FACULTY OF ADVOCATES

RESPONSE

by

the Faculty of Advocates

on the proposed repeal of the Human Rights Act and its replacement with a British Bill of Rights

1. The Faculty of Advocates is Scotland's independent referral bar. Advocates have been promoting the administration of justice and the rule of law in Scotland for over 450 years. The Faculty is a member of the Council of European Bars and Law Societies, which monitors actively "the rule of law, the protection of fundamental and human rights and freedoms, including the right of access to justice and protection of the client, and the protection of the democratic values inextricably associated with such rights". The Faculty welcomes this opportunity to submit evidence to the European and External Relations Committee of the Scottish Parliament on the UK Government's proposed repeal of the Human Rights Act and its replacement with a British Bill of Rights.

2. The European Convention on Human Rights ("ECHR") has proved to be a successful international instrument for the protection of human rights and the rule of law. Article 1 of the ECHR obliges the United Kingdom to secure the rights and freedoms set out in the Convention to everyone within its

jurisdiction.

3. It is for Contracting States to decide how to fulfil that obligation and to secure the rights and freedoms set out in the Convention within their territories. In Scotland, the rights and freedoms set out in the Convention are protected and secured, in the first instance, by our own common law and by domestic statutory provisions. But that protection is underpinned, promoted and supported by the incorporation into Scots law of the ECHR rights through the Human Rights Act and the devolution legislation.

4. The Faculty believes that the incorporation of the ECHR rights into domestic law through the Human Rights Act and the devolution legislation has been beneficial for the people of Scotland. Before incorporation, judges and lawyers made little reference to the ECHR and the decisions of the Strasbourg Court. In Scotland, it was not until 1996 that the ECHR could be relied upon at all in legal proceedings before the domestic courts[1], and then only as an aid to statutory interpretation. Individuals who considered that their rights under the Convention had been infringed could not advance that case in the Scottish courts, but only in the European Court of Human Rights once they had exhausted the domestic legal process. The situation has been transformed. Today, the ECHR is of great importance in daily practice in the Scottish courts. Individuals may rely directly on their Convention rights and enforce those rights in their own courts. Importantly, our own judges have the power to interpret and apply the Convention in a manner which reflects the particular circumstances of our own jurisdiction.

[1] *T, Petitioner* 1997 SLT 724.

5. The devolution and human rights legislation has revitalised the law. Almost every area of Scottish practice and procedure has been examined and tested against the ECHR. In many (perhaps most) areas, this process resulted in no substantial change. In others it has resulted in important and overdue reforms of our law. These include reforms of the appointment and tenure of judges[2], disclosure to the defence of the prosecution case[3], the right of a suspect to have a lawyer present when interviewed by the police[4], the right of unmarried fathers to participate in proceedings concerning their children[5] as well as important reforms in more technical areas such as the law on diligence on the dependence of an action[6]. The law's treatment of disability, mental health, discrimination and equality has progressed significantly since incorporation of the ECHR into domestic law. All of these advances would not have been made as rapidly or at all, or maintained, without reliance on the Convention and the jurisprudence of the Strasbourg Court. Advocates appearing in the Scottish Courts must now have an in depth understanding of the Convention and its application, and knowledge of relevant Strasbourg case law. Just as importantly, the domestic incorporation of Convention rights provides a framework of fundamental rights within which the legislature and executive operate, and which requires that legislation and executive action which affects those rights is properly justified.

5. The Faculty acknowledges that the Human Rights Act and decisions of the Strasbourg Court have been subjected to negative comment. Such criticism

[2] *Starrs v. Ruxton* 2000 JC 208.
[3] *Holland v. HM Advocate* 2005 1 SC (PC) 3; *Sinclair v. HM Advocate* 2005 1 SC (PC) 28.
[4] *Cadder v. HM Advocate* 2011 SC (UKSC) 13.
[5] *K v. Principal Reporter* 2011 SC (UKSC) 91.
[6] *Karl Construction Ltd v Palisade plc* 2002 SC 270.

may, perhaps, be regarded as an inevitable feature of any effective system of human rights protection. In a democracy, human rights protection is unnecessary for popular causes. The protection of the fundamental rights of individuals – such as an individual's right not to be deported to a country where he might be tortured or where he will be tried using evidence obtained by torture[7], or any prisoner's right not to be subjected to inhuman or degrading treatment or punishment[8] – may well produce decisions from the Courts which sections of popular opinion deplore or disapprove. It is in precisely these types of cases that the commitment of a country to the protection of fundamental human rights is tested.

What is your general view on the UK Government's proposal?

6. The UK Government has not published its proposals. It is accordingly not possible to express a considered view of any detailed programme at this stage.

7. The Faculty has been unable to identify any significant problem with the current operation of the Human Rights Act or the devolution legislation that incorporates ECHR. It is not convinced of the need for substantial reform.

8. The Faculty would oppose dilution or abrogation of any of the fundamental rights contained in the Convention. As Lord Bingham wrote in *The Rule of Law* (2010) at p 84:

> "*of course there are court decisions, here and in the European Court, with which one may reasonably disagree. But most of the supposed*

[7] *Othman v. United Kingdom* (2012) 55 EHRR 1.
[8] *Napier v. Scottish Ministers* 2005 1 SC 229.

weaknesses of the Convention scheme are attributable to misunderstanding of it, and critics of it must ultimately answer two questions. Which of the rights would you discard? Would you rather live in a country in which these rights were not protected by law?.. There are probably rights which could valuably be added to the Convention, but none which could safely be discarded."

9. Equally, 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.

10. It appears to the Faculty that the current system of domestic human rights protection works well. The existing legislation as interpreted by the courts has created a sophisticated system of human rights protection with sufficient flexibility to allow the law to be re-balanced or re-developed as and when required. The following features should be noted:

- The Convention Rights are a subsidiary form of human rights protection in Scots law. Consideration requires, in the first instance, to be given to the human rights protection given by the common law and statute, using the Convention rights as a cross check. This approach was explained by Lord Reed, one of the two Scottish Justices in the UK Supreme Court, in

R (Osborn) v Parole Board [2014] AC 1115. At paragraphs [55] – [57], he said:

> "*The guarantees set out in the substantive articles of the Convention, like other guarantees of human rights in international law, are mostly expressed at a very high level of generality. They have to be fulfilled at national level through a substantial body of much more specific domestic law... The Convention cannot therefore be treated as if it were Moses and the prophets. On the contrary, the European court has often referred to "the fundamentally subsidiary role of the Convention": see e.g. Hatton v United Kingdom (2003) 37 EHRR 611... Domestic law may however fail to reflect fully the requirements of the Convention... The Human Rights Act 1998 has however given domestic effect, for the purposes of the Act, to the guarantees described as Convention rights. It requires public authorities generally to act compatibly with those guarantees, and provides remedies to persons affected by their failure to do so. The Act also provides a number of additional tools enabling the courts and government to develop the law when necessary to fulfil those guarantees, and requires the courts to take account of the judgments of the European court. The importance of the Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based on the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate.*"

This approach has also been emphasised by the Lord Justice Clerk (Carloway) in the High Court of Justiciary in *Gorrie v Macleod* [2014]

SCL 293 [13] – [14]. Scotland has its own body of domestic human rights law, regardless of the Strasbourg caselaw and distinct from the position in the other jurisdictions of the UK.

- The Human Rights Act 1998 has, by its method of incorporation, in effect created a set of British Human Rights. The rights contained in Schedule 1 to the Act while mirroring the ECHR rights are domestic rights to be interpreted by the UK Courts in the same way as any other UK statutory provision: see the explanation by Lord Hoffmann in *Re G (Adoption: unmarried couple)* [2009] 1 AC 173 at paragraphs [33] to [38].

- Courts in the UK are required to take into account Strasbourg case law, but are not bound to follow that case law: section 2(1) of the Act. Domestic courts will usually follow a clear and consistent line of authority from the Grand Chamber of the European Court, but otherwise are open to taking a different view. The Grand Chamber is reserved for the most important cases. Most cases before the Strasbourg Court are decided by sections of the Court and these decisions, which may not represent the settled view of the Court as a whole, carry less significance for domestic courts than decisions of the Grand Chamber. In some cases, rather than follow Strasbourg caselaw, the domestic Courts will take a different view and this may, in turn, result in the European Court modifying its own approach[9].

- The courts in the UK try to keep pace with clear and settled authority from Strasbourg, but, as a general rule, do not advance beyond the Strasbourg authority unless domestic law requires it: *Ullah v Special*

[9] See e.g. *R v. Horncastle* [2010] 2 AC 373, where the UK Supreme Court disagreed with the European Court's decision in *Al-Khawaja v. United Kingdom* (2009) 49 EHRR 1; and see the European Court of Human Rights decision in *Horncastle v. United Kingdom* (2015) 60 EHRR 31.

Adjudicator [2004] 2 AC 323, considered in *Ambrose v Harris* 2012 SC (UKSC) 53.

- 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. The importance of the margin of appreciation was restated by the Council of Europe in the Brighton Declaration in 2012 during the UK's presidency of the Council of Europe, and is expressly referred to in the 15th protocol to the ECHR which is currently open for signature. The European Court has frequently emphasised the importance it attaches to the margin of appreciation. Recent examples of the application of the margin of appreciation may be seen *in Animal Defenders International v. United* Kingdom (2013) 57 EHRR 21 and *Nicklinson v United Kingdom (Admissibility)* (2015) 61 EHRR SE7. Similarly, domestic courts acknowledge the scope of the discretionary area of judgment which is open to Parliament where Parliament has expressed its view on a matter of public interest. For a recent summary of the position see *Christian Institute v Lord Advocate* 2015 SLT 633 at paragraph [72]

11. As we have observed above, it is for Contracting States to decide how to fulfil their obligations under Article 1 of the Convention. Different mechanisms of rights protection can be envisaged. While the Faculty has not identified a need for substantial reform of the current arrangements, its commitment is to the protection of fundamental rights as such and not to any particular legislative scheme. While the Faculty would be opposed to any reform which had the object or effect of undermining or diluting the protection of fundamental rights in Scotland, the same considerations would not apply to any reform which has the aim and effect of supporting and

promoting the protection of fundamental rights – or, indeed, of securing broader public acceptability of the protection of fundamental rights.

What rights, if any, would a British Bill of Rights have to contain, and how would it interact with Scotland's separate legal system

12. Reference is made to the Faculty's preceding answer. The Faculty's commitment is to the protection of fundamental rights as such and not to any particular legislative scheme. We do not consider that any of the rights currently in the Convention could be omitted from any domestic Bill of Rights without undermining the international rule of law and domestic human rights protection. It is hard to identify any advantage in expressing the same rights using different words and there would be potential disadvantages in the uncertainty and litigation that could result.

13. How any Bill of Rights would interact with Scotland's legal system is dependent upon the specific proposals. At this stage, it is not possible to anticipate what those might be.

Does the current system respect the sovereignty of Parliament?

14. The Faculty considers that it does. The Human Rights Act 1998 does not give the courts the power to reduce (or strike down) an Act of the UK Parliament. The powers given to the courts by the Human Rights Act 1998 are exercised by the courts pursuant to that Act of Parliament, and accordingly respect Parliamentary sovereignty.

15. Further, both the Strasbourg Court and the domestic courts recognise that there are matters which are for the legislature to determine. We have mentioned above the margin of appreciation allowed to Contracting States under the Convention. This is well illustrated by the *Animal Defenders* case, mentioned above. That case concerned the rules in the UK governing political advertising, a subject which had been the subject of detailed examination in Parliament and the domestic courts. In its judgment, the Strasbourg Court attached:

> "*considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom, and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process*"[10].

16. The proper approach to be taken by a domestic court was summarised – in relation to an Act of the Scottish Parliament – by Lord Hope of Craighead in *Salvesen v Riddell* 2013 SC (UKSC) 236 at paragraph [36]:

> *"There is no doubt that, as regards the question whether it is pursuing a legitimate aim in the general interest, the Parliament has a broad area of discretion in the exercise of its judgment as to social and economic policy. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the court to say whether the legislation represents the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another*

[10] Para. 116.

way. But there must be a fair balance if the requirement of proportionality is to be satisfied. The balance that must be struck is between the demands of the general interest of the community and the requirements of the protection of the fundamental rights of the individual."

17. Although *Salvesen v. Riddell* was a rare case where the Courts found a statutory provision to be incompatible with the Convention, the Court delayed the impact of its decision so that the Scottish Government and the Scottish Parliament could consider the appropriate remedial measures – an approach which respects the respective institutional roles of the courts on the one hand, and the legislature on the other. The Government rectified the matter by promulgating the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014.

18. Further, it is useful to consider the example of one of the most controversial issues – prisoner voting. Despite the Strasbourg Court and the UK Supreme Court both finding the current law to be in breach of the ECHR, Parliament has, thus far, not taken any remedial action and there are no means within the domestic legal order by which it can be compelled to take such action.

Is the European Court guilty of mission creep?

19. The Faculty does not consider that the Court is guilty of mission creep. The Court has frequently emphasised that the ECHR must be interpreted as a "living instrument", and as such its jurisprudence continues to evolve in light of changing societal norms. If the ECHR were not a living instrument, it would risk quickly becoming irrelevant to modern life. Society is very different now from what it was in 1950. No doubt the same will be true in 2050. Had the ECHR not been a living instrument, its case law could not

have developed to provide legal protection to homosexual relationships, or to children born out of wedlock, to give two examples[11]. In that way, the ECHR evolves in much the same way as the domestic common law has for centuries.

What do we think the practical impact will be?

20. The Faculty is unable to answer this question without knowledge of the detail of the proposals.

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

21. As a matter of law, the UK Parliament could, under the current terms of the Scotland Act 1998, legislate on this matter without the consent of the Scottish Parliament[12]. The Sewel Convention does not, at present, have legal force[13] and it would not be appropriate for the Faculty to comment on the competing views about its application.

Would it be possible to have different human rights regimes within the United Kingdom?

22. Yes. As explained by Lord Reed in the quotation from *Osborn* (reproduced above) 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

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[11] See Dominic Grieve QC MP, "Is the European Convention Working?", the Faculty of Advocates/Bar Council of England & Wales Rule of Law Lecture 2015, delivered in the Laigh Hall, Parliament House, Edinburgh, 20 September 2015, http://www.advocates.org.uk/media/1859/domgrievelecture.pdf, pp. 6-7.

[12] Scotland Act 1998, section 28(7).

[13] Clause 2 of the Scotland Bill, currently before the UK Parliament, would enact a version of the Sewel Convention.

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.

23. 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. For example, it is difficult to see why it would be desirable or practicable for different human rights standards to be applied in immigration law, for as long as that remains a matter reserved to Westminster.

24. 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.

What impact would the UK Government's proposals have on the UK and Scotland internationally?

25. This depends on the nature and implications of the proposals. 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[14]; and the Faculty would accordingly not support any such proposal. The Faculty believes that any such proposal, and any

[14] See Dominic Grieve QC MP, op. cit.

proposal which precluded the courts in the UK from adjudicating on fundamental rights questions, would affect the standing of our legal system internationally.