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Human Rights Act Reform: A Modern Bill of Rights: Royal Society of Edinburgh Response

To whom it may concern:

1. I am writing to you on behalf of the Royal Society of Edinburgh (RSE), Scotland's National Academy, and as Chair of the recent Human Rights Act (HRA) Reform working group, which was established to advise upon the RSE's response to the above call for evidence. We welcome the opportunity to respond to the UK Government Ministry of Justice's consultation on this important topic. At a time of significant political, economic, societal, and global change, it is imperative that human rights remain entrenched in and protected by robust legal frameworks that also honour the right to legislative divergence across the devolved nations.

2. The RSE is well-placed to offer objective and expert supporting evidence to this consultation, given the independence of our Fellowship and Young Academy of Scotland that includes legal expertise across multiple fields of law. Our recent working group included human rights, constitutional, and criminal law experts. The working group's in-depth discussion of the consultation has informed the below response.

3. Our evidence broadly focuses on the Scottish perspective and the questions and proposed provisions of potential consequence to Scotland's constitutional and legal systems. We recognise that these changes to human rights laws in the UK are still in the early stages. As a result, we aim to provide a reference to the unique Scottish viewpoint for policymakers to consider as the Bill is progressed to ensure that any changes do not adversely affect Scotland and are compatible with its devolution principles.

Q1. We believe that the domestic courts should be able to draw on a wide range of laws when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2 of the consultation document as a means of achieving this.

4. Whilst this specific question raises no particular concerns for Scotland, some questions and concerns were raised during our assessment of the illustrative draft clauses. Specific terminologies within the draft clauses could have unintended consequences for the UK courts and the state's international law commitments. In addition, clarity is needed around some of the rules quoted in the clause.

5. The RSE has concerns about the definitive nature of the phrase '*must follow a previous judgment*.' In practice, this has the potential to inhibit the Court's freedom to depart from previous decisions as it develops its jurisprudence following the enactment of any reform of human rights law. The Supreme Court, through its decisions, can develop the law, and this clause could impede this development process, making the move unduly restrictive. There could be scope to soften this strongly-worded terminology. 'Must', for example, might be replaced with an alternative term that would enable the courts to continue to perform this function.

6. We also noted the peculiarity of the *travaux préparatoires* as a discrete interpretive aid in domestic law (in option 2). Section II of the European Convention on Human Rights (ECHR) has established rules on treaty interpretation, which bind the UK as it does other states. This inclusion does not appear consistent with the UK's obligations under international law.

Q2. 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?

7. We are apprehensive about the named role of the Supreme Court as the 'ultimate judicial arbiter' on the implementation of human rights. Our concern is that this could undermine respect for the role of the Strasbourg Court with respect to human rights cases, especially in cases to which the UK is a party: see article 46 ECHR. We recommend that careful consideration should be given to how this proposal would be applied in practice if these changes were to be implemented.

8. We ask the Government to consider what other effects this move might have on the UK's obligations under the Convention. Questions were raised by the working group about whether the UK can remain part of the Convention without adherence to ECHR Article 13 (the right to an effective remedy). The article states that if an individual's '*rights and freedoms set out in the Convention are violated, the person is entitled to an 'effective remedy before a national authority*.'[1] This raises concern as to whether the position of the Supreme Court under this proposal could undermine the individual's right to petition and, therefore, the UK's obligations under the ECHR should that right be exercised. The potential implications of this change on rights under Article 13 should be carefully considered and explained.

Q3. Should the qualified right to jury trial be recognised in the Bill of Rights? YES/NO format - with reasons.

9. No, at least not for Scotland. Except in the case of offences such as rape and murder, which are in the exclusive jurisdiction of the High Court of Justiciary, decisions as to whether a case should be prosecuted summarily or before a jury are entirely at the direction of the prosecutor against whose decision there is no appeal. We also have concerns that this could limit the powers of the Scottish Parliament to pass legislation about the mode of trial, given

[1] European Court of Human Rights. (2013/1950). *European Convention on Human Rights amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. 3*. https://www.echr.coe.int/documents/convention_eng.pdf

that the Scottish Government is currently considering the report of the Lord Justice-Clerk's Review Group on the management of sexual offence cases which may have implications for the future of jury trials. [2] Any provision in this area should recognise that criminal justice is a devolved area, which the proposed reforms should not seek to constrain.

10. More generally, it is not clear what benefit the Government considers, including the right to a jury trial in the Bill will provide, or what gives rise to the need for such a right. The right to a jury trial in England and Wales or Northern Ireland does not seem to be susceptible to being infringed by public authorities in the same way as other rights. And conferring such a right would not prevent Parliament from removing the right in the future in regard to particular offences if it thought fit.

Q8. 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? YES/NO format - with reasons.

11. No. As with our response to question two, we have concerns that this proposal could have implications for our obligations under the ECHR. The condition that individuals must have suffered a 'significant disadvantage' raises questions about whether we would be adhering to the conditions stated in Articles 13 and 34 of the Convention, as the right of a victim to an effective remedy under those provisions is not so qualified.

Q10. How else could the government best ensure that the courts can focus on genuine human rights abuses?

12. For Scotland, we do not detect a particular need for reform in this area. At present, there appear to be no domestic concerns about the number of cases being brought forward to the courts in relation to breaches of the Human Rights Act 1998.

Q15. Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament? YES/NO format - with reasons.

13. This proposal appears to conflict with devolution legislation. Under section 29(1) of the Scotland Act 1998, legislation that is incompatible with any of the Convention rights is declared to be "not law", and under section 54(2), any such provision in delegated legislation is simply outside devolved competence. This means that any such provisions that contravene the Convention are struck down because the Scotland Act itself says that this is so. Our concern is that this change could confer on the Scottish courts a discretion regarding Scottish secondary legislation, which they do not currently have. The current position should be retained. Any changes that affect devolved legislation in this field should be made only with the agreement of the Scottish Parliament.

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[2] Scottish Courts and Tribunals Service. (2021, March). *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group*. https://scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2021/03/18/improving-the-management-of-sexual-offence-cases

Q19. 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?

14. In order for the Bill of Rights to best reflect the interests, histories and legal traditions of the whole of the UK, the Government must consider the potential impact that some of the proposals may have on the devolution settlements in Wales, Scotland and Northern Ireland. The Scotland Act 1998 reflects the distinctive Scottish traditions of our legal system. Any proposals should be framed to maintain compatibility with the provisions of the Act or else be approved by the Scottish Parliament.

15. We would like to reiterate our response to question three (the right to trial by jury) as an example of where the proposals appear not to recognise the current position in Scots law. We have previously expressed concerns about changes to the HRA that would unequally impact the legal traditions in Scotland, as Scotland's legal system is notably distinct from that in the rest of the UK.[3]

16. We recommend that the government takes these regional variations into account when enacting laws at a national level. A solution could be a 'margin of appreciation' applied to Scotland's criminal laws to ensure the respect of our legal traditions. The 2018 report by the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) made the point that in some instances (namely, the areas of EU laws retracted after Brexit, which 'intersects with devolved competence'), devolved nations should be allowed to 'diverge' and legislate themselves.[4] Whilst the changes to the HRA are not a result of the UK's exit from the EU, the impact the Bill of Rights may have on devolved competencies bears similarities and therefore could be considered an area where divergence would be acceptable.

Q20. 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.

17. The RSE holds some reservations about changes to the current definition of public authorities. We noted that when the HRA was drafted, it deliberately did not set out a full definition of public authorities. This was intentional, as it was thought better to leave the development of such a definition to the courts and to allow for changes to the concept of public authorities. We believe that there is an argument that the existing definition should be maintained. It is difficult to legislate in such areas when we cannot predict what will happen in future cases.

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[3] For a copy of RSE's advice paper AP15-24, *Scottish Parliament European and External Relations Committee Call for Evidence on Human Rights: Royal Society of Edinburgh response*, please contact Stephanie Webb at swebb@therse.org.uk.

[4] House of Commons Public Administration and Constitutional Affairs Committee. (2018, July). *Devolution and Exiting the EU: reconciling differences and building strong relationships, Eighth Report of Session 2017–19.* https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/1485.pdf

Q22. 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.

18. We recommend that this issue be dealt with outside of the current consultation paper and that it not be addressed in this Bill. The extraterritorial application of human rights law is the result of current jurisprudence in Strasbourg.

19. The law of armed conflict is an area of international humanitarian law that is not the exclusive province of the ECHR, and the extraterritorial application of that Convention is not confined to areas of armed conflict. This is a complex and highly contentious area, which would be better handled in isolation in the context of a more specialised consultation.

Q23. 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?

20. As far as we can see, the principle of 'proportionality' has not caused any issues in practice in Scotland and appears to be working reasonably effectively in the hands of the courts. There is an inherent risk that new terminology will create a degree of uncertainty until the direction of the resultant case law is reasonably predictable. So, we would think it would best be avoided unless there is a clear need for new or updated terminology.

21. However, of the two options, option one provides more clearly articulated guidance and is easier to understand. It also reflects the current guidance and may mitigate challenges with any changes made.

Q27. We believe that the Bill of Rights should include some mention of responsibilities and the conduct of claimants and that the remedies system could be used in this respect. Which of the following options could best achieve this?

22. We broadly accept the point that consideration of failure of responsibility is appropriate when considering the extent to which damages may be awarded for the breach of a Convention right. However, it is worth pointing out that there are very few cases where this has been litigated in the UK courts, which calls into question the need for corresponding legislation.

23. There is also doubt as to whether what is being proposed would be a workable solution. Rather than attempting to balance or quantify failures of responsibility against alleged human rights infringements, we would support the position that evidence of a serious failure of responsibility could be used to negate an entitlement to damages altogether. The alternative, a reduction in the amount of the award, is a relatively simple concept in personal injury cases, where the question is related to the extent to which fault on each side caused or contributed to the accident. It would be much harder to apply if, as is likely, the situation is one where the causative test cannot be applied.

24. We also have concerns about the suggestion in paragraph 307 concerning the consideration of relevant past conduct. This extends far beyond the scope of the existing jurisprudence on

contributory negligence (which would presumably be the closest analogue to considerations of failure of responsibility). However, we prefer not to assume a definitive position on this matter until we see more details on what is being proposed.

Q28. We would welcome comments on the options for responding to adverse Strasbourg judgments in light of the illustrative draft clause in paragraph 11 of Appendix 2 of the consultation document.

25. Upon our evaluation of the draft clauses, we found draft Clause one to be the only clause that is clear in its utility and purpose. The remaining draft clauses as they are written could introduce confusion and delay.

26. One concern is how the proposed provisions will relate to existing processes. We noted that there is already a supervisory procedure (e.g., *Hirst*) whereby the Committee of Ministers continuously supervises the European Court of Human Rights in its execution of judgments and decisions.[5] It is unclear how this provision is intended to relate to that process, though we would presume it would not have any bearing on the functioning of that supervisory role. While it may be appropriate for Parliament to hold a debate following a judgment to discuss its effects and implications, we think that this should not take the adversarial form of a *vote* on the judgment itself. It would therefore be better for the clause to indicate that the debate should be on a motion in neutral terms (in the Commons) or to take note (in the Lords), along the lines of these examples: Northern Ireland (Executive Formation etc.) Act 2019 s 3; Coronavirus Act 2020 s 99. This would not exclude the possibility of a Minister tabling a motion outwith the terms of the legislation if they wished to press matters to a vote. But it would be helpful to emphasise that this process is intended to be one of dialogue.

27. In relation to Subclause three, there is no indication as to what happens after this procedure. It would be worthwhile considering giving the Secretary of State a role in making decisions regarding motions on adverse judgements and to state that, for reasons that will be announced, the judgment will not receive effect. This decision can then be tabled so the Houses can express views on that decision. It should be understood, however, that a judgment cannot be overruled by a vote in Parliament.

Q29. We would like your views and any evidence or data you might hold on any potential impacts that could arise due to the proposed Bill of Rights.

28. Our most significant concern about these proposals is in relation to their potential implications with respect to the Scotland Act 1998, as noted above. We want to reiterate that we would be opposed to any moves that undermine the devolution settlement without the consent of the Scottish Parliament. We were pleased to see the response issued by the Scottish Human Rights Commission, which echoes this concern with respect to the status of the HRA as a protected enactment under the Scotland Act.[6]

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[5] Council of Europe. (2018). *Resolution Execution of the judgments of the European Court of Human Rights Five cases against the United Kingdom.* https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808feca9

[6] Scottish Human Rights Commission. (2021, March). *Submission: Independent Review of the Human Rights Act, Call for Evidence*. https://www.scottishhumanrights.com/media/2160/review-of-the-human-rights-act-vfinal.pdf

We look forward to seeing the outputs of the inquiry when they become available. We would also be willing to engage further with the Ministry of Justice on this topic in the future, perhaps in the form of a joint roundtable or other such engagement work. If you wish to follow up on what we have said in this letter, please contact Stephanie Webb, Policy Advice Officer, at swebb@therse.org.uk. Thank you for being willing to take our comments into account as you conduct your inquiry.

Yours sincerely,

Lord Hope of Craighead, KT, FRSE.