The Church of Scotland

Official Response

Subject:	Human Rights Act Reform: A Modern Bill of Rights
Requested by:	Ministry of Justice, UK Government
Date:	7 March 2022
Prepared on behalf of:	The Faith Impact Forum

General Comments

The Church of Scotland's status and independence is recognised in the Acts of Union 1706/1707 and the Church of Scotland Act 1921. As one of the United Kingdom's two 'national' Churches (that has a role with regard to the people within the territory of Scotland) we have a particular regard for the welfare and interests of the people of Scotland, including Scotland's distinct legal tradition. The Church of Scotland was also a participant in the Scottish Constitutional Convention in the 1980s and 1990s and strongly supported the moves towards devolution that were implemented at the end of the last century.

The Church, through its General Assembly, has also been an advocate and supporter of human rights principles. This was most recently expressed in the 2013 General Assembly report *Human Rights: Justice Informed by Love*, which sets out some of our theological reflections which underpin the establishment and protection of human rights generally. This also leads us to a conclusion that there is a role for society as a whole to ensure that people who live more precarious or vulnerable lives, whether long or short term, are given support and advice when it comes to understanding and accessing their rights. This might include foreign nationals, disabled people, asylum seekers, survivors of human trafficking, offenders, as well as a special interest in matters relating to freedom of religion or belief. However, it could include anyone who found themselves in a vulnerable position at any point.

We warmly welcome the UK Government's commitment to the European Convention on Human Rights (the "Convention" or "ECHR").

Having read the consultation paper we do not believe that the Ministry of Justice has made a sufficient case for reform. It is not clear why the paper in places rejects the recommendations of the Independent Human Rights Act Review ("IHRAR"), and in other areas introduces new proposals that were beyond the scope of the IHRAR consideration. We also have concern that in places the consultation paper uses tendentious language or argument to try to make a point;[1] if the need for these reforms were clear, there would be a stronger basis for a more even-handed approach. It has left us considering the question, are these proposals a solution in search of a problem?

Policy should start from where society finds itself today, and look forward and not back. The consultation paper is somewhat uncritical of Magna Carta (for its provisions about Jewish moneylending, and women) and the 1689 Bill of Rights and Claim of Right (for their anti-Catholicism). As a faith community that is now deeply committed to ecumenical relations and interfaith dialogue, the lionisation of Magna Carta and the choice of the proposed document as a 'Modern Bill of Rights' is troubling. The echoes of these ancient texts, the memories they evoke and

[1] An example includes quoting cases in such a way that plays to reaction or leads to a conclusion, without giving the key balancing considerations. For an example of this see our reference to *ML v Slovakia* in answer to question 7. A further example includes the consultation bemoaning the decision in *Hirst v United Kingdom* (No 2) [2004] 38 EHRR 40. It points out emotively that it "was originally brought by John Hirst, convicted of manslaughter for killing his landlady with an axe." This seems relevant only to the extent that a case for disenfranchisement of all those serving custodial sentences was brought by a prisoner.

the painful history of which they form part should be recognised. These texts, with the Convention, must be able to be seen and our opinions of their meaning and context revised as societal norms and mores evolve. Today it is the Convention and the Human Rights Act which are the foundation for a network of rights and relationships that are integral to our society. They are not free-standing concepts but are intertwined with the devolution settlements, the trade and co-operation agreement with the European Union and create a wider network of ideas on which our whole society is based.

We recognise and share concerns expressed elsewhere about the impact of the proposals on devolution in Scotland and the aggravation of constitutional tensions. As observed above, there is little objectively verified foundation of the case for reform, and no real demand for it in the devolved parts of the United Kingdom. The UK Government is presenting a narrow political ideology reflecting only the views of the current administration. It is not widely supported. In our engagement with Scottish civil society, legal and political actors, we find no appetite for the kind of reforms that have been proposed. Accordingly, our advice is that the Convention and the Human Rights Act serve us well, and should be allowed to continue do so in future.

Failing that, reforms such as those recommended by the IHRAR may be more appropriate than the proposals in the consultation paper. If a UK Bill of Rights were to have any meaning, it would need to have the broadest support from all parts of the United Kingdom and from a range of political perspectives. There is little likelihood of this in the Westminster political landscape at present, and minimal chance of legislative consent from the Scottish Parliament. In our view, it would be a political and moral necessity for proposed reforms purporting to create a pan-UK Bill of Rights to receive legislative consent from the Scottish Parliament. Yet there appears to us to be no evidence of a four-nations approach to building consensus around the content of any reforms.

Turning to specific aspects of the consultation, there are a number of topics that are not covered in the proposed reforms but which we believe need to be addressed: access to justice for those who need it; the importance of better funding for legal aid (especially civil legal aid); better access to advice and support for organisations and employers; strategies to work with civil society and public bodies to deepen and increase understanding and appreciation by the general public of human rights, to know what their rights are and the importance of the Human Rights Act and the Convention. We also would hope that the Government would be more vocal in explicitly acknowledging that in an open and free society, it has to be accepted that access to justice and human rights may incur costs to the taxpayer, even if we find some causes or individuals involved objectionable. This is the basis of human rights. As our 2013 report said:

> *The parable of the Good Samaritan illustrates our responsibility to each other in the narrative of an outsider travelling from Jerusalem to Jericho. He expresses our duty in archetypal form. The person to whom we owe responsibility is, simply, every person. Our duty, according to the parable, is a duty of care, justice informed by love, to our neighbour, who is every person, everywhere, in every time. Our responsibility neither rests on reciprocity nor contract. Nor is it limited by nation. It inheres in our common humanity. Just as the Samaritan was the quintessential outsider, hated and scorned, so human rights, if they mean anything, cannot be only for those whom we affirm and approve. To mean anything significant they need to be for the unpopular, for the dispossessed and indeed those who do not respect the rights of others. They also need to be for those with no voice, including future generations of humanity. Their very essence is what is due to our neighbour on account of 'common humanity.' That is their moral basis.*

I. RESPECTING OUR COMMON LAW TRADITIONS AND STRENGTHENING THE ROLE OF THE SUPREME COURT

Interpretation of Convention rights: section 2 of the Human Rights Act

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

The courts of the United Kingdom are already able to draw on a wide range of sources of law, including in relation to human rights. For example, in the case of *Lee v Ashers Baking Co and others*[2], the Supreme Court made reference to caselaw from the United States of America.

The Independent Human Rights Act Review ("IHRAR") recommended amending s. 2 of the Human Rights Act to require UK courts to apply domestic statute and case law before taking into account the European Court of Human Rights ("ECtHR") case law in the interpretation of a Convention right. The entry into force in August 2021 of Protocol 15 to the Convention, introducing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation, itself chimes with the according of greater priority to decisions of domestic courts, as the consultation paper recognises (paragraph 180).

However, the two options proposed in the consultation paper both go beyond the IHRAR recommendation. We are not convinced that this change of approach is necessary or helpful. It will lead to the UK being out of step with other members of the Council of Europe, and fail to allow consolidation within the institutions of the Council of the changes made only months ago.

Moreover, it is not clear how the clauses in Options 1 and 2 would operate in practice. Both include attempts to codify the law of precedent (clauses (4) and (8) in Option 1 and (4) and (7) in Option 2), which appear unnecessary. Permission to have regard to other materials is likewise not required: UK courts already draw widely on relevant sources from beyond these shores. Insofar as the Options appear to reflect a change to the current position, we infer that the aim is to downgrade the relevance of decisions from the ECtHR.

The present position, whereby UK courts are to take decisions of the European Court into account, appears unexceptionable, particularly in the context of continued membership of the Council of Europe and participation in the determination of cases in Strasbourg by means of the presence of a United Kingdom judge in the Court (arrangements which the UK government intends to maintain). The formula in section 2 of the Human Rights Act 1998, requiring domestic courts to take account of decisions of this multinational court, situated in the continent of which the United Kingdom forms part, when determining cases based on rights which will continue to be expressed in the same terms as those in the Convention, appears to us to accord with common sense.

We also have concerns that the changes will make it impossible for those without the means to afford it to take a case to Strasbourg. An express justification for the Human Rights Act in 1998, as part of a package of constitutional reform, was to 'bring rights home'. Thus, individuals could litigate in reliance on universal rights, but in their local courts. We do not quarrel with that.

[2] [2020] AC 413

The position of the Supreme Court
Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

It is already clear that the Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights; considerable development of the content of the rights in the Convention has occurred in the Supreme Court since the passing of the Human Rights Act in 1998. It is not clear how draft clause (1) of Option 2, if enacted, would co-exist with the continued right of individual petition to the ECtHR.

We suggest that the Ministry of Justice look again at the conclusion of the IHRAR on this area; we see no reason for substantial reform here. We do not agree that the supremacy of the UK Supreme Court has been 'undermined' by the ECtHR. Evidence to the Joint Committee on Human Rights generated the conclusion that both informal and formal judicial dialogue between the ECtHR and the UK judiciary 'is clearly working well'.[3]

Trial by Jury
Question 3: Should the qualified right to jury trial be recognised in the Bill of Rights? Please provide reasons.

No. No right to trial by jury exists in the law of Scotland. The proposals have not adequately explained what this would mean with regards to Scottish law, nor why this particular right needs to be recognised. In any event, the right to legislate in relation to criminal procedure is devolved to the Scottish Parliament.

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

There is necessarily a tension between protection of the right to respect for private and family life and the right to freedom of expression exercisable by media outlets. Resolution of this tension in individual cases is quintessentially a matter for courts, aware of the complexities of the specific situation, rather than a question of more rigid elevation of one right over another.

To illustrate the problem, the position of an individual accused of sexual misconduct but as yet untried is very different from the position of a powerful corporate entity trying to prevent release of information about its environmentally harmful activities in a distant location. As Lord Steyn famously remarked, 'in law, context is everything'.

In the context of attempts by well-resourced litigators to inhibit the press, the main source of interference today is posed by SLAPPs (strategic litigation against public participation) lawsuits by powerful subjects (e.g. a corporation, a public official, a high-profile business person) against individuals or organisations who express a critical position on a substantive issue of public significance. "Anti-SLAPP" laws exist in many states of the USA.[4] It may be that examination of specific measures of this sort is warranted for the United Kingdom, especially given the growth in 'reputation management' as a service, principally provided by firms in London.

[3] Para 70 of Joint Committee Report on Independent Review of the Human Rights Act, 8 July 2021; HC 89, HL Paper 31.
[4] https://leg.colorado.gov/sites/default/files/documents/2019A/bills/2019a_1324_enr.pdf

Question 5: The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?

As observed above, the UK Government might consider introducing an "Anti-SLAPP" law such as exists in many states of the USA[5] and is being considered by the proposed EU "package against abusive litigation (SLAPP) targeting journalists and rights defenders".

Bloomberg LP v ZXC[6] is a recent example of the balancing exercise between the right to privacy (Article 8) and the publisher's right to freedom of expression (Article 10), having due regard to section 12 of the HRA.[7] This was a unanimous decision of the five justices in the UK Supreme Court.

The decision has, however, been heavily criticised in the media.[8] We consider this debate to be a healthy one that will likely result in the balance being confirmed, modified and revised, as necessary.

We do not see the need for guidance to be given to the courts about the utmost importance attached to Article 10. The court should be left to take its own view on the difficult balance between privacy and freedom of expression, on the facts of each particular case.

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

We do not think this needs to be addressed in any reform to the Human Rights Act. Compliance with Convention rights, particularly given the UK Government's stated commitment to it, should be something that runs through all aspects of our legislation.

By way of example, the Home Office has been criticised for proposed reforms to the Official Secrets Act 1989. The criticisms have been extensive, and the reforms described as undermining democracy.

They have been categorised as potentially causing "an extremely hostile environment for journalism."[9] This does not suggest a desire for protection of journalists or their sources, at least in this area.

With regards to the Official Secrets Act reforms, the Law Commission of England & Wales recommended[10] that a statutory public interest defence should be available for anyone – including civilians and journalists – charged with an unauthorised disclosure offence under the Official Secrets Act 1989. If it is found that the disclosure was in the public interest, the defendant would not be guilty of the offence.

The Home Office rejected the Law Commission's recommendations for such a public interest defence.[11] It was argued that sufficient safeguards already exist and that the Law Commission's recommendations did not strike the right balance in this area.

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[5] Ibid.
[6] [2022] UKSC 5
[7] Ibid, Press Summary
[8] For example: *Ruling that will shield wealthy crime suspects is condemned*, Jake Kanter & Ors in The Times, 18 February 2022; and *The Guardian view on privacy law and press freedom: failing to strike the balance*, Editorial, 18 February 2022.
[9] *The Guardian view on official secrets: plans that undermine democracy*, Editorial in The Guardian, 29 August 2021. See also *How a proposed secrecy law would recast journalism as spying*, Duncan Campbell & Anr in The Guardian, 20 July 2021.
[10] Report on *Protection of Official Data* by the Law Commission of England & Wales, published 1 September 2020.
[11] In the consultation on *Legislation to Counter State Threats (Hostile State Activity)*, Home Office, May 2021.

This is despite the Law Commission suggesting that the terms of the 1989 Act may not be compliant with Article 10: -

> "We cannot rule out the possibility that a prosecution under the OSA 1989 as currently drafted, with no public interest defence available, would violate Article 10 ECHR in some cases, depending on the facts. For example, if the disclosure were made as a last resort, the prosecution was only for the purpose of protecting confidentiality in the information and not national security, and there was a serious public interest in disclosing the information, then it is likely that a prosecution under the OSA 1989 would be contrary to ECHR and the Human Rights Act 1998."[12]

There is a need for greater protection of the public and journalists' sources[13] but this should run through all legislation and does not need addressed in any Bill of Rights. The argument in the present consultation paper seems weighted towards the media, as opposed to journalists' sources or journalistic privilege.

We have not been persuaded of the case for reform in this area. To provide stronger protection for journalists and their sources – and to ensure compliance with freedom of expression (Article 10) – we suggest that the Government think again about the Law Commission's recommendation for a public interest defence.

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

We do not consider the case for amendment of the Human Rights Act in this regard has been successfully made. As we have said in answer to question 5, the court should be left to take its own view, in the particulars of the case, on the difficult balance between privacy and freedom of expression.

What is proposed in the consultation paper would likely shift this delicate balance in favour of freedom of expression which is likely to favour the media rather than individuals, or even the general public. This can be seen in the Government's own example.

It claims that *ML v Slovakia*, [2021] ECHR 821 shows "a willingness to give priority to personal privacy" in the case "finding that media reporting about a deceased priest's convictions…could interfere with his mother's right to private life."

This related to three tabloid newspapers publishing articles two years after the applicant's son's death and more than five years after the convictions had become spent. The Court considered "that the frivolous and unverified statements about the applicant's son's private life must be taken to have gone beyond the limits of responsible journalism."

The Court ultimately found that "the domestic courts failed to carry out a balancing exercise between the applicant's right to private life and the newspaper publishers' freedom of expression in conformity with the criteria laid down in the Court's case-law."
Is the Government arguing that the media's right to publish "frivolous and unverified statements" should be preferred over a mother's right to privacy with regards to her dead son? The ECtHR's judgement shows a careful consideration and balance.

[12] Para 9.7, Report on *Protection of Official Data* by the Law Commission of England & Wales, published 1 September 2020.
[13] *British police are hounding a journalist for his sources – it's vital he resists*, Duncan Campbell in The Guardian 18 February 2022.

The UK Government has repeatedly and consistently denied that freedom of expression is being threatened by its policies. Warnings in this regard have however been given by commentators, as well as human rights charities, unions and faith communities.[14]

As discussed in our answer to question 6, the Law Commission's recommendation on a public interest defence has been rejected. In the present consultation, the Independent Human Rights Act Review has not been properly considered. It was not asked to consider how to strengthen the protection for freedom of expression in a new Bill of Rights. Indeed, it was not even asked to consider the possibility of a new Bill of Rights.[15]

We are of the view that the Secretary for State should note the findings of the IHRAR, and go no further than their limited and considered recommendations.

We particularly support the IHRAR recommendation that: -

> "Serious consideration should be given by the Government to developing an effective program of civic and constitutional education in schools, universities and adult education. Such a programme should, particularly, focus on questions about human rights, the balance to be struck between such rights, and individual responsibilities."

We believe this is essential and should be a priority, far more so than the Government's proposals for the UK Bill of Rights.

II. RESTORING A SHARPER FOCUS ON PROTECTING FUNDAMENTAL RIGHTS

A permission stage for human rights claims

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

No. There is an apparent contradiction between the supposed encapsulation of 'essential rights' and the introduction of an additional test for their enforcement. A permission stage creates a barrier to accessing the courts and will make it harder for individuals to enforce their rights. This might especially impact those who already experience barriers in accessing justice (e.g. survivors of human trafficking). We also note the use of the term 'unmeritorious' to describe claims which should not be allowed to proceed. A notion of 'merit' is not necessarily synonymous with 'significance', and connotes evaluation against some unarticulated scale of worth, possibly related to characteristics of the claimant.

'Significance' is also difficult to adjudicate: is it objective or subjective? Important legal principles have been established in litigations where the pecuniary value of the claim was small.
Rather than a permission stage, it might be possible to introduce a right on the part of a public body to raise as an issue at an early stage of proceedings that only minimal disadvantage has been incurred.

[14] *Be warned: this government is robbing you of your right to challenge the state*, David Davis in The Guardian, 25 October 2021; *New anti-protest bill raises profound concerns and alarm, human rights groups say*, Aubrey Allegretti & Anr in The Guardian, 14 March 2021; and *Jailed for 51 weeks for protesting? Britain is becoming a police state by stealth*, George Monbiot in The Guardian, 1 December 2021.

[15] Per *Lord Carnwath lecture on Human Rights Act reform – is it time for a new British Bill of Rights?:* - "I have found my attempts to grapple with the Gross review (i.e. IHRAR) and the subsequent CP (the present consultation paper) a frustrating experience… They are almost like ships that pass in the night."

Question 9: Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

See previous answer to question 8: we do not support a permission stage.

Judicial Remedies: section 8 of the Human Rights Act
Question 10: How else could the government best ensure that the courts can focus on genuine human rights abuses?

We have confidence in the ability of the courts to detect unfounded human rights claims.
We strongly resist any attempt by the executive or legislature to define what is "genuine"; this would curtail the independence of the courts and could lead to a political agenda deciding on the merits of individual human rights cases, based on considerations related to the claimant rather than the claim.

Positive obligations
Question 11: How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.

As we noted in our introductory comments, we are concerned about access to justice. The tone of this question suggests the Government is seeking ways to limit litigation; our response to this is that there has to be a price to pay for justice. In an advanced democracy such as the UK this needs to be cherished, and funded. The value of human rights is more than just words on a paper, and as a living instrument that is part of the framework of so much of our common life, resourcing access to rights and justice should be a commitment of the Government. It is not an accountancy problem where the only solution is to minimise public expenditure.

It is an error to prioritise the issue of human rights and shielding the public sector from concern about potential litigation. In Scotland there is a good understanding of human rights. The Human Rights Act is used by professionals delivering essential services and support on a daily basis, including care workers, social workers and people involved in determining an individual's mental capacity and potential detention, to ensure that any restriction to the right to liberty is lawful, legitimate and proportionate.

III. PREVENTING THE INCREMENTAL EXPANSION OF RIGHTS WITHOUT PROPER DEMOCRATIC OVERSIGHT
Respecting the will of Parliament: section 3 of the Human Rights Act
Question 12: We would welcome your views on the options for section 3.
Option 1: Repeal section 3 and do not replace it.
Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.
We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

The consultation paper (paragraph 237) says that "the Government is minded to agree" with the IHRAR recommendation, which rejected an option to repeal s.3. Research quoted in the Joint Committee report referred to above found only 25 cases in the past 8 years in which section 3 had

been used to interpret legislation compatibly with Convention rights.[16] Further, as the Joint Committee records in paragraph 105 of its report, it is hard to identify any cases in which Parliament has felt the need to correct a court's interpretation of legislation under section 3, suggesting that the provision is not leading to judicial over-reach.
It is therefore not clear to us why this question is being asked, and we would urge the Government to commit to following the IHRAR conclusion.

Question 13: How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?

It is natural that Parliament should retain an interest in legal developments across the board, not only relating to human rights issues. However, it is not clear what would be the role of the legislature in scrutinising judgements, and this concept is incompatible with the separation of powers. There is a potential for politically motivated objections – protected by Parliamentary privilege – to be directed at individuals, cases and arguments involved in judgements. This could impair commitments to impartiality and equal treatment.

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

No. Existing databases of legislation and caselaw (such as Westlaw and Justis) already adequately meet any research requirement to identify decisions in which a particular statutory provision has been applied.

When legislation is incompatible with the Convention rights: sections 4 and 10 of the Human Rights Act
Declarations of incompatibility
Question 15: Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

We note that the IHRAR considered and rejected this proposal. It would appear to result in further widening of the gap between the status of UK legislation and the status of legislation of the devolved institutions.

We also note the oral evidence session to the Human Rights Joint Committee on 26 January 2022, and the implications for this proposal on devolved legislation (copied below and with pertinent sections highlighted). We respectfully suggest the Government look again at the IHRAR conclusions.

> *Q11 Chair: … The final question of our session this afternoon is about the impact of the proposed reforms on the devolved settlements. We have had written evidence from the Northern Ireland Human Rights Commission, the Scotland Human Rights Commission and other various stakeholders, which have all expressed the view that the UK Government's proposed reforms represent a regressive approach contrary to progressive steps taken to realise human rights in the devolved nations…*
> *Professor Alison Young: It is important that we think carefully about these concerns and think very carefully about maintaining the balance between the devolved legislatures and the Government at Westminster.* ***I would be very concerned about modifying the ability to strike down delegated legislation that has come from some of the proposals, because it would be very difficult to say, on the one hand, that delegated legislation made by a UK Minister cannot be struck down if it is incompatible with convention rights but that, on the other hand, the devolved legislatures may not legislate contrary to convention rights and their legislation can be struck down. That would send a very inappropriate message, and I would***

[16] Para 101 of Joint Committee Report on Independent Review of the Human Rights Act, 8 July 2021; HC 89, HL Paper 31.

be very cautious. There are other ways of dealing with potential problems of strike-down issues in delegated legislation…
Lord Mance: May I simply endorse all that Professor Young has just said? I particularly agree with her comment about delegated legislation. ***It would be a strange, unexpected and inappropriate situation in which you could strike down the legislation of the devolved Administrations but could not in relation to secondary legislation, which does not receive the attention that would merit it being given the status in this context of primary legislation. In my view, that would be a real backward step.*** *I endorse entirely her comments about concern for the position, particularly in relation to Northern Ireland, if we start arriving at a situation where the rights are diminished, or indeed perhaps even worse in some respects, where they are different in different jurisdictions.*[17]

Question 16: Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.

See response to Question 21.

Remedial orders
Question 17: Should the Bill of Rights contain a remedial order power? In particular, should it be:
a. similar to that contained in section 10 of the Human Rights Act;
b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;
c. limited only to remedial orders made under the 'urgent' procedure; or
d. abolished altogether?
Please provide reasons.

Support option a.

Statement of Compatibility – Section 19 of the Human Rights Act
Question 18: We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.

We do not wish to directly address this question at this time. Reference is made to our General Comments and the other answers given herein.

[17] https://committees.parliament.uk/oralevidence/3438/pdf/ pp.32-33

Application to Wales, Scotland and Northern Ireland
Question 19: How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

The interpretation and application of the Human Rights Act 1998 aligns comfortably with the interpretation and application by the Scottish Courts of laws that apply in Scotland. However, without the consent of the Scottish Parliament, the proposals in the consultation document would be incompatible with those parts of the law of Scotland attributable to the devolution settlement in this part of the United Kingdom.

The relationship with Scots law and the impact of the proposals are neither desired nor being sought by the legal profession or civil society in Scotland.

The statutory basis for the Sewel Convention (as expressed in Section 2 of the Scotland Act 2016) suggests that "the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament." There is no reason presented to suggest that an exception should be made on this issue.

We express concern also for the risks to peace in Northern Ireland, as expressed in the report of the IHRAR on the consequences for the Good Friday/Belfast Agreement.[18]

We endorse the view – expressed in the Joint Committee Report on the Independent Review of the Human Rights Act[19] – that the UK Government should not pursue reform of the Human Rights Act without the consent of the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly.

Public authorities: section 6 of the Human Rights Act
Question 20: Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.

The concept of "public authority" in the Convention is intended to cover any entity that has been authorised by law to exercise power over the people, whether the power is of a coercive or supportive nature. For example: an asylum-seeker immigration detention centre exercises the coercive power of the State, whether its running is by a public body or outsourced to private enterprise. An NHS hospital is a public authority but a private hospital not acting on behalf of the NHS is not.

The list of public authorities will accordingly vary from time to time. The present definition in section 6 (3) of the Human Rights Act automatically copes with this variation. A definitive list would require constant updating and failure to update would itself become an issue of compliance by the UK with its Convention obligations.

[18] Para 23, Joint Committee Report on Independent Review of the Human Rights Act, 8 July 2021; HC 89, HL Paper 31
[19] Ibid, para 258

Question 21: The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons.
Option 1: provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or
Option 2: retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

We do not propose, in this submission, to comment directly or indirectly on the provisions of the Judicial Review and Courts Bill. That said: we note that circumstances may exist where, in the words of the judgment of the (now named) Court of Justice of the European Union in Case C-262/ 88 *Barber v Guardian Royal Exchange Assurance Group*,

> "*...overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of* [a measure overturned by the judgment]".

Legal certainty is an established principle of the rule of law. No need for legislative intervention to further promote its use has been demonstrated.

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

We would not support any weakening of the UK's responsibilities over people outwith the territory of the United Kingdom. This issue has immediate relevance given present concerns about proposals in the Nationality and Borders Bill, which provides for offshore processing of asylum claims, for example.

We instead suggest that the Government should return to the recommendation of the IHRAR (chapter 8), to engage in further "national conversation", and to support "Governmental discussions in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR."

Qualified and limited rights
Question 23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act? We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.
Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.
Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.
We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

We note that the IHRAR did not identify any concerns around proportionality. The Government have not made the case that there is a problem, but have come up with a possible solution. We do not think either is necessary.

The Government's proposals are seeking to restrict the ability of courts, by setting rules purporting to direct how courts assess proportionality. Resort to adjectives such as 'great' will either create uncertainty or will place a limit on the ability of what should be an independent court system to make decisions based on the facts of each case. That Government might strike the balance differently in an individual case carries no necessary implication of systemic failings in current processes.

Deportations in the public interest
Question 24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons. Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment. Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights. Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.

We would wish to dispute the underlying premise behind this question. Human rights arguments can be a necessary part of a process when considering forced returns. Claiming fundamental rights – to not be tortured, to private and family life, for example – is essential. There is very considerable danger that political motivation, media pressure or populist rhetoric could be deployed to prevent individuals from accessing their Convention rights.

On the issue for forced returns in general, we commend the principles for just and humane treatment outlined in a joint paper from a coalition of European ecumenical organisations.[20] The Church of Scotland is a member of two of these organisations, Eurodiaconia and the Churches Commission for Migrants in Europe. This paper was aimed at a conversation for the European Commission and EU Member States, but we would concur with the values and principles as they are set out and would ask the Government to consider how to incorporate these ideas into the UK's policies and practices in this area.

Illegal and irregular migration
Question 25: While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

We dispute the term 'illegal migration', as the act of crossing an international border is not against the law. We have engaged for many years on the use of language around migration and continually encourage all involved, especially from Government and the media, to refrain from language which is pejorative or carries negative connotations. 'Irregular' or 'undocumented' migration are perfectly suitable alternatives.

Our experience is that migration, whether regular or irregular, is not always (or not only) a challenge, but can be an enriching and joyful experience for receiving communities who celebrate diversity and multiculturalism. The Church has benefitted from people coming to Scotland from all over the world, contributing to our work and to wider society. We are not advocates for open borders, but we do not view current issues with regards to migration with particular apprehension or fear. Management of people may present administrative challenges for the Government but given the scale of the global population and extent of refugee emergencies, we have an obligation to offer sanctuary and assistance to those that we are able to help.

[20] https://ccme.eu/wp-content/uploads/2018/12/2018-05-30_position_paper_return_FINAL.pdf

Fundamental human rights should be protected and human dignity respected. The Nationality and Borders Bill and its creation of a two-tier asylum system contravenes international treaty obligations (Refugee Convention), and has been widely criticised by church and faith groups and wider civil society. To demand that a person fleeing from war or oppression should remain in peril while applying for and awaiting the requisite entry permissions is manifestly absurd.

The issue of forced migration globally is linked with the UK Government's cut to the international aid budget; this decision will do nothing to combat instability, poverty or the displacement of people from their homes. The Government cannot expect that the problems of the world will diminish if they disengage from humanitarian and development projects designed to alleviate human suffering.

Remedies and the wider public interest
Question 26: We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:
a. the impact on the provision of public services;
b. the extent to which the statutory obligation had been discharged;
c. the extent of the breach; and
d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.
Which of the above considerations do you think should be included? Please provide reasons.

No case has been established for the proposition that damages payments for breaches are unaffordable or excessively high, in any part of the United Kingdom. Existing protections established by the courts are sufficient. The awarding of damages should be left in the hands of the courts unless and until a good public policy case can be made otherwise.

The consultation suggests "permitting UK courts to consider the claimant's conduct in deciding whether or not to award a remedy. The court will be invited to hear about the lawfulness of the claimant's conduct in the circumstances surrounding the claim but could also be empowered to consider relevant past conduct". It goes on to link "remedies available under the Bill of Rights to how the claimant has lived by its underlying principles…" to "avoid rewarding undeserving claimants who may themselves have infringed the rights of others."[21]

This seems to suggest diminishing human rights protections by virtue of past behaviour. We resist any suggestion that there are those "undeserving" of human rights protections, or that those such as criminals are less human than anyone else.

A pertinent example in Scotland is the cases arising from slopping out. The compensation payments were said to average around £2,500 per claimant but the volume of claims made and lack of time bar meant that the Scottish Prison Service reserve was as high as £67m in 2009.[22]

Slopping out was scheduled to be abolished in Scotland by 1999. Due to budget restraints the abolition was delayed, and by 2004 prisoners in five of Scotland's sixteen prisons still had to slop out.[23]

[21] Paras 307 & 308.
[22] *Slopping out millions 'must stop'*, BBC News, 11 March 2009; *Emergency law to halt inmates' court payouts for slopping out*, Severin Carrell in The Guardian, 20 March 2009
[23] Slopping out, Wikipedia, 14 September 2021

In 2005 the Lord Ordinary in the Outer House decided that the prevailing conditions meant that the Scottish Ministers had acted in a manner incompatible with Article 3 – Prohibition of torture.[24] This was upheld by the Inner House on appeal.[25]

The issue was resolved by bringing the prison infrastructure up to the required standard, including closing some prisons that could not be brought up to standard. The Scottish anomaly of lack of time bar was resolved when emergency legislation was "rushed through Westminster and Holyrood to introduce a one-year time bar".[26] This brought Scotland in line with England & Wales.[27]

The volume of claims and compensation reserves almost certainly accelerated the ending of a practice that is now widely accepted as having been degrading and inhumane. The removal or reduction in damages payable would reduce a deterrent to human rights abuses. Before any such change should be considered it should be empirically justified, and due consideration should be given to appropriate checks and balances, to ensure that it is both justified and proportionate.

Separately, the collaborative approach to ending the time bar anomaly is to be commended. We would encourage this approach in the present consultation to ensure that such fundamental and constitutionally important change happens by compromise and consensus, and with the consent of the devolved administrations.

IV. EMPHASISING THE ROLE OF RESPONSIBILITIES WITHIN THE HUMAN RIGHTS FRAMEWORK
Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.
Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or
Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

We do not concur with the principle behind this question: human rights cannot be dependent on a person's conduct. They have to be for everyone, including (especially) for people who behave in a way which we might find appalling – as they are still *human*, made in God's image, worthy of forgiveness and able to be redeemed.

V. FACILITATING CONSIDERATION OF AND DIALOGUE WITH STRASBOURG, WHILE GUARANTEEING PARLIAMENT ITS PROPER ROLE
Question 28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.

We contend that this is both unnecessary in the UK context and also a dangerous signal to send to other Convention states that tend towards autocracy. The UK should aspire to be a beacon championing the best approach to human rights rather than seeking to escape politically difficult judgements.

It should be acknowledged that it is entirely normal for unsuccessful defenders of legal actions to continue to believe that their cause was just and be discontented with an adverse judgment. 16

[24] *Napier v Scottish Ministers*, 2005 1 SC 229
[25] *Napier v Scottish Ministers*, 2005 1 SC 307

[26] Added 24 July 2009 by Convention Rights Proceedings (Amendment)(Scotland) Act 2009 asp 11, s1(2).
[27] 27 Deal to end slopping out payments, BBC News, 19 March 2009

Governments, like other institutions, should accept that this is part of the price paid for being subject to the rule of law.

By way of example, the consultation paper discusses prisoner voting rights and the decision in *Hirst v United Kingdom* (No 2) [2004] 38 EHRR 40. It is pointed out that "[b]etween 2009 and 2015, 648 prisoners claimed that the ban on prisoner voting rights violates their rights under Article 3… The government's litigation costs in these cases alone were approximately £130,000."

According to the Commons Library, this impasse was resolved when the Council of Europe's Committee of Ministers accepted the government's proposals, which primarily involved allowing prisoners on Temporary Licence to vote.[28]

The case was closed in September 2018, more than a decade after the ECtHR ruled that the United Kingdom's disenfranchisement of those serving custodial sentences was incompatible with the 'Right to free elections, Article 3 of Protocol 1'. The relatively simple solution suggests that the current system of dialogue can work.

Parliamentary sovereignty in an international context is discussed in the House of Commons Library Briefing Paper, Principles of international law: a brief guide[29]: -

> "Recent commentary on the UK Internal Market Bill reiterated the fact that Parliament in the UK is sovereign, and can in theory make or unmake any law it wishes, even if the proposed laws would violate international law… But in international law, the UK's internal principle of parliamentary sovereignty has no bearing on the international legal effect of the UK's international obligations. This is because no rule of a state's internal law can be used to justify a breach of an international obligation according to Article 27 of the Vienna Convention on the Law of Treaties."

Asserting domestic parliamentary sovereignty and introducing a mechanism whereby an 'adverse judgement' might be debated is accordingly not a solution. Greater parliamentary scrutiny is to be welcomed but not if its purpose is to assert parliamentary sovereignty as a mechanism for avoiding international obligations.

We should fulfil and be seen to fulfil our international obligations. We should work collaboratively, constructively and expeditiously with relevant international institutions – such as with the Council of Europe's Committee of Ministers in the example given – to reach reasonable compromises.
This is the direction we would advocate. The case for inclusion of the clause at Appendix 2, paragraph 11 of the consultation paper has not been established.

[28] https://commonslibrary.parliament.uk/research-briefings/cbp-7461/#:~:text=The%20ban,cannot%20vote%20in%20any%20elections.&text=The%20disenfranchisement%20of%20prisoners%20in,offenders%20their%20rights%20of%20citizenship, accessed 18 February 2022.
[29] Number 9010, 21 September 2020

IMPACTS

Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:
a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate;
b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate; and
c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.

We do not wish to directly address this question at this time. Reference is made to our General Comments and the other answers given herein.