation suggested that the role of Parliament in scrutinising human rights should be strengthened. Would the Bill of Rights achieve this? How could this be achieved?

Scottish Government Response

The measures contained in the Bill are likely in practice to be counter-productive and to complicate and diminish the ability of the UK Parliament to engage in effective scrutiny of UK compliance with human rights obligations.

Provisions in the Bill which purport to enhance the role played by Parliament (such as clause 25) are almost entirely tokenistic. Ministers already have a responsibility to ensure that Parliament is kept properly informed of important developments, such as a significant failure to comply with international obligations. Moreover, the Secretary of State for Justice already reports annually to the Committee[9]. His report covers not only adverse judgments in the ECtHR but also declarations of incompatibility made by the UK courts. Indeed, the report goes further still by providing an overview of wider developments in the field of human rights. The Bill adds nothing of substance to this existing practice.

The idea that repealing the current section 3 of the HRA and placing the courts under a duty to defer to Parliament (clause 7) might enhance the role of Parliament is similarly illusory[10]. Indeed, the Bill actively erodes the powers and privileges of Parliament. Clause 40, for example, has the effect of side-lining Parliament by giving far-reaching legislative powers to government ministers.

5. The Bill removes the requirement in section 19 HRA for Ministers to make a statement as to whether a Government bill is compatible with human rights. What impact would this have on Parliamentary scrutiny of human rights?

Scottish Government Response

The requirement in section 19 HRA is an integral part of the system of human rights safeguards established under domestic law in the UK. Its removal would be regressive.

There can be no obvious objection to a provision that requires the UK Government to state whether proposed legislation is (in its view) compatible with the Convention rights. Fulfilling that requirement should be a straightforward matter. Indeed, it would be unacceptable for the UK Government not to know whether a bill is compatible at the point it is introduced. Ministers should therefore be prepared to make a statement which informs both Parliament and the public about the effect of the bill.

If legislative change is required, the Scottish Government has argued that the better model to follow is that contained in section 31 of the Scotland Act 1998[11].

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[9] See Responding to human rights judgments: 2020 to 2021 - GOV.UK (www.gov.uk).

[10] See the response to question 6, below.

[11] See in particular the response to question 18 in Human Rights Act reform consultation: Scottish Government response - gov.scot (www.gov.scot).

Interpreting and applying the law compatibly with human rights

6. The Bill removes the requirement in section 3 HRA for UK legislation to be interpreted compatibly with Convention rights "so far as possible". What impact would this have on the protection of human rights in the UK?

Scottish Government Response

Repeal of section 3 of the HRA is one of the most unwelcome and damaging features of the Bill. It raises major questions of both principle and practice and will significantly diminish the domestic effectiveness of the human rights safeguards provided for by the ECHR.

In a modern, democratic society - in which human rights are recognised as being of special and overriding importance - it is entirely appropriate for the courts to interpret the legislative intention of Parliament as including a desire to give substantive effect to the Convention rights.

Section 3 also has strong practical benefits, including for the executive. As the Committee is aware[12], the use of section 3 has frequently been at the request of government, which has recognised the pragmatism of achieving a compatible outcome by means of a court judgment tailored to the specific facts of a particular case rather than by having to bring forward new legislation in response to a declaration of incompatibility.

It is therefore unhelpful, and unfortunate, that the UK Government appears to be inflexibly opposed to a mechanism which facilitates the pragmatic evolution of human rights law by means of domestic jurisprudence. In practice, an insistence that incompatibilities can only properly be addressed by means of new legislation will result in the creation of an unnecessary burden on Parliament, a proliferation of changes made by secondary legislation, or in no remedial action being taken. None of those outcomes are desirable.

Further significant concerns also follow from the repeal of section 3, including in particular the potential for retrospective effects[13] and in connection with the power given to ministers by clause 40.

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[12] Baroness Hale of Richmond addressed this point in her February 2021 evidence to the Committee – "Usually the Government argues first for compatibility, but if we decide that it is incompatible, there is then a choice between [using] the interpretive obligation, if we can, to try to cure [the incompatibility] or simply to make a declaration of incompatibility. I cannot remember a case that I was involved in where we did not do whichever of those two the Government asked us to do. The Government's first line was always, "It's compatible" but if they lost on that they would then argue either for using the interpretive obligation or for a declaration, and we would usually do what the Government asked for in that respect". More information can be found in the transcript of Baroness Hale's appearance at the Committee.

[13] See for example Kyle Murray's analysis at Kyle Murray: The future of rights-enhanced interpretations under the Bill of Rights – UK Constitutional Law Association.

7. Clause 40 enables the Secretary of State to make regulations to "preserve or restore" a judgment that was made in reliance on section 3. Do you agree with this approach? What implications does it have for legal certainty and the overall human rights compatibility of the statute book?

Scottish Government Response

This is a particularly troubling proposal. It confers powers on UK ministers to override settled interpretations of the law arrived at by the UK courts and to substitute, by means of secondary legislation, interpretations preferred by the government of the day.

Clause 40 therefore has very serious constitutional implications. Ministers will be entitled to change primary legislation in any situation where it "appears" to the Secretary of State that a court judgment has been made in reliance on section 3 HRA. The provision has already been the subject of close and critical scrutiny by legal academics[14]. The Scottish Government agrees with the concerns which have been expressed and believes clause 40 constitutes an unacceptable example of "executive overreach".

The fundamental inconsistency in the UK Government's position is also notable. The current provision in section 3 of the HRA is apparently to be abolished because there is a need "to rebalance the relationship between the courts and Parliament". Ensuring that legislation is read compatibly with the Convention rights "should be for Parliament to address". But having removed the interpretive power in section 3 of the HRA from the courts, the power to amend or modify any primary or subordinate legislation is given not to Parliament but to ministers.

It should be stressed that this power effectively amounts to an ability on the part of the government to pick and choose which features of existing human rights case law, as decided by the courts, are to be retained and which are to be discarded. That is constitutionally unacceptable and contrary to the fundamental notion that rights are a means of holding state power to account. The fact that regulations which modify or amend primary legislation are to be subject to affirmative procedure provides little reassurance.

[14] Stefan Theil has memorably described the clause as "Henry VIII on steroids" in Stefan Theil: Henry VIII on steroids – executive overreach in the Bill of Rights Bill – UK Constitutional Law Association.

8. Clause 5 of the Bill would prevent UK courts from applying any new positive obligations adopted by the ECtHR following enactment. It also requires the courts, in deciding whether to apply an existing positive obligation, to give "great weight to the need to avoid" various things such as requiring the police to protect the rights of criminals and undermining the ability of public authorities to make decisions regarding the allocation of their resources. Is this compatible with the UK's obligations under the Convention? What are the implications for the protection of rights in the UK?

Scottish Government Response

Clause 5 has the effect of fundamentally altering the substance of the Convention rights as they will apply in future in the UK. It is one of the most unwelcome and problematic provisions in the Bill.

Clause 5 appears to be predicated on the view that human rights should only be binding or effective insofar as compliance is administratively convenient for a public authority.

The apparent intent is to prioritise the operational preferences of public authorities over the human rights and fundamental freedoms of the public they serve. Unless existing case law requires otherwise, public authorities will in future have no obligation to comply with positive obligations even where these have been authoritatively established by the ECtHR. Institutional failures resulting in violations will not merely be legitimised but will be specifically protected against effective legal challenge.

In practice, clause 5 (had it been in force at the time) would have prevented challenges being brought by the relatives of those killed in the Hillsborough disaster or by the victims of criminals such as John Worboys[15].

Clause 5 could be deemed to be incompatible with the UK's international obligations. In common with other provisions in the Bill it will explicitly prevent the UK courts giving effect to the Convention rights in a manner that is consistent with the authoritative meaning given to those rights by the ECtHR[16]. That position is untenable if the UK wishes to remain a State Party to the ECHR.

Further significant problems of both principle and practice are evident in the clause. For example, it is unclear how clause 5 (which limits the extent to which a public authority is required "to do any act")[17] is intended to interact with clause 12 (which provides that "a failure to act" can be unlawful).

As has been noted in academic commentary[18], the clause ignores the fact that the existing regime already goes to some length to avoid imposing unreasonable burdens on public authorities. It is also likely to give rise to legal uncertainty and will require significant judicial effort to develop a workable scheme.

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[15] For a helpful discussion of positive obligations and the effects of the Bill see Edmund Robinson: Fumbling with interpretation – Clause 5 of the Bill of Rights and the positive obligations challenge – UK Constitutional Law Association.
[16] Article 46 of the Convention.
[17] See the definition of "positive obligation" in clause 5(7).
[18] Again, see for example the conclusion reached by Edmund Robinson.

9. Clause 7 of the Bill requires the courts to accept that Parliament, in legislating, considered that the appropriate balance had been struck between different policy aims and rights and to give the "greatest possible weight" to the principle that it is Parliament's role to strike such balances. In your view, does this achieve an appropriate balance between the roles of Parliament and the courts?

Scottish Government Response

Clause 7 is regressive and unnecessary. An appropriate balance between parliamentary sovereignty and judicial oversight of Convention compatibility is already struck by the HRA.

As drafted, clause 7(2)(a) risks further entrenching the ability of any majority UK government to override the Convention rights. A circular, self-justifying argument is established whereby Westminster legislation, by definition, must always be considered to strike the correct balance and cannot in consequence be incompatible. In effect, Parliament will always be right, even when it is wrong[19]. Furthermore, the clause seeks to restrict the ability of the judiciary to perform their proper constitutional function as a safeguard against errors and abuses. Clause 7(2)(b) amounts to a particularly egregious attempt to "warn off" the judiciary. The courts are not to question decisions made by Parliament even if those decisions are contradictory or defective.

The overall effect is not only to remove safeguards currently provided by the HRA but apparently to negate other features of the Bill itself, such as the ability to obtain a declaration of incompatibility[20]. The evident intent is to treat Westminster primary legislation as if it were infallible, and to render such legislation immune to interpretive challenge. That outcome is potentially incompatible not just with the UK's obligations as a State Party to the ECHR but with the principles of a constitutional democracy founded on the rule of law.

In reality, the UK courts are very clear in distinguishing their constitutional function from that of the legislature. They explicitly do not seek to substitute their views for those of Parliament. Their professional expertise does however consist, in particular, of the ability to reach decisions which balance complex and potentially competing requirements in a way that achieves the outcome intended by legislators whilst also

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[19] In practice much will depend on whether, or to what extent, the provision displaces the well-established balancing exercise already undertaken by the courts when examining the proportionality of actions that interfere with a Convention right. Requiring the courts to regard Parliament as having already decided the answer simply by virtue of having passed an Act may restrict the scope for meaningful judicial examination of the facts. Hayley Hooper argues that clause 7 "seeks to prejudice the proportionality exercise by compromising any independent evaluation conducted by a reviewing court" in Clause Seven of the Bill of Rights Bill: Diluting Rights Protection and Undermining Parliamentary Democracy | OHRH (ox.ac.uk). Mark Elliot takes the view that "clause 7 may blunt the application of the proportionality doctrine [but] does not strike it a fatal blow" in The UK's (new) Bill of Rights – Public Law for Everyone. Either way, the Bill's lack of clarity and the extent to which it challenges a central feature of established human rights law are troubling.

[20] Clause 7 would appear to significantly limit the availability of declarations of incompatibility (under clause 10) in respect of Acts of Parliament, where making the declaration depends on answering questions of "balance". See question 10 below for further discussion of this aspect. Since a majority government can in practice ensure that even manifestly "unbalanced" and incompatible legislation is passed, the overall effect is to restrict the ability of the courts to act as a safeguard against the over-extension of executive power.

ensuring that justice is done and the rule of law is upheld. The UK courts do not require instruction of the kind contained in clause 5.

10. Clause 12 would replace the current duty, in section 6 HRA, on public authorities to act compatibly with human rights unless they are required to do otherwise as a result of legislation. In the absence of the obligation to read legislation compatibly with Convention rights, what impact would clause 12 have on (a) individuals accessing public services and (b) public authorities?

Scottish Government Response

While clause 12 ostensibly carries forward key features of section 6 of the HRA, it is likely in practice to significantly weaken human rights protections in the UK. In particular it should be read in combination with clauses 5, 7 and 10.

For example, subject to exceptions arising as a result of existing case law, clause 5 ensures that the UK courts cannot, post-commencement, adopt interpretations of the Convention rights that would require a public authority to comply with a positive obligation. Public authorities cannot in consequence be compelled “to do any act”. That will be true even where such a failure would put the UK in breach of its obligations under the ECHR[21].

As a result, the protection conferred by section 12 would appear to be relevant only in situations where a) a public authority is itself directly responsible for a violation[22], or b) a relevant previous judgment imposes a positive duty to take action. In all other cases, and notwithstanding the apparent clarity of clauses 12(1), 12(3), 13 and 17, the public authority will in practice be able to act inconsistently with the UK’s international obligations.

Clause 5 brings about a further restriction in the scope of clause 12(1) as compared to section 6(1) of the HRA[23]. Although clause 12(3) maintains the position that a “failure to act” can be unlawful, clause 5 explicitly restricts the scope of clause 12(1) and the jurisdiction of the courts to provide an effective remedy for victims. Whilst the wording of section 6(1) and clause 12(1) may be identical, their effect is not.

Where a public authority is acting in accordance with legislation, the Bill does continue to provide for a declaration of incompatibility (clause 10). But the availability of this remedy also appears to be restricted by clause 5, at least insofar as a declaration would involve interpreting the legislation as giving rise to a “positive obligation”. In any event, a declaration of incompatibility has no binding effect and clause 7 risks limiting the extent to which any challenge could in fact succeed.

[21] One inevitable consequence will be that the Bill restricts access to an effective remedy in the UK courts and results in more cases being brought against the UK in Strasbourg. That in turn is likely to result in an increase in the number of adverse judgments. At present the UK has an exemplary record, and habitually wins more than 98% of cases. See the UK Government’s own report to the Committee: [Responding to human rights judgments: 2020 to 2021 - GOV.UK (www.gov.uk)].

[22] In which case the authority could simply decide to cease acting in an unlawful way, without there being any need to invoke a positive obligation.

[23] Clause 5 ensures that the substantive content of the relevant Convention right (as it applies in the UK) cannot, among other things, include a post-commencement positive obligation. A failure to discharge that positive obligation cannot, therefore, amount to an unlawful act for the purposes of clause 12(1). It is nonetheless still an act which is potentially incompatible with the UK’s obligations under the ECHR and therefore requires the victim to have access to an effective remedy in accordance with Article 13 of the ECHR.

Furthermore, even where existing case law establishes a “pre-commencement interpretation”, the public authority will be able (clause 5(2)) to plead operational inconvenience as a reason why the established interpretation should be set aside.

In effect the clause permits the unlawfulness of the public authority’s actions to be excused on the simple basis that complying with the law could have implications for operational decision-making or resource allocation.

Since the courts will be required to give “great weight” to such arguments, the clear expectation is that they should normally be willing to excuse actions that would otherwise be incompatible and which could conflict with the UK’s international obligations. Moreover, such a decision by a higher court may itself establish a precedent which calls into question the validity of any previously applicable pre-commencement interpretation.

It is extremely difficult to reconcile any of this with respect for the rule of law or with the UK’s international obligations.

Enforcement of Human Rights: litigation and remedies

11. Does the system of human rights protection envisaged by the Bill ensure effective enforcement of human rights in the UK, including the right to an effective remedy (Article 13 ECHR)?

Scottish Government Response

For the reasons set out elsewhere in this response it is clear that the Bill does not ensure the effective enforcement of the Convention rights in the UK. It is not, in consequence, compatible with the UK's obligations as a State Party to the ECHR.

Multiple clauses in the Bill have the effect of limiting access to an effective remedy. They do so by restricting the powers and decision-making discretion of the courts and by imposing tests and conditions which are designed to obstruct access to justice and the protection of Convention rights.

12. Do you think the proposed changes to bringing proceedings and securing remedies for human rights breaches in clauses 15-18 of the Bill will dissuade individuals from using the courts to seek an effective remedy, as guaranteed by Article 13 ECHR?

Scottish Government Response

Yes. The explicit intention of these clauses appears to be to impose tests and conditions which will make it more difficult to seek and obtain an effective remedy from the domestic courts.

13. Do you agree that the courts should be required to take into account any relevant conduct of the victim (even if unrelated to the claim) and/or the potential impact on public services when considering damages?

Scottish Government Response

The Scottish Government's view is that justice must be impartial and available to all. Making the outcome of a case dependent, even in part, on the general public standing or reputation of those who come before the courts would be wholly unacceptable[24].

Where it is appropriate to take account of such matters, the conduct of an individual *in a particular case* can already be considered by the courts when determining the most appropriate remedy. The UK courts are experienced in dealing with such matters and do not require to be micro-managed in the exercise of their functions.

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[24] See also the Scottish Government's response to the UK Government's December 2021 consultation paper - [Human Rights Act reform consultation: Scottish Government response - gov.scot (www.gov.scot)](https://www.gov.scot).

Specific rights issues

14. Clause 6 of the Bill would require the court, when deciding whether certain human rights of prisoners have been breached, to give the "greatest possible weight" to the importance of reducing the risk to the public from persons given custodial sentences. What effect would this clause have on the enforcement of rights by prisoners?

Scottish Government Response

The Convention as it stands, and the HRA as it implements the Convention rights in the UK, already inherently balances individual rights and the wider public interest. For its part, the UK Government has made no secret of its desire to "insulate" its own prison policies from legal challenge on human rights grounds[25].

Justice matters in Scotland are wholly devolved and the Scottish Government has not requested that clause 6 of the Bill be extended to Scotland. There are no plans to make equivalent provision covering Scotland by means of devolved legislation.

The Scottish Government's view is that both public protection and human rights compliance are of paramount importance. In fact members of the public have a human right not to be exposed to harm or loss as a result of criminal activity[26].

The Scottish Government is therefore clear that public protection considerations should already be an integral part of decision-making in contexts such as the release or transfer of prisoners. Such decisions should however be made, independently and without political interference, by the appropriate authority[27].

15. Clauses 8 and 20 of the Bill restrict the application of Articles 8 (right to private and family life) and 6 (right to a fair trial) in deportation cases. Do you think these provisions are compatible with the ECHR?

Scottish Government Response

The restrictions imposed by clauses 8 and 20 strike directly at the principles of universality, equality and the rule of law. The provisions violate the requirement that justice, and access to the courts, must be available to all.

The tests imposed by clause 8 are extreme, to the extent that they are clearly designed to obstruct access to justice and to prevent the courts from exercising jurisdiction in respect of important executive decisions. If anything, clause 20 is even more egregious in instructing the courts (in respect of deportation assurances) to "presume that the Secretary of State's assessment … is correct"[28] .

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[25] See Bill of Rights to strengthen freedom of speech and curb bogus human rights claims - GOV.UK (www.gov.uk).

[26] This illustrates a further troubling inconsistency in the UK Government's position. Effective public protection may itself require positive action on the part of public authorities, of the kind which clause 5 of the Bill explicitly seeks to exclude.

[27] For instance the Parole Board for Scotland (Parole Board for Scotland (scottishparoleboard.scot) or the relevant multi-disciplinary prison Risk Management Team (Risk Management, Progression and Temporary Release Guidance (sps.gov.uk)).

[28] The UK Government's own record calls into question whether such an assumption can reliably be made. The Special Immigration Appeals Commission found in *W and others* that "there remains a requirement in law for effective verification of the assurances, and it remains the case there is no

Such restrictions are potentially incompatible with the ECHR and are also wholly unnecessary. The existing HRA creates no automatic or necessary impediment to the deportation of foreign nationals where deportation is genuinely in the public interest.

16. Clause 14 introduces a total ban on individuals bringing a human rights claim, or relying on a Convention right, in relation to overseas military operations, subject to the Secretary of State being satisfied that this is compatible with the UK's obligations under the Convention. Does this comply with the UK's obligations under the ECHR and international law? If not, what would need to be amended to ensure clause 14 is consistent with the UK's obligations under the Convention?

Scottish Government Response

The UK's obligations in the context of overseas military operations are specific in scope and apply only where the UK exercises meaningful jurisdiction[29]. The suggestion that they give rise to some form of unreasonable or open-ended liability is factually incorrect.

Amongst the most objectionable features of clause 14 is its removal of the current human rights protections available to UK service personnel [30]. This raises concerns not simply in relation to the UK's obligations under the ECHR but with regard to the commitments given by the UK Government in its own Armed Forces Covenant[31]. The clause also seeks to prevent access to justice for other victims, irrespective of whether their claim is well-founded.

Given the clear potential incompatibility of this clause with the UK's obligations as a State Party to the ECHR, it is hard to see how it could in fact be brought into force[32].

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sufficient means of that effective verification" – see Special Immigration Appeals Commission: W and Others - Approved Judgement. For further commentary see: Daniella Lock: Three Ways the Bill of Rights Bill Undermines UK Sovereignty – UK Constitutional Law Association.

[29] See the exceptional circumstances identified in Al-Skeini v United Kingdom [2011] ECHR 1093.

[30] See Smith and others (FC) (Appellants) v The Ministry of Defence (Respondent) [2013] UKSC 41, which revised the position previously reached in R (on the application of Smith) (FC) (Respondent) v Secretary of State for Defence (Appellant) and another [2010] UKSC 29. See also commentary at: Smith and others v Ministry of Defence [2013] - JUSTICE. Clause 5 of the Bill also affects the interests of service personnel. It specifically seeks to exclude "positive obligations" of the kind relevant in ensuring that alleged breaches of the Article 2 right to life are properly investigated.

[31] See The Armed Forces Covenant.

[32] Clause 39(3) explicitly provides that clause 14 may only be commenced if the Secretary of State is satisfied that doing so is consistent with the UK's ECHR obligations. Such a decision might in turn be subject to challenge on normal *Wednesbury* reasonableness grounds.

17. The Bill introduces a limited right to trial by jury. What would be the legal significance of the right?

Scottish Government Response

The use of trial by jury is long established for the prosecution of serious offences in Scotland, but there is no right *per se* to trial by jury[33].

The practical effect of clause 9 remains unclear. While the policy intent appears to be largely symbolic, it is possible that the clause could have substantive effect. For example, clause 9(2)(b) could potentially be interpreted as creating a new right for accused persons in Scotland to choose a trial by jury[34] . Challenges might also arise in cases where an offence is “triable either way” but the decision has been taken to prosecute summarily. Such an interpretation would amount to both a significant change to Scots criminal procedure and a profound interference with the ability of the Crown Office and Procurator Fiscal Service[35] to exercise independent decision-making powers.

The Scottish Government respects the right of other jurisdictions within the UK to adopt their own policies in relation to jury trial, but it is neither appropriate nor necessary for the UK Parliament to seek to legislate in respect of Scotland.

18. The Bill strengthens protection for freedom of speech, with specific exemptions for criminal proceedings, breach of confidence, questions relating to immigration and citizenship, and national security. Do you think these changes are necessary? What would be the implications of giving certain forms of speech greater protection than other rights?

Scottish Government Response

Clause 4 purports to defend and promote free speech but is likely in practice to have the effect of undermining the broader right to freedom of expression secured by Article 10 of the ECHR. While clause 4 does not displace the restatement of Article 10 in Schedule 1, the Bill substantively alters (for example in clauses 3 and 5) the way in which the UK courts must interpret that right.

Whilst ideas, opinions and information may be imparted, the right to protest is excluded, as are other actions (such as whistle-blowing) which may inconvenience or challenge the executive. The inescapable conclusion is that “free speech is only valued when it is not used against the government”[36].

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[33] Arrangements in Scotland are explained in more detail in the Scottish Government’s response to the UK Government’s December 2021 consultation paper (Question 3) - Human Rights Act reform consultation: Scottish Government response - gov.scot (www.gov.scot).

[34] Where an offence (including all common law offences) is “triable either way”, the implication of clause 9(2)(b) may be that a person charged with the offence is entitled to choose whether to be tried summarily (in front of a Sheriff) or on indictment (with a jury). In fact, that choice is not available. Whether an offence will be tried by a jury will generally depend on how the prosecution of specific offences has been provided for in statute, the powers of Scottish courts under the Criminal Procedure (Scotland) Act 1995, and the decision of the prosecutor on the most appropriate court to hear the case. Where discretion does exist, it lies entirely with the prosecutor.

[35] See Crown Office and Procurator Fiscal Service (copfs.gov.uk).

[36] See New UK ‘bill of rights’ exempts government from free speech protections | The Independent.

19. Why do you think the Government has chosen to protect freedom of speech rather than freedom of expression, as guaranteed in Article 10, and what are the implications of treating the elements of Article 10 differently?

Scottish Government Response

The intent appears to be to re-interpret Article 10 by giving special emphasis to a more restrictive statutory formulation. Such restrictive provision is inconsistent with the principles of modern democracy.

One potential consequence of “disassembling” the Article 10 right may be that effective remedies need to be sought in Strasbourg rather than in the domestic courts.

The Human Rights Act and the devolved nations

20. How would repealing the Human Rights Act and replacing it with the Bill of Rights as proposed impact human rights protections in Northern Ireland, Scotland and Wales?

Scottish Government Response

The HRA is central to the devolution settlement in Scotland[37]. Its repeal will alter the competence of Scotland's democratic institutions and diminish the rights enjoyed by individual members of Scottish society. Both changes are unwelcome. In contrast to UK ministers, the Scottish Government has no desire to acquire new powers which would permit it to circumvent ECHR obligations.

21. Should the Government seek consent from the devolved legislatures before enacting the Bill and, if so, why?

Scottish Government Response

The requirement for legislative consent is central to the constitutional settlement established by the Scotland Act 1998[38].

The Scottish Government is clear that consent must be sought for all UK legislation that would be within the legislative competence of the Scottish Parliament or which alters legislative or executive competence. Where consent is not granted, the relevant provisions (or as the case may be, the Bill as a whole) should not extend to Scotland. The significance of the HRA is such that the imposition of any changes affecting Scotland, without the consent of the Scottish Parliament, would profoundly undermine the Scottish Parliament and Scotland's devolution settlement.

The Scottish Government's preferred outcome, in this instance, would be for the UK Parliament to decline to pass the Bill of Rights Bill. The HRA should remain in force. Failing that, the provisions of the Bill should not be extended to Scotland. The Scottish Parliament will be asked to reach a definitive view on the question of legislative consent in due course[39].

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[37] Further information is available in Human Rights Act 1998 - The UK Government's consultation paper on "Human Rights Act Reform: A Modern Bill Of Rights" - Response by the Scottish Government (www.gov.scot).

[38] The principle that the UK Parliament should not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament has been a fundamental feature of the settlement since its inception. It was given explicit statutory recognition by the Scotland Act 2016 - Scotland Act 2016 (legislation.gov.uk). See also: Devolution Guidance Note 10 (1998) and the Standing Orders of the Scottish Parliament. For a helpful discussion of the potential devolution implications of the Bill of Rights Bill see: Iain Jamieson: Effect of the Bill of Rights upon the meaning of Convention Rights under the Scotland Act – UK Constitutional Law Association.

[39] The Scottish Parliament passed motions in 2014 and 2017 recording its support for the Human Rights Act and calling on the UK Government to avoid actions that undermine or erode human rights – see Official Report – Meeting of the Scottish Parliament - 11 November 2014 and Official Report – Meeting of the Scottish Parliament - 10 January 2017.

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