The Scottish Parliament
Pàrlamaid na h-Alba

EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

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Dear Lord Chancellor and Secretary of State for Justice,

I am writing to you regarding the inquiry conducted by the Scottish Parliament's European and External Relations Committee into the implications for Scotland of the UK Government's proposals for a British Bill of Rights to replace the Human Rights Act 1998.

The Committee carried out a wide-ranging inquiry into this issue. It received 42 responses to a call for written evidence;[1] it has taken oral evidence,[2] and has held meetings with the Scottish Human Rights Commission, the UK Parliament's Joint Committee on Human Rights and the Commissioner for Human Rights of the Council of Europe.

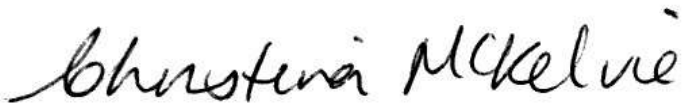
The Committee is of the view that the Scottish perspective should be taken into account in regard to any reform of human rights in the UK. Therefore, please find attached in the Annexes the key points which the Committee wishes to make to you, and also a more detailed summary of the written evidence received which supports the key points.

[1] The Committee's written evidence is available on the Committee's website at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/92540.aspx

[2] The Committee took evidence from Scottish stakeholders on 4 February 2016, and from the Scottish Government on 3 March 2016. The Official Reports of these sessions are available on the Committee's website at: http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10363 and http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10416

The Committee would like to highlight that our inquiry has shown that there is strong opposition from Scottish stakeholders to any repeal of the Human Rights Act 1998, as they did not perceive that there was any evidence for doing so and believe that any human rights reform should build on and strengthen the Act. We therefore ask you to take these views into account in any reform of human rights legislation.

Yours sincerely



Christina McKelvie
Convener
European and External Relations Committee

Annexe A – key points from the inquiry

The Committee focussed on the following three key areas in its inquiry, and has summarised its findings under these three areas in this document—

- The impact of the Human Rights Act 1998 (HRA) in Scotland in practice. What has it achieved?
- Is there a need to change or reform human rights legislation? Are there ways in which it could be improved or developed in Scotland?
- What are the potential implications for Scotland of reform of human rights legislation?

Potential UK Government reforms

Although the proposals for human rights reform have not been published, the Committee drew on the information in the public domain which suggested that the potential areas in which the UK Government might seek reform included:

- that the European Court of Human Rights (ECtHR) has developed "mission creep" by expanding into new areas (such as prisoner voting) which go beyond the original intentions of the European Convention on Human Rights (ECHR).[3]
- that the HRA undermines the role of UK courts, and undermines the sovereignty of the UK Parliament and democratic accountability.[4]
- to limit the application of the HRA to the UK so that it would not, for example, apply to the actions of the armed forces overseas.[5] [6]
- to limit the amount of compensation that public bodies have to pay individuals affected by human rights infringements.[7]
- to establish that the EU Charter of Fundamental Rights (the Charter) does not create any new rights and that courts cannot use it as the basis for new legal challenges.[8]

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[3] Conservative Party proposals for reforming human rights law in the UK, 2 October 2014 https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf

[4] Conservative Party proposals for reforming human rights law in the UK, 2 October 2014 https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf

[5] See the Sunday Times article on 8 November 2015 and the Independent's article of the same date

[6] Oral evidence by the Lord Chancellor and Secretary of State for Justice and the Parliamentary Under-Secretary of State for Justice to the EU Justice Sub-Committee of the House of Lords, 2 February 2016 http://parliamentlive.tv/Event/Index/def905e8-cb82-4a6f-a186-aced8465af0c

[7] See the Sunday Times article on 8 November 2015 and the Independent's article of the same date

[8] See David Cameron's speech on Europe delivered on 10 November 2015

- to consider whether the UK's Supreme Court could function as a constitutional court similar to those in certain EU countries (for example Germany).[9] [10]

- the perceived need for specific UK "glosses" placed on certain rights protected by the HRA. [11]

In the absence of final proposals, the Committee's inquiry has analysed human rights reform on the basis of these suggestions.

The impact of the Human Rights Act 1998 (HRA) in Scotland in practice. What has it achieved?

In all the evidence received by the Committee, there was a strong consensus that the Human Rights Act 1998 had become a "key component of our society and an effective tool for the protection of our rights", as well as "an effective means for individuals to challenge the actions of the State and seek redress in a more accessible, timely and affordable way than was possible before incorporation of the ECHR rights."[12]

Scottish stakeholders gave numerous examples of what the HRA had achieved in Scotland, and in particular how it had assisted some of most vulnerable in society to seek redress, such as those with disabilities and older people.

Is there a need to change or reform human rights legislation? Are there ways in which it could be improved or developed in Scotland?

There was a strong consensus amongst Scottish stakeholders that the UK Government's proposals were unnecessary and regressive, and that:

- the HRA did not require any major amendment,

- there was no evidence that the HRA needed to be repealed, and

- the suggested proposals could undermine the further development of a human rights culture in the UK.

Scottish stakeholders told the Committee that any proposals to reform or change human rights legislation should build on and strengthen the HRA, rather than repeal it.

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[9] Oral evidence by the Lord Chancellor and Secretary of State for Justice and the Parliamentary Under-Secretary of State for Justice to the EU Justice Sub-Committee of the House of Lords, 2 February 2016 http://parliamentlive.tv/Event/Index/def905e8-cb82-4a6f-a186-aced8465af0c

[10] See blog post by Dr Tobias Lock for views on setting up a German style constitutional court in the UK: http://ukconstitutionallaw.org/2015/11/25/tobias-lock-human-rights-and-eu-reform-in-the-uk-and-the-german-question/

[11] Oral evidence by the Lord Chancellor and Secretary of State for Justice and the Parliamentary Under-Secretary of State for Justice to the EU Justice Sub-Committee of the House of Lords, 2 February 2016 http://parliamentlive.tv/Event/Index/def905e8-cb82-4a6f-a186-aced8465af0c

[12] Written evidence from the Law Society of Scotland.

Some organisations suggested that rights should be strengthened for certain vulnerable groups, or if there was a reform via a UK Bill of Rights, then it should include some or all of the following:

a) rights which are contained in EU and other UK or devolved legislation;

b) economic and social rights;

c) rights contained in other international treaties, for example the UN Convention on the Rights of the Child or the International Covenant for Civil and Political Rights; and

d) the Charter.

They also expressed concerns that the UK Government's proposals to repeal the HRA was regressive in that it could drive claimants to use the ECtHR in Strasbourg rather than UK courts (as was the case before the introduction of the HRA).

Additionally, the Scottish Human Rights Commission (SHRC) called for a "progressive test" to be applied to any proposed changes to ensure that current rights were enhanced and current levels of rights maintained.

The Committee therefore questions your statement made on 2 February 2016 to the EU Justice Sub-Committee that—

> "…depending on how you ask the question, there is strong support for human rights reform in Scotland, as there is across the United Kingdom."[13]

Several respondents said that public support to both repeal the HRA and reform human rights had a foundation in the "toxic rhetoric" in the UK media regarding controversial human rights cases. This resulted in a common misunderstanding amongst the UK public on specific elements such as human rights claimants' success rates, and a wider misunderstanding as to how UK law interacts with EU law and the ECtHR. It also meant that discussion of 'unpopular rights,' such as those of prisoners, terror suspects, and asylum seekers dominated the human rights debate in the UK (although in reality these issues only cover only a small part of what the HRA addresses).

The Committee heard that, as a consequence of this misunderstanding and misinformation, there is a need in the UK for public education to highlight that human rights are frequently part of everyday life and can be used to redress the balance between the individual and the state and make the state more accountable.

[13] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/potential-impact-of-repealing-the-human-rights-act-on-eu-law/oral/28347.pdf

Sovereignty

Respondents to the Committee disagreed with the argument that the HRA undermines the sovereignty of the UK Parliament and democratic accountability. Firstly on the basis that decisions made by the ECtHR are not binding on UK courts, and secondly since the UK Parliament ultimately maintains the final say on UK legislation (an example being the various ECtHR judgments on prisoner voting rights which the UK has yet to implement). Additionally, it was highlighted that the ECtHR had become increasingly accommodating of member States, indicating that sovereignty was sufficiently respected.[14]

Furthermore, several respondents emphasised that UK laws rarely violated the ECHR, arguing that as of August 2014, only 1.5% of pending cases at the Court were against the UK, and in 2014, there were only four new judgements finding a violation by the UK.[15]

The Faculty of Advocates also highlighted the ECtHR's 'margin of appreciation'[16] as a mechanism used to protect sovereignty, saying that—

> "The Strasbourg Court applies a margin of appreciation when determining whether states have breached the ECHR - how wide a margin depends upon the particular right. The margin of appreciation recognises that it is primarily for nation states to protect the rights of their citizens."[17]

'Mission creep'

The general view amongst respondents was that the concept of 'mission creep' was unhelpful and misleading as, although the ECHR has evolved as a 'living instrument' in order to keep with up with modern developments, the ECtHR merely takes a consensus based approach and only looks to take decisions when it is clear that the law and cultural positions in the countries that make up the Council of Europe have moved on. In that regard, Dr Tobias Lock emphasised that the ECtHR will not interfere where there is no consensus noting that—

> "The flip side to that is the margin of appreciation, where there is no such consensus and where European countries do not agree. A current example is same sex marriage. In Austria and other countries, cases have been brought to the European Court of Human Rights where same-sex couples have said that they are being denied same-sex marriage and that they want to be given that as part of their human rights. The court has said … that society has not moved on that far yet. In some parts of Europe that is true, but in other parts it is not true. Therefore, member states have a margin of appreciation, and they can still deny same-sex

[14] Written evidence from Professor David Mead, University of East Anglia.
[15] Written evidence from Dr Jacques Hartmann, University of Dundee, Liberty and Amnesty International.
[16] Margin of appreciation incorporates a degree of discretion into the ECtHR's assessment, and a degree of latitude available to the State, particularly where difficult issues of social, economic or moral policy are involved on which there is no clear European consensus.
[17] Written evidence from the Faculty of Advocates.

couples the right to get married and to have equal status to different-sex couples."[18]

In addition, several respondents said that there was a constructive dialogue between the UK and ECtHR judiciary as to how the ECHR was interpreted, as opposed to the ECtHR expanding the ECHR into areas which it should not cover without that information flow.

Amnesty International Scotland described this relationship saying—

> "The relationship between UK and ECtHR judges as set out by the HRA is one of dialogue not diktat…The divergent rulings contribute to a positive dialogue between the UK courts and the ECtHR, leading to improved standards of justice in both."[19]

Restriction of rights

Several organisations raised concerns about the proposal to limit the use of human rights law to 'serious cases' or restricting the eligibility based on nationality or citizenship, saying this would undermine the basic principle of universal human rights and marginalise vulnerable people, and in doing so they also questioned who would make this judgement and how.

The proposal for the Supreme Court to function as a constitutional court similar to other EU countries such as Germany

At its meeting on 4 February 2016, the Committee considered the proposal with academics and legal professionals that the Supreme Court should function as a constitutional court in relation to human rights reform.

Dr Tobias Lock, University of Edinburgh, outlined two main problems with the proposal. Firstly he stated that the legal positional of the German constitutional court had been exaggerated in relation to its powers—

> "That court has so far never exercised the power that it has—indeed, it has very limited power in that respect. It will review EU legislation only with regard to whether it is ultra vires, and only then in extreme circumstances and after having asked the European Court of Justice, by way of a preliminary reference, whether that court thinks that the legislation would be ultra vires and therefore whether it would have the power to declare it void. It will also review whether German national constitutional identity has been violated, which relates to fundamental concepts such as human dignity, democracy and the existence of the German state."[20]

Secondly, Dr Lock questioned how the UK would provide for such constitutional powers in the absence of a written or codified constitution that takes precedence over Acts of Parliament. The Law Society of Scotland

[18] Oral evidence, Committee meeting of 4 February 2016, Official Report, col 22.
[19] Written evidence from Amnesty International.
[20] Oral evidence, Committee meeting of 4 February 2016, Official Report, col 36.

concurred that significant constitutional change would be required and highlighted further practical problems with the proposal—

> "…the Supreme Court does not have universal jurisdiction, because criminal law appeals stop here in Scotland. That is one issue that would have to be thought about if we were to deal with a constitutional court. It also does not take cases in criminal areas other than through the route of devolution issues under the Scotland Act 1998. There is a lot to be thought about before we immediately jump to creating a constitutional court."[21]

What are the potential implications for Scotland of reform of human rights legislation?

How would a British Bill of Rights interact with Scotland's separate legal system?

The Committee highlights that the question of how a British Bill of Rights would interact with Scotland's separate legal system is a complex one given the human rights provisions in the Scotland Act 1998. The provisions in the HRA apply in Scotland, but in addition the Scotland Act 1998 also contains its own provisions incorporating the ECHR. In particular, it provides that Acts of the Scottish Parliament which are incompatible with the ECHR are unlawful (section 29(2)).[22]

The Law Society of Scotland stated in written evidence that a stronger judicial role would be needed if a Bill of Rights were enacted, because the current arrangements under the Scotland Act 1998 provide a much stronger way of dealing with non-compliance with ECHR by Scottish Ministers than that which the HRA provides for the UK Parliament and UK Ministers.[23]

Devolution settlement

The Human Rights Act applies to all the devolved nations, but is also part of the devolution settlement and affects how the Scottish Parliament legislates.

Arguments have been made to the Committee that repealing the Human Rights Act could impact on the devolution settlement and might trigger the Sewel Convention.[24] Others have, however, argued that the Sewel Convention would not be triggered. For its part, the Scottish Government has indicated that the repeal of the Human Rights Act would require a legislative consent motion in the Scottish Parliament.[25]

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[21] Oral evidence, Committee meeting of 4 February 2016, Official Report, col 37.

[22] Section 57(2) also provides that the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with the Convention rights

[23] Acts of the Scottish Parliament can be struck down judicially if they breach the ECHR, whereas UK Acts can only be declared incompatible with the ECHR by the judiciary by means of a declaration of incompatibility.

[24] For a general overview of this issue see the Annex to Dr Tobias Lock's written evidence at page 10

[25] See: http://news.scotland.gov.uk/News/Embedding-human-rights-2037.aspx

The Committee is of the view that until it is known what the UK Government's specific proposals are, it is not possible to ascertain whether the Sewel Convention would be triggered and so cannot offer a view or recommendation on the matter at this juncture.

The Committee is, however, concerned that the UK Government does not yet appear to have explained publicly how its proposals will respect the position of the devolved nations in the devolution settlement. The Committee is of the view that any proposals must take into account the specific position of Scotland in the devolution settlement and should respect the Sewel Convention.

The possibility of different human rights regimes in different parts of the United Kingdom

Some respondents raised the possibility of either:

- the devolved governments legislating to apply stronger protections in devolved areas if the HRA was repealed and replacing it with new human rights legislation, thus creating differing human rights regimes in the UK, or

- the UK Government only repealing and replacing the HRA in relation to England, and leaving it in force for Scotland and the other devolved nations.

There was a general consensus amongst respondents that it would be possible but undesirable to have different human rights regimes in the UK following a repeal of the HRA, partly on the basis that human rights are universal but mainly due to the potential scope for confusion if different human rights regimes evolved in the UK.

What would be the international and EU level impact of the UK Government repealing the Human Rights Act?

Several respondents raised concerns regarding the detrimental impact that the UK Government's proposals could have on the UK's relationship with the EU, the Council of Europe and internationally. It was also noted that the proposals had already had a detrimental impact on Council of Europe and international human rights more generally. For example, the Children and Young People's Commissioner Scotland and Unison Scotland commented on the impact in Russia and Egypt in their written evidence to the Committee. The Commissioner said—

> "Dominic Grieve, former Conservative Attorney General, noted that Russia has already used the UK's position on human rights to delay implementing ECtHR judgments… That the UK would seek to alter the terms of the ECHR because a few cases did not suit them is both disproportionate and ill-judged and could do immense damage to the UK's reputation abroad, leading to the unravelling of an important multilateral international agreement."[26]

[26] Written evidence from the Children and Young People's Commissioner Scotland.

The Committee also considered the potential effects of repeal of the HRA on the application of the Charter.

The Committee heard that the UK would still have obligations to fulfil under EU human rights law regardless of the repeal of HRA (if it remained a member of the EU following the upcoming referendum on EU membership in June). Consequently, if the HRA were to be repealed, the Charter could still be used in cases where it is relevant to the interpretation of EU law.

Dr Katie Boyle, University of Roehampton also highlighted the ongoing process of the EU acceding to the ECHR, noting that—

> "This is critical to this discussion because the EU is in the process of acceding to the ECHR and also because the EU Charter of Fundamental Rights consolidates much of the same rights contained in the ECHR and other international treaties, including socio-economic rights. Whilst EU law applies domestically much of the same human rights as available under the ECHR will also be available under the EU framework in relation to matters of EU law.'[27]

In its written evidence to the Committee, the Scottish Government also noted the potential international impact of recent changes to the UK Ministerial Code, in which the obligations on UK Ministers to comply with international law and treaties had been removed. The Scottish Government noted that the Code does not have legal effect and so the removal of obligations does not alter the UK Government's obligations under international law, but that this change is likely to be seen as important by international observers in the context of proposals such as the repeal of HRA.

[27] Written evidence from Dr Katie Boyle, University of Roehampton.

Annexe B – summary of written evidence received

What is your general view on the UK Government's proposal to introduce a British Bill of Rights to replace the Human Rights Act 1998?

Overall views

There was a general consensus from respondents to the EERC that:

- the UK Government's proposal was unnecessary, with some describing it as "regressive",
- the Human Rights Act 1998 was effective and did not require any major amendment,
- there was no evidence for the need for any repeal of the 1998 Act; and
- the proposals for change could undermine the development of a 'human rights culture' in the UK.

For example, the Law Society of Scotland said—

> "We believe that the Human Rights Act 1998 (the HRA) is a key component of our society and an effective tool for the protection of our rights through the domestic courts in the UK. The HRA provides an effective means for individuals to challenge the actions of the State and seek redress in a more accessible, timely and affordable way than was possible before incorporation of the ECHR rights. The HRA has had a positive impact on the development of law and policy both in the UK and in Scotland."

Richard Edwards, University of Exeter said—

> "The oft-floated proposed changes put populism before principle. There is no evidence that the Human Rights Act 1998 (HRA) requires radical reform. For instance, the HRA was intended to provide a domestic forum for the redress of the type of cases that routinely wound up in the Strasbourg court yet did not display a systemic failure on the part of the UK to discharge its obligations under the ECHR. Equally, the HRA has, albeit somewhat belatedly, promoted a judicial dialogue between British judges and the Strasbourg court."

The Faculty of Advocates said that repealing the HRA could be regressive in that it could drive claimants to use the European Court of Human Rights (ECtHR) in Strasbourg rather than UK courts—

> "The Human Rights Act 1998 has, by its method of incorporation, in effect created a set of British Human Rights … the Faculty would not welcome any proposal which would reduce or restrict the

> circumstances in which a member of the public could seek to vindicate Convention rights in the domestic courts. It would be most unsatisfactory if litigants were to require to exhaust the domestic legal process and petition the Strasbourg court before obtaining the redress now available in their local court. Such a retrograde step would cause unnecessary delay, expense and uncertainty and would damage the reputation of our legal system internationally. It would also deprive the Strasbourg Court of the assistance which it derives from the decisions and reasoning of our own courts in relation to cases which come before it."

Public debate on human rights

Several respondents expressed concern about some of the public debate on human rights, particularly what Amnesty International Scotland described as the "toxic rhetoric" in the media in the UK regarding controversial human rights cases which it perceived as resulting in a common misunderstanding amongst the UK public, thus creating a foundation for calls to repeal the HRA.

For example, the Scottish Police Federation said,

> "The Home Secretary has peddled much misinformation about the Human Rights Act, most notably how a cat prevented the deportation of a person from the UK. This claim was subsequently ridiculed and rubbished but it perhaps serves as a perfect illustration of the willingness of the Government to grossly exaggerate the "impact" of Human Rights on the "British way of life".

SCVO and other organisations also voiced concerns regarding the manner in which human rights cases had been portrayed in the context of the proposed repeal and questioned whether the repeal was motivated by the UK Government's wider plans for EU reform.

SCVO said—

> "According to the Conservative Party's 'Protecting Human Rights in the UK' document, a British Bill of Rights would: 'Break the formal link between the British Courts and the European Court of Human Rights.'
>
> We are concerned this drive for a British Bill is motivated more by a sense of antipathy towards Europe and decisions made by the courts there, rather than ensuring people continue to have their rights protected and are able to challenge decisions."

Professor David Mead, University of East Anglia, said that the way cases were covered in the media led to misunderstanding and that claimants' success rates were misreported—

> "The perception that criminals and terrorists are the "real" or major beneficiaries of human rights protection stems to a large degree from

> the way the media reports human rights cases and incidents… I looked at the coverage by the Daily Mail on-line for a year of stories covering the deportation (or non-deportation) of foreign criminals on human rights grounds … The regular reader of The Daily Mail has almost a mirror image of the likelihood of the HRA being used to found a claim to stay in the UK. It is little surprise then that the HRA is perceived as a charter for PFTs, paedophiles, foreigners and terrorists."

The Glasgow Human Rights Network agreed that discussion of 'unpopular rights,' such as those of prisoners, terror suspects, and asylum seekers dominated the human rights debate in the UK, and that "these issues cover only a small part of what the HRA addresses—

> "If rights are only protected if they are popular, this undermines the entire concept of universal human rights which are applicable to everybody everywhere – not just when they are seen as convenient or popular. Further, the talk of responsibilities is particularly worrying since it seems to indicate that individuals might lose their human rights if they are perceived to have acted irresponsibly, which also undermines the idea of fundamental human rights."

Several organisations said that statistics showed that the amount of cases against the UK at the ECtHR as reported by the media are often greatly overestimated.

For example, Amnesty International Scotland said, "As of August 2014 only 1.5% of pending cases at the Court were against the UK. Most – some 60% - were against Italy, Ukraine, Russia and Turkey. In 2014 of 1,997 cases lodged against UK, the ECtHR struck out or declared inadmissible (so no full judgment) 1,970 of them. Of the remainder, the UK won 14 and lost 13 of cases heard."

Effect on vulnerable members of society

The third sector said that some more vulnerable parts of society would be particularly affected and have benefitted from the current arrangements of the HRA and its interpretation with reference to the European Court of Human Rights (ECtHR). Some examples of those groups were children and young people (highlighted by CYPCS) and people with dementia and their carers (highlighted by Health and Social Care Alliance Scotland) and also people living with and at risk of HIV (highlighted by HIV Scotland and the National AIDS Trust (NAT)).

For example, Clan Childlaw highlighted the importance to the children's hearing system—

> "From a children's rights point of view protection under ECHR as implemented by the Human Rights Act 1998 by the United Kingdom Parliament and as interpreted by the UK courts with reference to

> decisions of the European Court of Human Rights is a far clearer application of accepted Human Rights. An example in point is the children's hearing system… this led to fundamental change in the hearing system with regard to legal representation[28] and types of people able to participate in a hearing[29]."

Human rights are "universal not British"

Several respondents made the ethical point that human rights were not British or affiliated to any nation but universal, and so they did not support the general concept of a 'British' Bill of Rights.

HIV Scotland and NAT said—

> "British' human rights should not differ from human rights internationally. The criticism that the HRA is not sufficiently British misunderstands the universality of human rights. This criticism also fails to recognise that the European Court of Human Rights (ECtHR) allows a 'margin of appreciation' for political and cultural variation between the 47 members."

Do you think changes need to be made to the current human rights regime in the UK?

What rights, if any, would a British Bill of Rights have to contain?

In summary, respondents concurred that the current human rights regime in the UK did not require major changes, but did suggest an array of improvements to human rights law that could be made either through a repeal of HRA or by amending existing legislation.

Respondents also said that there was a need for extensive consultation on any proposed changes, taking into consideration the different constitutional structures of the UK's four parts.

For example, Amnesty International Scotland said that there was "no need to change human rights legislation in the UK, unless it be to extend its scope by incorporating economic, social and cultural rights into our domestic legal framework."

There was a general consensus that any repeal should lead to the introduction of new rights, and also expand or improve existing rights. Respondents expressed disappointment that this did not appear to be the intention of the UK Government.

The SHRC called for a "progressive test" to be applied to any proposed changes which to ensure that current rights were enhanced and current levels of rights maintained.

[28] S v Miller, 2001 S.L.T. 531and 1304
[29] K v Authority Reporter, 2009 S.L.T. 1019

HIV Scotland and NAT said any new regime should “apply to all human beings” and should be “universal, not depending on a person's immigration or citizenship status. “

The Law Society of Scotland proposed that a UK Bill of Rights could include:

e) rights which are contained in EU and other UK or devolved legislation;

f) economic and social rights;

g) rights contained in other international treaties, for example the Convention on the Rights of the Child or the International Covenant for Civil and Political Rights; and

h) the EU Charter on Fundamental Rights.

Dr Tobias Lock of the University of Edinburgh said a British Bill of Rights would allow the UK Government to provide for the protection of additional rights, such as: a free-standing right to equal treatment and non-discrimination; a right to trial by jury; and a right to open access to courts.

Several organisations suggested that rights should be strengthened for certain vulnerable groups. For example, AEA Scotland said that Scotland should follow the Welsh Government’s example by creating a Declaration of Rights for Older People and establishing an Older People’s Commissioner. Similarly Health and Social Care Alliance Scotland said that the UK Government should strengthen rights for disabled people and people who live with long term conditions.

The Mental Health Foundation also suggested that there was an “opportunity to provide greater protections that fit the 21st century, such as: free expression for the digital age, better defined privacy laws and clarity around religious freedom.”

International treaties

Several respondents said that the ability to challenge breaches of human rights should be expanded to cover international treaties, which would give the correct messages about the UK’s stance to an international audience.

Inclusion Scotland said, “Whilst the Human Rights Act entitles people to challenge breaches of the ECHR in the domestic courts, no such entitlement exists to challenge breaches under other international treaties and obligations to which the UK is a signatory—

> Of particular interest to disabled people is the UNCRPD, but the same is true for other UN Human Rights Treaties, including the United Nations Convention on the Rights of Children (UNCRC).
>
> This makes challenging breaches of human rights extremely difficult, time consuming and largely ineffective. If the UK is to have a Bill of

> Rights, it should incorporate all International Human Rights obligations, thereby enabling people to challenge human rights breaches in the domestic courts."

HIV Scotland and NAT gave one example of what should be included, although several others were suggested by other respondents—

> "Any new UK Bill of Rights should incorporate Protocol 12 ECHR and Article 12 of the International Covenant on Economic, Social and Cultural Rights and should reflect the UN Convention on the Rights of Persons with Disabilities."

The Law Society of Scotland said that, "A Bill of Rights for the UK could also include rights which have commonly been characterised as constitutional, for example, the right to access to justice or the right to have Human Rights determined by a court, however, arriving at consensus on this proposition may be difficult."

The Law Society of Scotland cautioned against including other rights which are characteristically considered as rights within one legal system in the United Kingdom, such as, "the right to trial by jury" saying, "In Scotland there is no such right as whether a case goes to jury trial is determined by the forum which is at the instance of the prosecutor."

How would a British Bill of Rights interact with Scotland's separate legal system?

Dr Katie Boyle, University of Roehampton, said that there was a clear divergence emerging between devolved countries in the UK and the UK Government on human rights, which might be further polarised by a repeal of HRA.

HIV Scotland and NAT said that the question of how a British Bill of Rights would interact with Scotland's separate legal system was a complex one—

> "The Scotland Act 1998 sets out the Scottish Government's compliance with the ECHR on devolved human rights matters such as health, education, social policy, justice and housing. The Scotland Act 1998 also provides that the Scottish Executive and the Scottish Parliament have no power to act contrary to the ECHR.
>
> In addition, the Scotland Act contains components of the HRA. For example, Section 29 of the Scotland Act, states that the Scottish Government "cannot act in a way that is incompatible with any of the Convention Rights or with EU law." Later Section 57 states "A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention Rights or with EU law." This wording is taken from the HRA showing that the Act is embedded within Scottish legislation."

The Law Society of Scotland said that a stronger judicial role would be needed if a Bill of Rights were enacted because the current arrangements under the Scotland Act 1998 provide a much stronger way of dealing with non-compliance with ECHR by Scottish Ministers than that which the HRA provides for the UK Parliament and UK Ministers.

> "That stronger judicial role would imply restrictions on the concept of Parliamentary sovereignty and allow for the judiciary to strike down legislation which was incompatible with the Bill of Rights for the United Kingdom. In other words a Bill of Rights would need to be constitutionally superior to other statutes."

Arguments have been made that the current system does not sufficiently respect the sovereignty of the UK Parliament. What are your views on this?

There was general disagreement amongst respondents regarding this argument, the overall view being that parliamentary sovereignty was protected under the HRA as decisions made by the judiciary at the ECtHR were not binding on UK courts (an example being the recent ECtHR judgment on prisoner voting rights which the UK has chosen to not uphold).

The Royal Society of Scotland (RSE) said that "in reality, sovereignty is shared and has been for some time"—

> "The UK Parliament is far from autonomous or omnipotent, as in some areas such as in relation to the European Union and under the devolution legislation it has limited its own sovereignty. Scots are represented by two legislatures with distinct jurisdictions, and further powers are exercised by the European institutions. Furthermore, Article 46 of the ECHR commits the UK to "abide by the final judgment of the [European Court of Human Rights]" in a case to which the UK was a party."

The RSE also said that "the raison d'être of developing a system of human rights is itself inherently to restrict parliamentary sovereignty—

> The protections provided by the ECHR serve as an acknowledgement that democratically elected parliaments are not infallible and can act without due regard to the rights of minorities and those who, for one reason or another, are unpopular or vulnerable."

The Scottish Government highlighted recent evidence given to the House of Lords EU Justice Sub-Committee by the former UK Attorney General, Dominic Grieve MP and Professor Sir David Edward, former UK judge in the Court of Justice of the EU, who both commented that parliamentary sovereignty had been misunderstood in the context of the UK Government's proposals.

Professor Sir David Edward said that parliamentary sovereignty was—

> “the legislative sovereignty of Parliament. That is to say, the laws duly passed by Parliament are bound to be applied by the courts. … It does not mean the sovereignty of the House of Commons. It does not mean the sovereignty of Ministers—the Government—still less of individuals who are Members of the Parliament. Parliament is sovereign as a legislator.”

Dr Jacques Hartmann, University of Dundee, said that the current system does sufficiently respect the sovereignty of the UK Parliament based on three reasons:

1. The European Court of Human Rights has no powers to change UK law.

2. UK law is rarely found to violate the European Convention on Human Rights.

3. The UK Parliament maintains the final say on UK legislation.

On the first point, Amnesty International Scotland said—

> “Human Rights Act does not allow the Judiciary to strike down Acts of the Westminster Parliament, precisely in order to preserve parliamentary sovereignty. The courts can either interpret legislation so as to make it compatible with human rights, or, if this is not possible, they can make a “declaration of incompatibility” which then allows Parliament to reconsider the legislation and decide what to do.’

Professor David Mead, University of East Anglia, said that instead of the ECtHR wishing to change UK law, it had become increasingly accommodating of Member States. He said—

> “What has generally gone unremarked in Government plans and announcements is what many commentators would see as increasing deference towards domestic bodies in recent judgments, a much greater (political?) desire on the part of the Strasbourg Court to be, and be seen as, accommodating. One example would be Animal Defenders case (that came as a surprise to most) and in my own area Pentikainen v Finland (a decision of the Grand Chamber of 20 Oct). In short, perhaps, (some of) the worries about judicial over-reach might either be misplaced or might be en route to being misplaced?”

On the second and third points, HIV Scotland and NAT said—

> “We believe that…concerns have been exaggerated to undermine our current human rights system. The HRA only requires UK courts to take into account decisions of Strasbourg as far as possible. This affords courts a considerable margin of appreciation or discretion to allow them to adjust decisions of Strasbourg in such a way as to respect sovereignty of Parliament.

In addition, Liberty noted that the number of cases decided against the UK has steadily decreased since the HRA came into force, saying that in 2014, there were only four new judgments finding a violation by the UK.[30]

> "In fact it could be argued that the HRA increases UK jurisdiction. Before the HRA, human rights cases went directly to the ECtHR; now cases are tried domestically in UK courts and only go to Strasbourg as a matter of last resort."

The Faculty of Advocates also highlighted the role of ECtHR's 'margin of error' used to protect sovereignty, saying that—

> "The Human Rights Act 1998 does not give the courts the power to reduce (or strike down) an Act of the UK Parliament… We have mentioned ... the margin of appreciation allowed to Contracting States under the Convention.. The Strasbourg Court applies a margin of appreciation when determining whether states have breached the ECHR - how wide a margin depends upon the particular right. The margin of appreciation recognises that it is primarily for nation states to protect the rights of their citizens."

Richard Edwards, University of Exeter, said that the human rights system in the UK was "overly deferential to the sovereignty of the UK Parliament" compared to "the position of EU Law where rights and freedoms under the EU Charter of Fundamental Rights are in play."

The Glasgow Human Rights Network (GHRN) said that "notions of absolute sovereignty are outdated", and that "the reality of sovereignty and the locus of political authority is more nuanced.—

> The fact that decision-making in the UK is shared between Westminster, devolved authorities such as the Scottish Parliament, and European Union bodies problematises the absolute sovereignty that is proposed in the Conservative Party document."

The GHRN also said that, "There are concerns that the proposals on the HRA are related to broader proposals to withdraw from, or significantly renegotiate the relationship with, the European Union."

Inclusion Scotland highlighted the need for international permanent human rights to protect them despite political changes in governments—

> "Whilst Parliaments may be sovereign, they are also transitory. What one Parliament decides may be overturned by another Parliament. What the ECHR, and other international Human Rights Treaties, does is establish permanent rights that are underpinned by international law

[30] Human Rights Act Mythbuster, Liberty

and cannot be undermined by the actions of a particular Parliament or Government."

In addition, it has been suggested that the European Court of Human Rights has developed "mission creep" expanding the European Convention on Human Rights into areas which it should not cover. What views do you have on this argument?

The general consensus amongst respondents was that the mooted concept of 'mission creep' was unhelpful and misleading as the ECHR was constantly evolving as a 'living instrument' beyond its origins in the 1950s to keep up with modern developments. Respondents also mentioned the element of "toxic rhetoric" (covered previously in this summary) in this context.

For example, the Legal Services Agency on behalf of Campaign for Housing and Social Welfare Law said—

> "As with almost all international law instruments, and indeed constitutional instruments, it can only endure if it is considered as a "living instrument". As a result, it is responsible for Europe's current stance on key issues such as access to abortion, LGBTI rights, and corporal punishment. These rights were not even contemplated in 1940's and 1950's Europe. It is worth pointing out that the latter two examples provided above involve landmark cases brought by British applicants."

Similarly, the Church of Scotland Church and Society Council said—

> "The proposition that there is "mission creep" proceeds on what may be a false major premise, namely that the European Convention is clear-cut with precisely defined limits, rather than a broad statement of principles which will be open to developing interpretation."

Richard Edwards, University of Exeter said that "this development is misreported, to a large extent, by the press so that almost uniquely in Europe human rights enjoy something of a pejorative status in the eyes of the public … The European Court was intended to be a watchdog, and has remained as one … The European Court only therefore becomes seized when the national legal system has failed, in some arguable way, to protect Convention rights."

Dr Tobias Lock of the University of Edinburgh highlighted the "lively academic debate" that had arisen around the question of whether there was 'mission creep'—

> "Some, including the former Law Lord Lord Hoffmann, argue that the Court has gone too far, whereas others would argue that the Court is striking the right balance between respect for the original intention of the signatories of the Convention and a need to adapt the reading of the Convention to modern developments both in society and in law."

Several respondents said that there was a constructive dialogue between the UK and ECtHR judiciary, as opposed to a mission creep agenda from Strasbourg.

Amnesty International Scotland described this relationship saying—

> "The relationship between UK and ECtHR judges as set out by the HRA is one of dialogue not diktat…The divergent rulings contribute to a positive dialogue between the UK courts and the ECtHR, leading to improved standards of justice in both."

What do you think the practical impact of the proposals will be in individual cases, for example as regards immigration policy, criminal law, or decisions made by public authorities?

The general view was that it was difficult to express a concrete opinion without seeing specific proposals but respondents did suggest a variety of possible scenarios.

The Law Society of Scotland discussed the likely impacts for human rights claimants if the UK remained part of the Convention or not, saying—

> "As long as the UK remains a party to the ECHR, the ECHR rights will be binding on the UK, and individuals will be able to take cases to the European Court of Human Rights. If the ECHR is no longer directly incorporated into the UK's domestic law, this would mean that individuals would have to go to the European Court of Human Rights (the ECtHR) and would be unable to seek legal enforcement of their ECHR rights through the UK court system. This was the situation prior to the enactment of the HRA."

The Legal Services Agency on behalf of Campaign for Housing and Social Welfare Law said that although "the ECHR is "hard wired" into the way that Scottish Government and Parliament work" via the Scotland Act, "the Scotland Act … does not apply beyond acts of Scottish Ministers and acts of Scottish Parliament", and it is the HRA that applies to public bodies. Therefore a repeal of the HRA could have a detrimental effect on hospitals, schools, councils and the Police as "a practical impact of the proposals would be, for example, to remove immigration policy, criminal law or decisions made by public authorities from the scope of Human Rights law."

Several organisations raised concerns about the proposal to limit the use of human rights law to 'serious cases', or restricting the eligibility based on nationality or citizenship.

The Scottish Human Rights Commission said that this would "undermine the basic principle that each of us has the same rights simply because we are human", and questioned who would make such a judgement.

AEA Scotland thought this could lead to possible marginalisation of older peoples' rights, as rights cases raised for older people were often subtle involving elements such as psychological abuse and might not qualify as 'serious'. Other organisations such as Health and Social Care Alliance Scotland, HIV Scotland and NAT had similar concerns for other vulnerable groups such as people with disabilities or HIV.

What impact do you think any changes will have on Scotland more generally?

Would the Scottish Parliament have to consent to any changes under the Sewel Convention?

Could the UK Government act without the consent of the Scottish Parliament?

Impact on Scotland

Several respondents considered the impact for Scotland should HRA be repealed, as human rights are embedded into the devolved settlements.

The Law Society of Scotland said that—

> "The HRA is entrenched within the Scotland Act so that it is expressly outwith the competence of the Scottish Parliament to modify the HRA.
>
> However, the subject of human rights more broadly has not been reserved, and Scotland has taken steps to legislate on human rights issues (for example setting up the Scottish Human Rights Commission).
>
> Schedule 5 to the Scotland Act also makes an exception for 'observing and implementing international obligations, obligations under the Human Rights Convention and obligations under [EU] law' from the general reservation of international relations.
>
> So, it seems that there remains considerable scope for Scotland to take action on human rights, both as a subject to themselves and as they relate to devolved matters."

Additionally, Inclusion Scotland said, "What is less clear is what impact the proposal to restrict the right to challenge "the most serious cases" will have on devolved responsibilities where Scottish Ministers and Public Authorities have clear legal obligations under the Scotland Act, and what the impact on the Scottish Courts will be of the change from "taking account of" to "advisory" will be."

Sewel Convention

Respondents offered differing opinions as to whether the Sewel Convention would be triggered following repeal of the HRA. There was also debate on at

what point the Sewel Convention would be triggered, that is whether it would be following the repeal of HRA, or following subsequent actions to replace HRA with a British Bill of Rights.

For example, the Law Society of Scotland said that repeal of the HRA might trigger the Sewel Convention—

> "The close links between the HRA and Scotland Act, and the overlap of human rights with devolved matters, mean that a repeal of the HRA, or significant change to how the ECHR is given effect in the UK, would likely trigger the Sewel Convention and require the consent of the Scottish Parliament. However, there is a lack of clarity on this point, and quite how or at what point the Convention would be triggered is still a matter of some debate."

Alternatively, the Legal Services Agency on behalf of Campaign for Housing and Social Welfare Law said that repealing the HRA would not trigger Sewel, but that replacing the HRA might—

> "Our position is best summarised thus: the repeal or any amendment of the Human Rights Act would not engage the Sewel Convention by virtue of the fact it is protected by Schedule 4 of the Scotland Act 1998. However, were it to be replaced by a British Bill of Rights this would presumably impact on Human Rights in Scotland. Human Rights is not a "reserved" matter as outlined in section 7 of Schedule 5 of the Scotland Act 1998. Therefore, as things stand, it is certainly arguable that replacing the Human Rights Act with another instrument which would apply in Scotland would require consent of the Scottish Parliament *per* Sewel Convention.
>
> What is more straight forward is that any change in the UK's relationship with the Council of Europe would likely require Sewel consent. "

Those who said the Sewel Convention was not triggered, such as Clan Childlaw and the Mental Health Foundation, cited Professor Mark Elliot's views which state that as the devolved administrations cannot legislate to change the HRA, Sewel is not triggered.

Professor Christine Bell of the University of Edinburgh said that the repeal of HRA would not affect ECHR compliance, but if the UK Government withdrew from ECHR then this possibly would affect compliance, and the entire framework of devolution. She said that it was technically possible for devolved governments to keep ECHR as a framework, but that it would be a strange arrangement and uncertain.

Mental Health Foundation agreed with this point saying, "Section 57(2) Scotland Act 1998 states that the Scottish Parliament may only pass laws that comply with the European Convention on Human Rights. However, repealing

the Human Rights Act 1998 might not, by itself, breach Section 57(2); it would only be breached if the UK was no longer a signatory to the Convention."

The Mental Health Foundation also recognised that opinions in this matter differ and suggested where devolved consent would be required should a Sewel Convention be triggered as follows:

- If the Devolution Statutes were to be amended to reduce the influence of the European Convention on Human Rights,

- If a British Bill of Rights that applies to the devolved nations is enacted, in respect of changes to devolved matters,

- If the UK decides to withdraw from the European Convention on Human Rights because this will necessitate the amendment of the Devolution Status – indeed, the devolution statutes impose the obligation upon the devolved administrations to comply with the European Convention.

Could the UK Government act without the consent of the Scottish Parliament?

Respondents agreed that the UK Government could theoretically act without the consent of the Scottish Parliament, but that the consequences would be so serious that it was unlikely. Several respondents also said it was improbable following moves to put the Sewel Convention on a statutory footing following the Smith Commission's recommendation. The Mental Health Foundation said that it "would also risk backlash against the Conservative party."

For example, the Children and Young People's Commissioner Scotland said, "At a time when no exaggeration is involved in saying that the Union hangs by a thread, it would be a foolish Prime Minister who cast aside a convention that institutionalises respect for devolved autonomy in order to implement the human rights change."

The Scottish Government said in its written evidence to the Committee that it "has made explicit that it would invite the Scottish Parliament to refuse legislative consent" as regards the Sewell Convention.

Do you think it would be possible to have different human rights regimes within the United Kingdom?

There was a general consensus amongst respondents that it would be possible but undesirable to have different human rights regimes in the UK following a repeal of the HRA, on the basis that human rights are universal.

Some respondents also said that there would be patchiness of provision, inconsistency and confusion as a result of having different regimes. For

example, HIV Scotland and NAT said that there would be confusion in how to interpret the law—

> "Many legal professionals have already expressed concern about the confusion repealing the HRA could have. With fifteen years of case law from the HRA, would lawyers and judges need to refer back to before 2000 when looking at legal precedent, or would some aspects of previous HRA judgments remain relevant, especially if the UK remains a signatory of the European Convention?"

The Legal Services Agency on behalf of Campaign for Housing and Social Welfare Law said that it would be possible in theory to have different human rights regimes in the UK, and so it might be possible for the Scottish Parliament to re-create the HRA in Scotland. However they also said that this would not be desirable in any way as it would create differing types of rights in the UK—

> "Individuals would have different levels of protection depending on their geographical location in the UK. This will inevitably lead to constitutional confusion in respect of devolved and reserved matters, and great injustice seems an inescapable result."

However, the Scottish Human Rights Commission said that the Scottish Parliament would be limited to devolved issues—

> "Scotland could not mitigate against the adverse consequences in people's lives in reserved policy areas. Even if Scotland introduced new laws maintaining or enhancing human rights protection in devolved areas, this would almost certainly still leave a gap in protection for people's rights in reserved policy areas."

The Children and Young People's Commissioner Scotland said that Westminster could repeal the HRA and enact its own Bill of Rights, applying it to English matters and allow the Scottish Parliament to enact its own legislation (eg Bill of Rights) which could go further. However, the Commissioner also said that this was unlikely to be an approach supported by the Scottish Government—

> "It is however worth recalling the speech made by the First Minister on 23rd September 2015 in which she said. 'We would have no interest whatsoever in doing a deal at Westminster which leaves rights intact here in Scotland, but dilutes them in other parts of the country or, as is perhaps more likely, protects human rights on devolved issues but not on reserved issues'."

The Scottish Government in its written evidence to the Committee supported this by saying—

> "The Committee will however be aware of media stories suggesting that Scotland might be "exempted" in some way from changes to the

> HRA which apply to other parts of the UK. In response, the Scottish Government has made clear that it is neither seeking, nor will it enter into, any deal which assists the UK Government in deconstructing human rights safeguards in other parts of the UK."

The Law Society of Scotland summarised the differing views on this matter, highlighting that to a limited extent, different regimes already exist—

> "On the one hand, some feel that it would lead to confusion and a two-tier system where different protections were applied to different subject areas in different regions. On the other hand, there are already different frameworks developing by nature of the operation of devolution and separate legal systems, and it is not unusual internationally for there to be multiple rights frameworks within one country. For example, it is common in federal systems for one Bill of Rights will apply to the central government, as well as each of the state/provincial governments having their own frameworks."

The Law Society of Scotland developed further the idea of a model whereby England had its own Bill of Rights separate from the rest of the UK describing it as "…a model of core UK rights augmented by and different from rights which would only apply in Scotland, Wales and Northern Ireland. This could be the result of devolved jurisdictions legislating to apply stronger protections in devolved areas if the HRA was repealed and replace it with something that was viewed as weaker, or by Westminster only repealing and replacing the HRA in relation to England, and leaving it in force for Scotland and the other devolved nations."

Another model suggested by the Society was to have "one UK application from which derogations by the devolved jurisdictions would be possible."

The Faculty of Advocates also said it would be possible to have differing human rights regimes on the basis of Scottish common law—

> "…the common law itself protects human rights and rights are also protected through statute. The common law of Scotland differs from the common law of England & Wales or Northern Ireland. The statutory regimes which provide specific protection for fundamental rights within our domestic legal order differ as between Scotland, on the one hand, and the other parts of the United Kingdom. We accordingly, already, have differences in the approach to human rights protection in different parts of the United Kingdom. In federal states, the different parts of the federation may have their own bills of rights, in addition to a federal constitution which also contains protection for fundamental rights – an example is the United States of America."

However, the Faculty said that there would be practical problems in certain areas were there to be material differences in the human rights protection in

the different parts of the United Kingdom such as in immigration law, for as long as that remains a matter reserved to Westminster.

Dr Tobias Lock of the University of Edinburgh also said that problems could occur if there were different regimes. Regarding the model of retaining the HRA in Scotland but repealing it in England, he asked whether "Scottish courts would have stronger powers of review as regards Westminster legislation than English courts—

> For instance, if an English human rights regime did not provide for an equivalent to section 2 HRA – the obligation to take account of European Court of Human Rights case law – but this would remain unchanged for Scotland, then the intensity of human rights review of Westminster legislation might differ: a Scottish court might be forced to interpret a provision of the same Act of Parliament in light of the ECHR, whereas an English court might not. Moreover, Scottish courts might retain the power to make declarations of incompatibility with regard to Westminster statutes whereas English courts might be deprived of this possibility. This might lead to undesirable consequences for legal certainty and should thus be considered with caution."

Inclusion Scotland said that this area could become even more complex when the new devolved powers proposed under the Scotland Bill are enacted, as there will be more areas of shared competency—

> "For example, whilst it may not be possible to raise a case against UK Ministers for a breach of ECHR as a result of a change to welfare benefits, it might be possible to raise an action against Scottish Ministers for failing to use their discretion to mitigate against the breach in human rights."

What impact do you think the UK Government's proposals will have on the UK and Scotland at an EU and international level, for example within the Council of Europe?

Several respondents said that the UK Government's proposals could have (and were already having) a detrimental impact on the UK's relationship with the EU, the Council of Europe and internationally.

European relationships

For example, on the European relationship, Clan Childlaw said—

> "This proposed re-ordering of fundamental rights will jeopardise British membership of the ECHR and the Council of Europe as other member states will consider these changes to be incompatible with continued membership of the Convention.
>
> This has a knock on effect with the UK's membership of the EU as fundamental to being a member state of the European Union is the country being a signatory to the ECHR."

The Mental Health Foundation outlined the differing scenarios if the UK remained a signatory to the ECHR, or if it left. If it remained in the ECHR, the UK would be expected to replace the Human Rights Act with legislation that contains those rights found in the Convention. The Foundation said that if there was a time gap between repealing the HRA and introducing a British Bill of Rights (i.e. no domestic legislation in place), UK citizens could appeal directly to the ECtHR in Strasbourg. However this would "cause additional costs and time delays due to the heavy caseload at the ECtHR."

The Foundation also said that the UK may be forced to withdraw from the ECHR if the new British Bill of Rights does not include all of the rights listed within the Convention—

> "Whilst countries are given a degree of flexibility in the wording used within domestic legislation, they must retain the core rights within the Convention. If the UK left the European Convention, the Supreme Court would then be the highest court on matters relating to human rights."

Similarly the Faculty of Advocates said—

> "Any proposal which had the effect of withdrawing the United Kingdom from the Council of Europe, or of diluting the UK's commitment to fulfilling its obligations under Article 1 of the Convention, would undermine the effectiveness of the Convention system; and the Faculty would accordingly not support any such proposal. The Faculty believes that any such proposal, and any proposal which precluded the courts in the UK from adjudicating on fundamental rights questions, would affect the standing of our legal system internationally."

EU law

Several respondents said that the UK would still have obligations to fulfil under EU human rights law if it remained a member of the EU, regardless of the repeal of HRA.

Dr Tobias Lock of the University of Edinburgh said that if HRA was repealed, the EU Charter of Fundamental Rights could be used in cases where the UK has acted within the scope of EU law.

The Faculty of Advocates agreed, saying—

> "Where EU law is engaged, the Charter of Fundamental Rights will apply equally in all parts of the United Kingdom, regardless of any other instruments protecting human rights or differences between the laws of those various jurisdictions."

Prof David Mead, University of East Anglia, said—

> "The elephant in the room remains EU Law. Almost whatever is done – or not done – to the HRA in terms of dilution or indeed replacement, for

so however long we remain members of the EU (and of course, that too is up for renegotiation and reconfirmation/rejection), EU Law, and its expanding corpus of human rights law and protection, offers us in the UK even greater protection than does the HRA."

Dr Katie Boyle, University of Roehampton said—

> "This is critical to this discussion because the EU is in the process of acceding to the ECHR and also because the EU Charter of Fundamental Rights consolidates much of the same rights contained in the ECHR and other international treaties, including socio-economic rights. Whilst EU law applies domestically much of the same human rights as available under the ECHR will also be available under the EU framework in relation to matters of EU law.'

International relationships

As well as undermining the relationship with the EU, several respondents said that the UK Government's proposals were likely to weaken human rights internationally.

For example, the Scottish Human Rights Commission said, "Regressive measures weakening accountability for human rights is likely to have implications for the observance of human rights both for European countries such as Russia, Belarus and all over the world."

The SHRC and other respondents also said that international stakeholders were already expressing concern such as the United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein who said that, "If Britain- a key member of the Human Rights Council, a founding member of eth UN and a privileged, permanent member of the Security Council - is considering a move that will potentially weaken a vital regional institution upholding fundamental human rights guarantees, this would be profoundly regrettable; damaging for victims and human rights protection; and contrary to this country's commendable history of global and regional engagement."

The Children and Young People's Commissioner Scotland and Unison Scotland commented that these concerns were already emerging internationally in Russia and Egypt. The Commissioner said—

> "Dominic Grieve, former Conservative Attorney General, noted that Russia has already used the UK's position on human rights to delay implementing ECtHR judgments… That the UK would seek to alter the terms of the ECHR because a few cases did not suit them is both disproportionate and ill judged and could do immense damage to the UK's reputation abroad, leading to the unravelling of an important multilateral international agreement."

The Scottish Government in its written evidence to the Committee also noted the potential international impact of recent changes to the UK Ministerial

Code, in which the obligations of UK Ministers to comply with international law and treaties had been removed. The Scottish Government noted that the Code does not have legal effect and so the removal of obligations does not alter the UK government's obligations under international law, but that this change is likely to be seen as important by international observers in the context of proposals such as the repeal of HRA.