UK Independent Human Rights Act Review (IHRAR)

Call for Evidence

Response by the Scottish Government

March 2021

Scottish Government
Riaghaltas na h-Alba
gov.scot

Introduction

1. The Scottish Government welcomes the opportunity to respond to the Review Panel's call for evidence.

2. In doing so, the Scottish Government particularly welcomes the assurance that the Review will not seek to re-examine or diverge from any of the substantive rights contained within the European Convention on Human Rights ("the Convention"). It is similarly welcome that the Review will not be concerned with the question of whether the UK should remain a signatory to the Convention.

3. In relation to both of these matters, the Scottish Government regards the continuing and unequivocal adherence by the United Kingdom to the Convention, and to the international institutional framework which supports its implementation, as an essential requirement of both domestic and international policy.

4. The Scottish Government has made clear that it would robustly oppose any attempt to weaken or undermine UK commitment to the Convention, together with any actions which seek to distance the UK from membership of the Council of Europe.

The UK Record

5. As the Chair of the Review Panel correctly observes in his preface to the call for evidence, the UK's historical contribution to the development of human rights law has been of immense importance. The UK was instrumental in the drafting and promotion of the Convention, and was the first state to ratify, in 1951.

6. That is a record of which the UK as a whole should be proud. It is a matter of profound regret that representatives of the UK Government have, in more recent times, come increasingly to be seen as detached from, and often openly hostile to, the Convention and its institutions.

7. Repeated attempts have been made since 2011 to advance an agenda which has been explicitly directed at securing the repeal, replacement or "reform" of the Human Rights Act 1998 ("HRA"). The fact that those attempts have been defeated by concerted cross-party opposition and the efforts of civil society campaigners should not disguise the ongoing existence of a real and present danger.

8. The Scottish Government's responses to previous exercises which threatened the integrity or the existence of the human rights safeguards contained in the HRA are a matter of public record[1]. In practice, and despite the narrower remit of the current Review, much of this previous commentary remains relevant.

[1] 1/ Response to the Scottish Parliament European and External Relations Committee (November 2015)
2/ Response to the UK Government's additional questions about a possible UK Bill of Rights (September 2012)
3/ Response to the UK Government's discussion paper, 'Do we need a UK Bill of Rights?' (November 2011)

A Precautionary Approach

9. Against that background, the Scottish Government acknowledges, and again welcomes, the Panel's intention to address the questions identified in its Terms of Reference in an objective and politically-neutral manner.

10. In doing so, the Scottish Government nonetheless asks the Panel to recognise that any exercise directed at reviewing the working of the HRA must proceed with the utmost caution, and with a very keen awareness of the dangers inherent in the current political and constitutional environment.

11. It is therefore incumbent on the Review Panel to give close and careful consideration to the wider implications of its work. In doing so, it should also critically evaluate the assumptions which inform the questions posed in its Terms of Reference.

Danger of Proceeding from False Premises

12. The Scottish Government disagrees, for example, with the premise which underlies Theme 2 of the Review's questionnaire.

13. The Scottish Government does not believe that the courts "have been drawn unduly into matters of policy". In adjudicating in human rights cases the UK courts have merely carried out their proper function, which is to interpret and apply the law, and to do so objectively and without fear or favour.

14. The fact that the government of the day may happen to dislike or disagree with the judgment of the court in a particular case does not render that judgment "political" or constitute an interference in matters of policy.

15. What it does mean is that the government in question has erred as a matter of law, and that it must rectify that error in line with the ruling of the court. The practical consequence may, of course, be that a particular policy cannot be implemented in the manner Ministers might have wished. But again, that is in reality a question of whether the law permits the preferred course of action, not one of subjectivity on the part of the court.

16. That state of affairs, reflecting as it does the most important and fundamental of constitutional safeguards, is not one which should trouble any government which is committed to the principles of democracy, human rights and the rule of law.

17. A critical part of the core skillset of both government officials and Ministers is the ability to find alternative, and legally compliant, means to achieve legitimate policy aims. A problem will therefore only truly arise where it is the policy objective itself which is legally-questionable and liable to be blocked by the judgment of a court. Self-evidently, policies which have as their purpose the obstruction or denial of human rights will be at particular risk of challenge. But these are not policies which any modern democratic government should contemplate pursuing.

18. The idea that there has somehow been an "over-judicialising" of public administration in the UK must therefore be regarded as a political construct in its own right, and one that in practice serves an agenda which is at odds with human rights principles and the existence of necessary constitutional constraints on the exercise of state power.

Enhancing and Extending Safeguards

19. For its part, the Scottish Government has made clear in its response to previous initiatives, such as the Commission on a UK Bill of Rights, that its overall position on the potential amendment or extension of the HRA is not dogmatic or inflexible. Where a genuine and convincing human rights case for improvement can be made, the Scottish Government remains open to that possibility. The Scottish Government was, for example, supportive of Convention-related adjustments made to the Criminal Procedure (Scotland) Act 1995 by the Scotland Act 2012[2].

20. Moreover, the Scottish Government is itself collaborating with a widely-drawn group of public sector, civil society and other partners (including the Scottish Human Rights Commission and the Equality and Human Rights Commission) to develop proposals aimed at significantly extending the reach of human rights law in Scotland, by incorporating further international human rights treaties into domestic law.

21. The resulting proposals, which are currently being developed by the National Taskforce for Human Rights Leadership, are expected to be agreed and published before the end of the current session of the Scottish Parliament. The proposals will be of interest to the Review Panel and the Scottish Government will ensure that the Panel is notified of publication in due course.

22. The Panel will also wish to be aware that a Government Bill to incorporate the UN Convention on the Rights of the Child ("UNCRC") into Scots law has completed Stage 2 in the Scottish Parliament, and is expected to be passed before the end of the current parliamentary session [3].

23. A necessary feature of all such legislative proposals, without which the Scottish Government would not be willing to support any change to the law as it currently stands, is that both the purpose and effect must be directed at enhancing the ability of individual members of society, as rights-holders, to assert and vindicate their rights in the face of actions by public authorities and state institutions.

24. That includes the ability of the individual, as the subject rather than the object of an effective human rights regime, to challenge the actions of both government and the legislature, by seeking (where necessary) an effective remedy in the courts.

[2] Amendments to the Criminal Procedure (Scotland Act) 1995 were made by Part 4 of the Scotland Act 2012. These related to compatibility issues arising as a consequence of the actions of a public authority or in relation to legislation passed by the Scottish Parliament.
[3] See further details below at paragraphs 40 to 47. The text of the Bill can be found at: https://beta.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill

25. It is certainly the case, in the view of the Scottish Government, that the corollary to the further empowerment of individual rights-holders is that the accountability of public institutions at all levels, and their ability to perform their functions in a manner that fully respects, protects and fulfils human rights, should also be extended and enhanced.

The Scottish Context

26. As Scotland's national government, exercising executive responsibility for devolved matters in Scotland, the Scottish Government is committed to embedding human rights at the heart of devolved policy-making and public service delivery.

27. Since 2018, that commitment has been reflected, *inter alia,* in Scotland's National Performance Framework ("NPF")[4], which, as well as listing respect for the rule of law as a core value, establishes a human rights National Outcome relevant to the work of all public authorities with devolved and mixed functions. This states that:

"We respect, protect and fulfil human rights and live free from discrimination"

28. That commitment to human rights is itself a characteristic of the legal and constitutional context within which the Scottish Government, and Scottish public authorities in general, exercise their functions.

29. Human rights are, of course, universal and inalienable in nature and, as such, they are also essentially constitutional in both their intent and application. In that sense, human rights requirements should properly be regarded as occupying the highest tier in any hierarchy of legal norms. They necessarily transcend, and should displace, decisions or actions which are incompatible with the fundamental values of humanity, as these are expressed in internationally-agreed treaties and conventions[5]. The HRA gives domestic effect to one of those conventions in the UK.

30. That presumption in favour of the pre-eminence of human rights requirements is a central feature of the current constitutional settlement in Scotland, at least insofar as the rights identified in the Convention are concerned.

<u>The Scotland Act 1998 and the HRA</u>

31. As the Panel is aware, public authorities in Scotland, including the Scottish Government, the Scottish Parliament and Scotland's courts, are subject to the requirements of the HRA in the same way as public authorities elsewhere in the United Kingdom.

32. In addition, the activities of the devolved legislature and the executive in Scotland are subject to important human rights obligations which are set out in the Scotland Act 1998 ("the Scotland Act").

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[4] Scotland's National Performance Framework - https://nationalperformance.gov.scot/

[5] A principle memorably expressed by the Inter-American Court of Human Rights in *Velásquez-Rodríguez* (1988) – "The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State."

33. In particular, the Scotland Act provides that legislation which is incompatible with the Convention rights[6] established by the HRA is outside the legislative competence of the Scottish Parliament and is "not law"[7]. The Scottish Ministers similarly have no power to act incompatibly with the Convention rights[8]. The Act further provides for the courts to be able to vary the retrospective effect of decisions, by removing or limiting any retrospective effect or suspending the effect in order to allow the defect to be corrected[9]. The Act is supplemented by other statutory provision, such as the Convention Rights (Compliance) (Scotland) Act 2001[10] which enables remedial orders to be made.

34. The result is a robust and sophisticated, yet flexible, framework of constitutional limitations on the exercise of executive and legislative powers. Not only are the legal mechanisms which serve to protect Convention rights in Scotland more extensive than is the case in England (though similar to the arrangements in Wales and Northern Ireland). They also impose a more demanding compliance standard in relation to the compatibility of primary legislation of the devolved legislature. That framework has served Scotland well for more than two decades, within the confines of the current constitutional arrangements of the United Kingdom

An Effective Framework of Protections

35. In the view of the Scottish Government both the HRA and the Scotland Act function effectively, and in combination, in a way that enables the successful transaction of government and parliamentary business, whilst delivering vitally important safeguards against the possibility that human rights and fundamental freedoms might be breached.

36. The fact that this sophisticated constitutional framework is comprised of two constitutional statutes – the Scotland Act and the HRA – rather than just one is of importance in the context of the current Review. The mechanisms in the Scotland Act are integrally connected to the HRA and the Convention and form part of a larger whole.

37. In particular, the definition of "Convention rights" in the Scotland Act is drawn directly from the HRA. The rights identified in both Acts are therefore identical. In addition, the Scotland Act is clear that proceedings cannot be brought unless (with the exception of the relevant Law Officers) a person qualifies as a "victim" for the purposes of Article 34 of the Convention. The damages which may be awarded by a court are effectively those which it could award under section 8 of the HRA[11].

38. It is therefore essential that the Review understands the HRA, at least insofar as it applies in Scotland and in the other devolved nations, as an integral part of a larger and more complex legal and constitutional framework.

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[6] Defined in section 1 of the HRA and listed in Schedule 1. Articles 1 and 13 of the Convention are not included, but the Convention rights do encompass elements from optional Protocols 1 and 13.
[7] Section 29 Scotland Act 1998 (legislation.gov.uk)
[8] Section 57 Scotland Act 1998 (legislation.gov.uk)
[9] Section 102 Scotland Act 1998 (legislation.gov.uk)
[10] Convention Rights (Compliance) (Scotland) Act 2001 (legislation.gov.uk)
[11] Section 100 Scotland Act 1998 (legislation.gov.uk)

39. For all that the HRA is a "protected enactment" which cannot itself be modified by devolved legislation passed by the Scottish Parliament[12], the view of the Scottish Government and of the overwhelming majority of members of the Scottish Parliament is that changes affecting Scotland cannot and should not be made to the HRA without the explicit consent of the Scottish Parliament[13].

UNCRC Bill

40. The emphasis being given to compliance with human rights obligations in a devolved context is further exemplified by the current Government Bill to incorporate the UN Convention on the Rights of the Child ("UNCRC") into Scots law[14] (insofar as it is possible to do so within the current legislative competence of the Scottish Parliament)[15].

41. The objective of the Bill ("UNCRC Bill") is to "incorporate in Scots law rights and obligations set out in the United Nations Convention on the Rights of the Child [and] to ensure compliance with duties relating to the [UNCRC]". The approach taken by the Scottish Government seeks to ensure the highest protection possible for children's rights, within the current limits of devolved competence.

42. The UNCRC Bill intentionally reflects the approach employed by the HRA and the Scotland Act. Amongst other key features, the Bill imposes a duty on public authorities not to act incompatibly with the incorporated provisions of the UNCRC and its first and second Optional Protocols (referred to as the "UNCRC requirements"). It also enables the courts to hear cases relating to those rights and to decide whether legislation is compatible with the requirements of the UNCRC requirements. Depending on the specific circumstances, the courts may "strike down" the legislation in question, so that it ceases to have effect, or issue a declarator of incompatibility [16].

43. The UNCRC Bill also follows the HRA model in other key respects. In particular, section 19 directly reflects the approach taken in section 3 of the HRA, by requiring legislation to be read and given effect in a way that is compatible with the UNCRC requirements, so far as it is possible to do so.

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[12] Paragraph 1(2)(f) of Schedule 4 Scotland Act 1998 (legislation.gov.uk)

[13] The Scottish Parliament passed motions in 2017 and 2014 expressing support for the HRA and calling on the UK Government to avoid actions that weaken international human rights.

- Official Report - Parliamentary Business 10 January 2017 - motion S5M-03297
- Official Report - Parliamentary Business 11 November 2014 - motion S4M-11484

[14] The UNCRC Bill: bill-as-amended-at-stage-2.pdf (parliament.scot)

[15] Those provisions of the UNCRC that relate to reserved matters will not be incorporated by the Bill.

[16] The Scottish Government's preferred policy approach would be to require all legislation, past and future, to be compatible with the incorporated UNCRC rights and obligations, with the courts having the power to 'strike down' incompatible provisions, including primary legislation. However, a provision requiring future Acts of the Scottish Parliament to be compatible with UNCRC would alter the legislative competence of the Parliament and is, therefore, beyond its current powers. Accordingly, the Bill provides for two different remedies in respect of legislation which is found to be incompatible.

44. The fact that this key feature of the HRA is being replicated in new devolved human rights legislation provides a very clear indication that the HRA model is not only effective, but enjoys the explicit support of the Scottish Government, the Scottish Parliament[17] and Scottish civil society. The UNCRC Bill adopts these key features and builds upon them to ensure that the framework which the Bill puts in place is the strongest model which it is currently possible to deliver within the powers available to the Scottish Parliament.

Implementing International Obligations

45. In addition, amongst the rights which will be incorporated by the UNCRC Bill are a number of rights which are directly analogous to rights set out in the Convention, including in relation to freedom of expression; freedom of thought, conscience and religion; freedom of association and peaceful assembly; and respect for privacy and family life.

46. The UNCRC Bill does not modify or amend the HRA (and it would be outside devolved legislative competence for it to do so). But (subject to the Bill being passed and enacted) the proposed new legislation will mean that it becomes possible in Scotland to vindicate these UNCRC-derived rights by means of proceedings enabled by devolved legislation, either in combination with the HRA and the Scotland Act, or independently from them. The ability to do so is an explicit objective of the UNCRC Bill. The proposals being developed (in relation to the wider international human rights framework) by the National Taskforce for Human Rights Leadership are expected to take a similar approach.

47. In adopting this approach to incorporating internationally-recognised human rights into Scots law, the conscious decision has been taken to reference the rights which are set out in the relevant international instruments. That approach mirrors the one taken in the HRA. The rights set out in the UNCRC Bill are explicitly recognised as originating in the UNCRC, just as those in the HRA derive from the Convention.

48. Should it prove necessary (whether as a result of the current Review, or in consequence of some future UK Government initiative) the Scottish Government is clear that the full extent of devolved legislative competence should be used in order to prevent the erosion or removal of existing HRA safeguards – including by means of legislation which establishes protections which take the place, in a devolved context, of those removed by any future Act of the UK Parliament.

UK Independent Review of Administrative Law

49. The work of the current Review necessarily interfaces with issues being explored by the separate Independent Review of Administrative Law (IRAL) launched in July 2020 by the UK government to consider options for reform of the process of judicial review[18].

[17] The Bill has completed Stage 2 consideration and Stage 3 (which is the final stage of parliamentary consideration) is scheduled for 16 March.
[18] Independent Review of Administrative Law - GOV.UK (www.gov.uk)

50. The Scottish Government has a close interest in any potential changes to judicial review affecting Scotland. The Scottish Government has responded in detail to the IRAL's call for evidence, setting out its overall position and identifying significant concerns in relation to any attempt to restrict the reach of judicial review.

51. The matters addressed in the IRAL response are therefore not reiterated in this response.

52. The Scottish Government nonetheless wishes to emphasise that it regards judicial review as a mechanism of particular importance in ensuring that human rights are respected, protected and fulfilled. The Scottish Government is satisfied that the law in relation to judicial review currently provides an efficient and proportionate means of ensuring that potential breaches of human rights can be brought before the courts.

THEME ONE

The relationship between domestic courts and the European Court of Human Rights (ECtHR).

QUESTION

The Review Panel has invited views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.

Scottish Government Response

53. In the view of the Scottish Government, the relationship between domestic courts in the UK and the European Court of Human Rights ("ECtHR") functions successfully and largely as intended.

54. It remains the case that the HRA does no more than require domestic courts and tribunals in the UK to "take into account" the jurisprudence of the ECtHR. Moreover, that requirement is subject to the further rider that they should do so only "so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen"[19].

55. The Scottish Government notes that the Terms of Reference for the Review are themselves clear that the domestic courts and tribunals "are not bound by the case law of the ECtHR".

56. The requirement to take ECtHR jurisprudence "into account", but not to be rigidly bound by its decisions, remains the correct approach, and is the model that simultaneously delivers both the greatest alignment and the greatest flexibility.

57. The HRA is constructed in such a way as to ensure that the rights derived from the Convention are understood and applied with reference to their proper trans-national context, as rights which are universal and inalienable in nature, whilst at the same time allowing the domestic courts to apply those rights in a manner that is appropriate to the specific national circumstances of each individual case.

58. In taking this approach, including in section 2, the HRA demonstrates a proper regard for both the constitutional separation of powers and the principle of subsidiarity. It is an approach which values and respects the independence of the judiciary, and the vitally important role played by the national courts in reviewing decisions made by the executive and the legislature. At the same time it accords an appropriate level of deference to the right of Parliament and the duly-elected government (including the devolved institutions) to determine public policy and to legislate.

[19] Section 2 Human Rights Act 1998 (legislation.gov.uk)

59. The requirement on the national courts to take ECtHR jurisprudence "into account" should therefore be understood as a necessary, and fully intentional, consequence of both the requirements of the Convention (and in particular the role accorded to the ECtHR) and of the policy decisions made by the UK Parliament when passing the HRA.

The Authority and Functions of the ECtHR

60. The jurisdiction of the ECtHR (defined in Article 32 of the Convention) extends to "all matters concerning the interpretation and application of the Convention". It is consequently the ECtHR which exercises ultimate authority in determining the meaning of the rights set out in the Convention. It is also the ECtHR which is ultimately entitled to decide whether or not a state party is in breach of its obligations under the Convention. Indeed, Article 19, which establishes the ECtHR, does so explicitly for the purpose of "ensur[ing] the observance of the engagements undertaken by the High Contracting Parties".

61. Given the role of the ECtHR as the ultimate source of a definitive interpretation of the Convention, it would be very odd indeed for the UK courts to have no regard to its jurisprudence when hearing Convention cases. That would clearly give rise to the risk of significant divergence or inconsistency, in a way that would ultimately defeat the purposes of the Convention as a pan-European human rights instrument which guarantees common standards across the territory of all members of the Council of Europe.

62. As a minimum therefore, it is clearly necessary for the domestic courts to be required to "take into account" the jurisprudence of the ECtHR. The question which follows is not whether this places too onerous a burden on the domestic courts. (It does not, and the courts would - practically, necessarily and inevitably - require to have regard to the ECtHR in some form even if section 2 of the HRA did not exist). Rather, the question which might legitimately be asked is whether this requirement is too weak, and whether it should be replaced by a requirement to follow the letter of ECtHR decisions (or at least of those issued by the Grand Chamber).

63. The Scottish Government believes that a stricter requirement of this kind would also be a mistake. It would unhelpfully constrain the discretion and judgement of UK judges and risk defeating the purposes of the Convention as an instrument which explicitly recognises not only a common European heritage but which also values individual national traditions. The availability of a "margin of appreciation" is explicitly intended to facilitate different routes to a common destination.

64. The Scottish Government therefore opposes any change to the current wording of section 2 of the HRA, and supports the continuation of the status quo. Within that, the Scottish Government believes strongly in the principle that the courts should be trusted to exercise their powers, independently[20] and objectively and in a manner that ensures the law is interpreted and applied coherently, consistently and reliably, with the purpose of ensuring that every member of society is able to vindicate their rights and obtain justice.

[20] As required by section 1 of the Judiciary and Courts (Scotland) Act 2008.

65. Both the executive and the legislature should be hesitant to interfere with the exercise of judicial authority – not least because the principal effect of attempts to constrain the discretion of the courts may well be to obstruct the ability of the courts to find just and equitable solutions to the challenges thrown up by individual cases.

Connecting Domestic and International Systems

66. Retention of section 2 of the HRA in its current form is also supported by an understanding of the intentions of the UK Parliament when it originally passed the legislation

67. As is well known, the white paper for the Bill[21] sought to "bring human rights home", in the sense of enabling individual rights-holders in the UK to seek a remedy in the domestic courts, rather than having to make individual application to the ECtHR under Article 34 of the Convention. That Article 34 right was however retained, so that rights-holders who had exhausted the remedies available in the domestic courts would continue to have the option of seeking a remedy from the ECtHR. There was no sense in which the remit given to the domestic courts was to be exercised in opposition to that of the ECtHR.

68. The HRA was therefore explicitly conceived as a mechanism which should connect the domestic legal system in each of the UK's three jurisdictions with that of the ECtHR.

69. From the start, the HRA has been intended to implement, and to complement, the rights identified, and the mechanisms established, at the pan-European level by the Convention. It would therefore be self-defeating and illogical for the HRA to do anything other than to require domestic courts to "take into account" the decisions reached by the ECtHR. Those decisions, understood as a coherent but evolving body of case law, serve ultimately to define both the intent and the legal substance of the Convention.

70. It is essential in that context to recognise that Convention cases heard in the UK courts are not solely of national significance. Such cases give life and substance to the Convention rights and they necessarily have wider relevance. In fact, significant cases decided in the UK courts directly enrich the jurisprudence of the entire Convention system and may well prove influential in other jurisdictions. Sir Nicolas Bratza , a former President of the ECtHR, has for example pointed out that one reason the ECtHR may wish to hear a case which has previously been decided in the UK courts is precisely because the UK decision may have application in other countries, where national courts are addressing the same or a similar issue[22].

71. As a matter of policy applicable to Scotland, the Scottish Government would supplement this observation on the transnational value of the Convention system by drawing attention to the particular desire which has been expressed by the Scottish Parliament to maintain maximum alignment with European systems and norms.

[21] White Paper: Human Rights Bill – October 1997 (publishing.service.gov.uk)

[22] For example see his comments in European Human Rights Law Review E.H.R.L.R. 2011, 5, 505-512 in relation to the return of Tamils to Sri Lanka – a matter which engaged not just the UK courts but those of Denmark, Finland, France, Germany and the Netherlands.

72. Whilst that policy objective has been expressed primarily in relation to membership of, and alignment with, the European Union (with Scotland having voted by 62% to 38% to remain within the EU), it also applies to the Council of Europe. As members of the Panel will be aware, the policy of the Scottish Government is for Scotland to become a fully independent nation, within the wider international frameworks established by multinational organisations such as the EU, the Council of Europe and the United Nations.

73. It is therefore very much part of Scottish Government policy to maintain full participation in mechanisms such as the Convention. Doing so is also clearly in the best interests of the UK. Further, that ongoing commitment is essential to the maintenance of the rules-based international order which has prevailed since 1945. Changes to the HRA which had the effect of distancing Scotland and the UK from the Convention or the Council of Europe would be strongly opposed by the Scottish Government.

Further Specific Questions asked by the Review Panel

QUESTION

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

Scottish Government Response

74. The Scottish Government recognises that there has been an active, and necessary, debate which has sought, over the last two decades, to explore the full meaning and implications of the obligation to take ECtHR decisions "into account".

75. Importantly, the primary force driving that debate has been the work of the courts themselves, and in particular their ongoing need to reconcile potentially competing demands within the sophisticated and organically evolving legal framework provided by the Convention. The existence of such debate is in fact an indication of the strength and vigour of the system as a whole (and of the Convention as a "living instrument") and not, as some commentators may wish to believe, a sign of weakness.

76. In simplistic terms, that debate has centred on the question of whether the UK courts should "mirror" ECtHR jurisprudence, by following the line originally established by Lord Slynn (in *Alconbury Developments*[23]) and Lord Bingham (in *Ullah*[24]).

77. In that sense, the question has been whether the UK courts should proceed (as Lord Bingham proposed) on the basis that while ECtHR *"case law is not strictly binding, it has been held that courts should, in the absence of some special*

[23] R (Alconbury *Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at 26 (9th May, 2001) (bailii.org)
[24] R (on the Application of Ullah) v Special Adjudicator [2004] UKHL 26 (17 June 2004) (bailii.org)

circumstances, follow any clear and constant jurisprudence" of the ECtHR. In doing so Lord Bingham further proposed that *"[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".*

78. Set against that view has been the proposition that courts in the UK should have the freedom to explicitly diverge from the path taken by the ECtHR, either by innovating in ways that go further than existing ECtHR jurisprudence (for example by extending the scope of certain rights), or by concluding that existing ECtHR case law is either not applicable to the case in front of the court, or is mistaken or outdated in some key respect.

Possibilities and Choices

79. The reality of course is that a range of possibilities simultaneously exist, and are contained within, the current wording of the HRA. The existence of those possibilities is itself consistent with the legislative intention of Parliament.

80. For the UK courts, the framework provided by the HRA establishes boundaries within which it is for the courts themselves (and in particular for the UK Supreme Court) to chart a coherent long-term path. Amongst the possibilities available to them are the options to take a looser or a more rigid view of the extent to which they should take account of ECtHR case law, and indeed to adapt their own approach in the light of experience.

81. In the parliamentary and the political sphere, there are also choices to be made, although the debate is qualitatively different in nature. To the extent it remains necessary to make decisions about the UK's ongoing relationship with the Convention and the ECtHR, such decisions represent a choice to be made between different conceptions of the UK as a state and as a society – between a future that is timid, introverted and isolationist, or one that is confident, collaborative and international.

82. There is, however, a requirement to recognise a further important truth that applies whether one happens to believe that the UK courts have been unnecessarily cautious in wishing to avoid outpacing the ECtHR's interpretation of the Convention or have been unduly adventurous in seeking to break new ground.

83. The reality is that the decisions in each individual case have been the result of careful deliberation by the courts concerned. That careful analysis and the formulation of a binding decision is precisely what the courts exist to do and it is the essence of both their constitutional function and their professional expertise.

84. It therefore seems singularly unproductive to sift through the detail of every significant Convention case which has come before the UK courts in an attempt to second-guess the decisions which have emerged. Whilst the Review Panel is of course comprised of eminent and experienced individuals, there is no particular reason to suppose that it (or any similar body) is better placed than the UK judges hearing each case to identify those instances where the "right" decision has been reached, and those where the courts may have taken a "wrong" turning.

Alternative Formulations

85. Of rather more immediate relevance is the question of whether the requirement set out in the HRA could realistically be expressed in any other way, and if it could, what potentially adverse or beneficial consequences might result.

86. Some obvious potential alternatives include the possibilities that the HRA should:

- say nothing about ECtHR jurisprudence;
- explicitly direct the courts to follow ECtHR decisions;
- recognise the existence of ECtHR jurisprudence but place no particular obligation on the courts to have regard to it;
- direct the courts to give primacy to domestic case law or common law over ECtHR jurisprudence
- prohibit the courts from taking account of ECtHR jurisprudence.

87. All of these alternatives can readily be dismissed as less desirable than the current formulation of section 2 of the HRA.

88. The reality, of course, is that an effective court will quite properly have regard to those matters which it is persuaded are material to the case in front of it. Where ECtHR jurisprudence is germane to the particular case, the court will necessarily be inclined to take that jurisprudence into account. In doing so, it may follow the decision of the ECtHR more or less closely, depending on the facts of the case and the relevance of the decision. It will naturally also weigh ECtHR case law against available domestic judgments, where both shed light on the issues under examination.

89. Nothing is to be gained, and much stands to be lost, from embarking on any change to the current wording of section 2 of the HRA. The Scottish Government therefore strongly urges the Review Panel to endorse the HRA as it currently stands and to reject any suggestion of change.

QUESTION

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

Scottish Government Response

90. The concept of a national “margin of appreciation” is central to the functioning of both the Convention and the ECtHR.

91. It reflects the reality of a system which applies across the 47 member States of the Council of Europe and which must therefore be capable of serving nations and societies which subscribe to a common European identity and democratic tradition, but which are nonetheless socially and culturally very diverse.

92. Crucially, it is this simultaneous emphasis on shared values and diverse national traditions that is one of the core strengths of the Convention and its institutions.

93. Moreover, the overall emphasis within the system on subsidiarity and the primary responsibility which each State Party has to secure the Convention rights within the scope of its own jurisdiction has been given further formal expression in Protocol 15 to the Convention[25], as a result of the 2012 Brighton Declaration[26].

94. The UK Government was instrumental in formulating the declaration and in the development of the protocol, including in particular its emphasis on subsidiarity and the margin of appreciation. The UK ratified the protocol in April 2015 (although it has not yet come into force, as a result of delays by other States Parties). The importance of these principles was again re-iterated in the 2015 Brussels Declaration[27], which *inter alia* invited the ECtHR "to remain vigilant in upholding the States Parties' margin of appreciation".

95. The degree to which the task of interpreting and applying Convention rights is explicitly understood to belong first and foremost with the national courts therefore merits special emphasis.

96. It is the national courts which are, intentionally, the first available forum for the protection of human rights, and it is the national courts which are expert in relation to both national law and the factors relevant to assessing the public interest in the particular context of the society in which a case has arisen.

97. The ECtHR may review the decisions reached by the national courts, and it may reach a different conclusion having had regard to the broader, trans-national context in which the Convention applies. That process is itself important in promoting "judicial dialogue" between the national courts and the ECtHR. But the ECtHR has been clear that national authorities are best placed to understand context-specific factors such as those which determine how the qualifications and limitations allowed for in the Convention should be applied at the national level. As the former UK ECtHR judge, Paul Mahoney, has observed:

> *"if the independent and impartial national courts, who are better acquainted with the democratic society of their country, have properly and fully considered the contested legal measure on the basis of the relevant human rights standards, there will need to be strong reasons for [the ECtHR] to substitute [its] own, different assessment for that of the national judges."*[28]

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[25] Protocol 15 of the Convention (coe.int)
[26] 2012 Brighton Declaration - High Level Conference on the Future of the European Court of Human Rights (coe.int)
[27] Brussels Declaration (coe.int)
[28] Paul Mahoney, The relationship between the Strasbourg court and the national Courts, Law Quarterly Review, L.Q.R. 2014, 130(Oct), 568-586

98. For their part, the domestic courts have successfully translated this international law concept of a margin of appreciation into a distinct and more detailed mechanism which accords appropriate respect to the role of the executive and the legislature in determining public policy.

99. Both are premised on ideas of judicial restraint which respects democratic institutions and acknowledges where institutional ability/capacity lies to best make certain decisions.[29]

100. The Scottish Government considers that the domestic courts are well used to making these assessments and do so appropriately. The Scottish Government respects the independence and objectivity of the domestic courts to reach just and equitable solutions in individual cases.

101. Accordingly, the Scottish Government does not believe that there is any case for changes in relation to the manner in which courts in the UK approach issues falling within the margin of appreciation which properly belongs to individual States Parties.

QUESTION

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

Scottish Government Response

102. The Scottish Government considers the scope for "judicial dialogue" between the domestic courts and the ECtHR to be an important feature of the Convention system. This is a strength and not a weakness, and is very much a feature to be retained and valued.

103. Judicial dialogue in this sense contributes to ensuring both coherence and consistency in the way Convention rights are applied by the domestic courts and the further clarification and evolution of a common pan-European understanding of the full scope and effect of those rights.

104. In practice, the process of judicial dialogue between the UK courts and the ECtHR can be regarded as one of convergence and adaptation, with the courts in each jurisdiction (and in particular the UK Supreme Court and the ECtHR) recognising the value to be derived from a close examination of the reasoning set out in the decisions of the other, but without any necessary requirement to follow that reasoning where, in the judgment of the court, there are good grounds for believing that an alternative is to be preferred.

[29] See for example: *R v DPP, Ex p Kebilene* [2000] 2 AC 326 at 381; *R(Samaroo) v Secretary of State for the Home Department* [2001] UKHRR 1150 at para 35; and in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 at 44.

105. This can be seen for example in the convergence of the respective courts in the cases of *Al-Khawaja*[30]and *Horncastle*[31]. Giving judgment in Horncastle (in 2009), Lord Phillips (at paragraph 11), rejected the argument that the UK Supreme Court should simply follow the decision of the ECtHR in *Al-Khawaja*.

> *11. … The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court.*

106. Having been invited to reconsider the position previously adopted by the ECtHR, the Grand Chamber ultimately agreed with the UK courts in finding that a conviction based solely or decisively on the statement of an absent witness would not automatically or inflexibly result in a breach of Article 6[32].

107. A further example of such "valuable dialogue" occurred in relation to whole life sentences. This was the focus for political controversy at the time, with an initial ruling by a Chamber of the ECtHR (in *Vinter*[33]) that there had been a breach of Article 3 being followed by a judgment in the Court of Appeal (for England and Wales) which rejected that assessment (*McLoughlin*[34]). A further examination of the matter by the ECtHR – first by a Chamber and then by the Grand Chamber (*Hutchinson*[35]) – resulted in a recognition that the UK position was compliant, or at least within the allowable national margin of appreciation.

108. Whilst these cases did not directly engage with the law of Scotland (which was never in question in terms of compliance with Convention rights) the process itself clearly demonstrated a willingness on the part of the domestic courts to push back against reasoning by the ECtHR, and an openness on the part of the ECtHR to an alternative interpretation. It also helpfully underlines that individual national systems (including those within the UK) can rationally adopt approaches which are consistent with each other as part of a coherent overarching human rights mechanism, but do not have to be identical in relation to every last detail.

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[30] *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1
[31] *R v Horncastle & Ors* [2009] UKSC 14 at 11
[32] HORNCASTLE AND OTHERS v. THE UNITED KINGDOM (coe.int)
[33] *Vinter v United Kingdom* [2012] 55 EHRR 34
[34] *Attorney General's Reference (No. 69 of 2013): R v McLoughlin*; *R v Newell* [2014] EWCA Crim 188
[35] *Hutchinson v United Kingdom* [2015] ECHR 111

109. A further significant feature of such judicial dialogue is the recognition that courts can reasonably disagree in their conclusions even when presented with the same facts. In the case of *Al-Skeini*[36] both the House of Lords (by a majority)[37] and the ECtHR[38] came to broadly the same conclusion in relation to the general principle that the Convention and the HRA can have extraterritorial application. However they disagreed on whether the specific conditions "on the ground" amounted to the exercise of effective control by the UK.

110. Since the ECtHR has ultimate authority to determine the meaning and application of the Convention, its assessment prevailed in the *Al-Skeini* case. However, in reaching its conclusion the ECtHR gave very careful consideration to the reasoning not just of the House of Lords, but also of the lower courts. The final ruling was therefore informed not just by the knowledge and expertise of the Grand Chamber of the ECtHR, but by that of the other courts which had engaged with the case. On any measure that constitutes a remarkably powerful mobilisation of the best collective legal expertise available at both the national and the European level.

111. There can certainly be no doubt that the ECtHR itself attaches great weight to the reasoning of national courts, and perhaps especially to the high quality judgments delivered by the UK courts. As the former President of the ECtHR, Sir Nicolas Bratza, has remarked, the ECtHR has:

> *"been particularly respectful of decisions emanating from courts in the United Kingdom since the coming into effect of the Human Rights Act and this because of the very high quality of the judgments of these courts, which have greatly facilitated our task of adjudication. In many cases, the compelling reasoning and analysis of the relevant case-law by the national courts has formed the basis of the Strasbourg Court's own judgment.*[39]*"*

112. Again, the Scottish Government would argue that the decision-making involved, of the part of both the national courts and the ECtHR, is precisely of the kind that the courts themselves are best placed to undertake.

113. What wider society expects of the courts at all levels is that they should apply the law in a manner that is just and legally-correct, but also consistent, predictable and capable of evolving rationally and coherently over time. That process is one which is facilitated by "judicial dialogue" of the kind which takes place between the UK courts and the ECtHR. It is a process which self-evidently works, in a manner that is both organic and successful, and there is no objective or reasoned case for legislative change.

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[36] *Al-Skeini v United Kingdom* [2011] ECHR 1093
[37] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26
[38] *Al-Skeini v United Kingdom* [2011] ECHR 1093
[39] *The relationship between the UK Courts and Strasbourg,* E.H.R.L.R. 2011, 5, 505-512

THEME TWO

The impact of the HRA on the relationship between the judiciary, the executive and the legislature.

The Review Panel has invited views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy.

The Review Panel has particularly asked for views on any strengths and weakness of the current approach and any recommendations for change.

Scottish Government Response

114. For the reasons previously set out, the Scottish Government believes that the HRA (in combination with the Scotland Act in relation to Scotland) successfully balances the roles of the judiciary, the legislature and executive. The fact that the government of the day may happen to dislike or disagree with the judgment of the court in a particular case does not render that judgment "political" or constitute judicial interference in matters of policy.

115. That is not, of course, to make light of the practical consequences of an adverse ruling. Such an outcome may be challenging to resolve, particularly where legislation has been in force for some time. In other instances, the incompatibility in question may require significant changes to long-established procedures and practices. It may also result in controversy, and criticism of decisions made by government, in a way that may be politically damaging[40]. Clearly, none of these outcomes is desirable. But they are not consequences which can be attributed to the actions of the courts. The role of the courts is to make findings of fact in relation to the law. Responsibility for defects of policy-making or legislation which may be exposed by that process rests with the original decision-maker, not with the judiciary.

116. The idea that the courts have been unduly drawn into matters of policy, or that there has been an "over-judicialisation" of public administration in the UK is ultimately itself a political construct, and one that serves an agenda which is at odds with human rights principles and the existence of necessary constitutional constraints on the exercise of state power.

[40] Significant examples of challenging cases in a devolved Scottish context include:
Napier v The Scottish Ministers [2005] CSIH 16 – as a result of which prisoners who had been subject to "slopping out" practices were entitled to compensation and the Scottish Prison Service was required to invest in updated toilet facilities.
Cadder v HM Advocate [2010] UKSC 43 – reforms were introduced by the Criminal Procedure Human Rights and Devolution (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 to give suspects questioned by the police a right of access to legal advice.
Salvesen v Riddell & Anor [2013] UKSC 22 – the UK Supreme Court ruled in 2013 that section 72 of the Agricultural Holdings (Scotland) Act 2003 was defective. See paragraphs 30 to 72 of the report by the Scottish Parliament's Rural Affairs, Climate Change and Environment Committee for further detail.

Further Specific Questions asked by the Review Panel

QUESTION

a) Should any change be made to the framework established by sections 3 and 4 of the HRA?

Scottish Government Response

117. No. The Scottish Government would not support any changes to sections 3 or 4 of the HRA that might have the effect of weakening or removing the vitally-important human rights safeguards provided by the HRA. If changes were to be made, these should be directed at strengthening and extending human rights protections.

118. As previously noted, the Scottish Government strongly supports the current implementation of the Convention as it applies in Scotland via the combined effect of the HRA and the Scotland Act. The controls which this approach imposes on the exercise of executive and legislative authority, and in relation to the making of legislation and its subsequent interpretation and application, are directly comparable to the sophisticated constitutional constraints which exist in comparator jurisdictions in Europe and elsewhere.

119. There is consequently a good theoretical argument for the extension of the controls imposed in Scotland by the Scotland Act (and in the other devolved jurisdictions by equivalent statutes) to the Westminster system. In particular, the theoretical ability of the UK Parliament to knowingly and intentionally legislate in a manner that is in breach of the international human rights established by the Convention, is difficult to reconcile with international legal and constitutional norms.

120. It is similarly problematic that the rectification of human rights incompatibilities at a UK level, which have been explicitly identified by the UK courts, is ultimately at the discretion of the executive and the legislature. No individual rights-holder, irrespective of the fact that a court has found in their favour, can be fully confident that their rights will in practice be upheld. Whilst it is of course true that such defects have almost invariably been rectified, though not necessarily with any great speed, the situation remains one which inevitably gives rise to important questions in relation to access to justice and the availability of the effective remedy required by Article 13 of the Convention.

121. The Scottish Government is very clear that the courts play a constitutionally essential role in protecting human rights from potential breaches and incursions by the other branches of government. The independent exercise of that essential function must be rigorously protected.

122. It is therefore entirely proper that sections 3 and 4 of the HRA should explicitly empower the UK courts to proceed on the basis that legislation should be read, wherever possible, in a way that is consistent with the (essentially constitutional) rights derived from the Convention.

123. It is also entirely proper that, where provisions cannot be "read down" in this way, the courts should (as a minimum) be able to issue a declaration of incompatibility. In relation to Scotland, the Scottish Government is entirely happy that the courts can in fact go further, by virtue of the Scotland Act, and declare incompatible legislation to be outside legislative competence and therefore "not law". That approach is consistent with mainstream international constitutional practice.

124. Further, it must be recognised that the practical effects of both the HRA and the Scotland Act were well understood when they were passed by the UK Parliament in 1998.

125. Those effects are the result of carefully considered drafting and reflect the will of the UK Parliament. In passing the HRA, parliamentarians were fully aware that a special status was being accorded to the Convention rights, and that "bringing human rights home" would necessarily require other legislation to adapt organically, so as to be consistent with the new domestically-enforceable human rights regime.

126. In that sense, the Convention rights and the HRA were emphatically not to be seen as "just another statute". The clear intention was that the HRA should have the character of a constitutional statute, insofar as that concept can be said to exist in UK law. [41]

127. The overall conclusion to be drawn is that the framework established by sections 3 and 4 of the HRA is:

- Entirely intentional in its practical effect. The underlying rationale – including the central role to be played by the courts in safeguarding human rights in the UK - has not changed.
- Consistent with the parallel mechanisms established by the Scotland Act and the other devolution settlements in the UK.
- Wholly unremarkable when compared against constitutional norms in other modern, progressive jurisdictions.
- Nonetheless, consistent with the UK Parliament's understanding of the special privilege enjoyed by its own primary legislation (and subordinate legislation which could not have been made in another, compatible way) – exceptional as that status may be.

[41] On which, see *Thoburn v Sunderland City Council* [2002] EWHC 195 and subsequent judicial discussion of constitutional legislation by the Supreme Court in *H v Lord Advocate* [2012] UKSC 24 and *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22

QUESTION

i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

Scottish Government Response

128. The question posed is founded in what appears to be a logical inconsistency.

129. By definition the "will of Parliament" in relation to any legislation passed in the two decades since the HRA was enacted in 1998 includes the intention that the legislation in question should be interpreted and applied (so far as it is possible to do so) in a way that is compatible with the Convention rights established in domestic law by the HRA.

130. In respect of legislation which pre-dates the HRA, the potential existence of incompatibilities was also understood by the UK Parliament and was properly taken into account when passing the HRA.

131. It is therefore difficult to see how the courts, in following the requirements set out by Parliament in the HRA, could be said to be interpreting legislation in a manner inconsistent with the intention of the UK Parliament. To make that suggestion is, at best, disingenuous.

132. In reaching judgment in human rights cases, the courts have in fact merely been fulfilling their constitutional duty to apply legislative provisions which have been passed by the UK Parliament and duly enacted. That process includes the judicial task of reconciling one statute (the HRA) with the requirements of other applicable legislation.

133. Again, the Scottish Government would emphasise that judgments cannot be regarded as "political", or an interference in policy matters, just because they happen to annoy or inconvenience the government of the day. Such an assertion is itself a political act and one that history suggests is unlikely to be motivated by a strong attachment to the principles of democracy, human rights and the rule of law.

134. Further, the Scottish Government would encourage the Review Panel to bear in mind the principle that "hard cases make bad law". The reality is that the HRA has delivered vitally important protections and safeguards which have directly benefited individual rights-holders across the whole of society.

135. Even if one were to accept the UK Government complaint that it sometimes loses human rights cases in the UK courts or in the ECtHR (though it normally wins 98% or more of cases which come before the ECtHR)[42], these reversals do not constitute a basis for re-engineering the fundamental features of the HRA.

136. For its part, the Scottish Government regards section 3 as a necessary and important feature of the HRA. Moreover, the Scottish Government has explicitly chosen to replicate section 3 of the HRA in section 19 of the UNCRC Bill currently in the Scottish Parliament. The Explanatory Notes to that Bill make clear that "This interpretative obligation is analogous to the obligation created by section 3 of the Human Rights Act 1998, the effect of which has been the subject of judicial consideration in a number of cases (see for example *Ghaidan v Godin-Mendoza* [2004] UKHL 30)".

137. Accordingly, the Scottish Government does not see any credible case for amending section 3 of the HRA and would strongly oppose any attempt at repeal.

QUESTION

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

Scottish Government Response

138. The Scottish Government believes that the UK Parliament's intent in relation to section 3 of the HRA was clear and unequivocal in 1998 and that the approach it adopted was correct.

139. More than two decades later, the rationale for section 3 in its current form remains overwhelmingly persuasive. In that connection, the Review Panel will again wish to note (as above) that the Scottish Government has explicitly adopted the same approach in section 19 of the UNCRC Bill currently under consideration in the Scottish Parliament.

140. As previously indicated, the Scottish Government does not believe that section 3 should be amended, and the repeal of section 3 should be definitively ruled out by the Review Panel. Over and above the Scottish Government's general objection to proposals that might weaken, undermine or remove section 3, the Scottish Government would be particularly alarmed were there to be any attempt to retrospectively unpick or reverse the effect of past judgments "by the back door", by means of changes to section 3.

[42] In 2019, of a total of 352 cases decided by the ECtHR (including cases against the UK declared inadmissible or struck out) there were findings of violation in 5 cases (or 1.4% of the total). In 2018, the equivalent figures were 360 and 2 (or 0.6%). By population, the UK has the fewest applications of any member of the Council of Europe (at 5 applications per million inhabitants). For full details see the annual Ministry of Justice report: Responding to Human Rights judgments - Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020 (publishing.service.gov.uk)

141. Existing HRA judgments form part of a complex and sophisticated body of law and should only be developed by means of explicit remedial legislation or the evolving interpretation and application of the law by the courts. New legislation should, of course, itself be fully compatible with the Convention rights.

142. The Scottish Government would also be concerned at the possibility that changes to section 3 might deprive the courts of clarity in relation to the application of Convention rights. That would, at best, give rise to inconsistency and would also increase the risk that UK court decisions might themselves prove to be incompatible with the Convention. The consequence would be an increase in individual applications to the ECtHR, and a potentially embarrassing reversal of the UK's historically very strong performance as a State Party to the Convention

143. As with any other actions which serve to undermine or weaken the Convention, the wider international effect would be to embolden and empower regimes around the world whose instincts and actions are directly opposed to the principles of democracy, human rights and the rule of law.

144. In a domestic context, the further risk would be that any change to section 3 might simply result in an increase in declarations of incompatibility under section 4 of the HRA. This too would have the potential to delay access to justice for those who have been the subject of a violation and might in turn increase the number of applications to the ECtHR, in cases where an effective remedy is not readily available in the UK courts.

145. At very best, such a situation would be harmful to the interests of rights-holders, inefficient for both the legislature and the executive and contrary to the original intent of the HRA, which was to ensure that remedies are available in the domestic courts.

QUESTION

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

Scottish Government Response

146. It is unclear what the Review Panel may have in mind.

147. The Scottish Government considers the current arrangements in section 4 of the HRA to be successful. They have a proven track record as effective legislative provisions which have delivered clarity, consistency and legal certainty.

148. The Scottish Government does not regard it as desirable, or practicable, to place the courts in a situation where legislation has to be read in an "all or nothing" manner (if this is what is implied by the question).

149. The HRA as it currently stands draws an important distinction between legislation that can be read as compatible with the Convention rights, and that which cannot. Only legislation which conflicts with human rights in some irreconcilable manner will be incapable of being interpreted in an appropriate manner by the courts. That is a comparatively rare occurrence.[43]

150. The fact that a statutory provision has been interpreted in this way does not prevent the government of the day from seeking to amend the provision by means of new legislation, if it disagrees with the interpretation arrived at by the courts. But it would be wholly unnecessary, unrealistic and counter-productive to require the courts to issue a "precautionary" declaration of incompatibility every time they are confronted by a legislative provision which may potentially be in conflict with the Convention.

151. The Scottish Government considers that the Review Panel should endorse the current arrangements set out in sections 3 and 4 of the HRA, and provide the UK Government with a clear recommendation against any change.

QUESTION

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

Scottish Government Response

152. The power to derogate from the requirements of the Convention (under Article 15) is limited to situations occurring "in time of war or other public emergency [which] threaten the life of the nation" and are permissible only "to the extent strictly required by the exigencies of the situation".

153. Derogations in respect of Articles 3, 4(1) and 7 are not permitted, and derogation from Article 2 may only be made in respect of deaths resulting from lawful acts of war.

154. The power to derogate is one which properly belongs with the executive, acting on behalf of the state as the party to the Convention. Derogation is a ministerial decision, to be exercised by the government of the day.

155. Such decisions cannot however be taken in a legal, constitutional or democratic vacuum. Ministers must not only act at all times in accordance with the law, including international law and treaty obligations[44], but be fully accountable for their actions.

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[43] See the Ministry of Justice's annual reports – link to the 2019/20 report in previous footnote.

[44] This wording was removed from the UK Ministerial Code in 2015, resulting in a legal challenge. The Court of Appeal ruled that the change to the wording of the Code did not change the substance of the duty on Ministers to comply with international law. Gulf Centre for Human Rights, R (On the Application of) v The Prime Minister & Anor [2018] EWCA Civ 1855 (01 August 2018) (bailii.org) The reference to international law and treaty obligations has been explicitly retained in the parallel, but separate, Scottish Ministerial Code

156. Any decision to derogate from the Convention under Article 15 must therefore be open to challenge in both Parliament and in the courts. As far as legal challenge is concerned, both the domestic courts and the ECtHR provide a forum and the remedies available should be those which are appropriate in these distinct contexts.

157. In the domestic courts, the remedies should be those which are normally available in the context of judicial review. That affords significant discretion to the court, which can grant a remedy appropriate to the particular case and in Scotland includes, *inter alia*, the possibility of an order for reduction, declarator, suspension, interdict, implement, restitution, or any interim order.

158. In the case of a successful challenge to a derogation order, the remedies most likely to be sought would be the reduction or suspension of the order, with a resulting requirement that the government either abandons its intention to derogate or that it remakes the order in a manner that is compliant with the Convention and the decision of the court.

159. The Scottish Government believes that any government decision of this nature, which has significant potential consequences for the protection and enjoyment of Convention rights, should be open to challenge in the courts.

QUESTION

c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

Scottish Government Response

160. Subordinate legislation made under UK primary legislation will be treated differently depending on whether or not "the primary legislation concerned prevents removal of the incompatibility".[45] This arrangement is in turn a consequence of the special status afforded to UK primary legislation, in line with the UK constitutional doctrine of "parliamentary sovereignty".

161. As has been noted elsewhere, the idea that the UK Parliament is "sovereign" or "supreme" in the sense that it can legislate in any way it wishes, including in a manner that intentionally violates human rights, is a constitutional anomaly when viewed from an international perspective and from within the Scottish constitutional tradition.

162. It is not a constitutional principle which applies to the Scottish Parliament, whose primary legislation is susceptible to invalidation on competence grounds. The Scottish Ministers have no power to act incompatibly with the Convention rights – a prohibition which includes the making of incompatible subordinate legislation.

[45] Section 4(4)(b)

163. However, within the specific context of the HRA, as legislation passed by the UK Parliament, the current differentiation between subordinate legislation which could be made in another way, and that which is prevented by primary legislation from being compatible, is logically consistent.

164. The Scottish Government does not believe that section 4 of the HRA should be changed. It would, however, be particularly offensive to constitutional norms and the rule of law were any change to be contemplated which would accord subordinate legislation in general the special status currently reserved to UK primary legislation (and "constrained" statutory instruments). To do so would be to put not just the UK Parliament but the UK Government above the law. That outcome is one which the Review Panel's recommendations should explicitly reject.

QUESTION

d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

Scottish Government Response

165. Both the ECtHR and the domestic courts have given careful consideration to the question of "extraterritorial" application of the Convention and the HRA.

166. The requirement established by Article 1 of the Convention is that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Article 1 was not incorporated by the HRA.

167. In most circumstances, the acts of UK public authorities will take place within UK territory and those acts will unequivocally and as a matter of international law fall within the jurisdiction of the UK as a party to the Convention.

168. However, it is unduly simplistic to focus solely on the question of whether the act of a public authority takes place within UK territory. The more important test is ultimately whether a person affected by the act of a UK public authority is meaningfully "within the jurisdiction" of the UK.

169. In *Al-Skeini*[46] the Grand Chamber of the ECtHR recognised that obligations under the Convention could arise in situations outside the territory of a state, where that state exercises control and authority over individuals or, as a consequence of lawful or unlawful military action, has effective control over a particular area. In such exceptional situations, the normal assumption that a state has obligations under Article 1 of the Convention only within the extent of its own territory could not reasonably apply.

[46] *Al-Skeini v United Kingdom* [2011] ECHR 1093

170. It is important to acknowledge that, in reaching its judgment, the ECtHR gave detailed consideration to the views of the UK courts, including the Divisional Court, the Court of Appeal and the House of Lords – each of which had themselves given careful consideration to the case law of the ECtHR.

171. For its part, the House of Lords[47] had concluded (by a majority) that the general purpose of the HRA is to provide a remedial structure in domestic law for the rights guaranteed by the Convention. It therefore followed that the HRA should be interpreted as applying wherever the UK has jurisdiction. However, the House of Lords differed from the ECtHR in deciding that the UK had not, in this instance, been exercising "effective control" to the extent necessary to constitute the exercise of jurisdiction.

172. In light of the very detailed consideration given to the extraterritorial application of the HRA and the Convention rights by both the domestic courts and the ECtHR, and the clear reasoning that has emerged, the Scottish Government does not believe that there is any case for change.

173. That view is further supported by the judgment of the UK Supreme Court in *Smith*[48] which concluded that the HRA also provides at least partial protection to UK service personnel when deployed overseas. The Scottish Government considers it essential that all rights-holders are able to assert and uphold their Convention rights, where necessary by means of legal action. Changes to the HRA which might have the effect of denying service personnel and their relatives access to a human rights remedy would be strongly opposed by the Scottish Government.

174. The Scottish Government believes that the HRA should continue to apply wherever the UK exercises meaningful jurisdiction, in line with the case law of the ECtHR. That is the correct approach for any state which is committed to the Convention and which wishes to demonstrate international leadership and signal its own adherence to an international order founded in the principles of democracy, human rights and the rule of law.

175. The Scottish Government would particularly warn against any temptation to respond to the position established by the ECtHR in *Al-Skeini* by means of some form of unilateral UK "opt-out". Amending the HRA to exclude extraterritorial application would have no effect on the case law of the ECtHR and would not change the substance of the UK's obligations under international law. It would, however, complicate the work of UK courts and signal to the wider international community that the UK is unwilling to act in accordance with universal human rights standards.

[47] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26
[48] *R (Smith) v Secretary of State for Defence and another* [2010] UKSC 29

QUESTION

e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

Scottish Government Response

176. The Scottish Government believes that the current remedial order process strikes an appropriate balance between the functions of the executive and the legislature. The powers under section 10 of the HRA are available to the Scottish Ministers but only to a limited extent.

177. The Review Panel will be aware that broadly analogous provision is contained in Part 6 of the Convention Rights (Compliance) (Scotland) Act 2001 ("2001 Act")[49]. These powers can be exercised, within devolved competence, by the Scottish Ministers in relation to primary and subordinate legislation and in respect of the exercise of functions by a member of the Scottish Government. The Scottish Government has also proposed similar provisions in sections 32 to 34 of the UNCRC Bill.

178. It is recognised that the powers in both the HRA and the 2001 Act place significant responsibility in the hands of the executive, and include the power to amend primary legislation. That is why both attract strong types of parliamentary procedure. Such power should not be granted lightly and it remains important that the legislature exerts effective scrutiny over the use made of such powers.

179. In a devolved context there is a particularly persuasive case for order-making powers of the kind provided by the 2001 Act. Unless a court makes other provision (for example under section 102 of the Scotland Act, which permits, *inter alia*, the suspension of the effect of a decision that a provision of legislation is outside legislative competence) the consequence of a ruling of incompatibility is that the incompatible legislation ceases to have effect.

180. A defect of that kind could be addressed by means of emergency legislation in the Scottish Parliament, and such legislation may be appropriate in the most significant cases. However, the availability of a devolved order-making power provides a pragmatic and proportionate alternative means of remedying an incompatibility.

181. Given the significantly different effect of a ruling of incompatibility in relation to UK primary legislation (and some subordinate legislation) it is legitimate to ask whether the rationale for an order-making power is quite so clear in the Westminster context. The reality, however, is that parliamentary time is always at a premium and an appropriate balance does therefore have to be struck between the need to rectify human rights incompatibilities quickly and the desire to do so by means of primary legislation which is subject to the full scrutiny of Parliament. The mechanism chosen should of course be proportionate to the particular issue in hand.

[49] Convention Rights (Compliance) (Scotland) Act 2001 (legislation.gov.uk). See also the Policy Memorandum for the Bill

182. The Scottish Government can confirm that it has no plans to alter Part 6 of the 2001 Act. For the same reasons, it does not believe that there is a case for altering section 10 and schedule 2 of the HRA.

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