European and External Relations Committee: Human Rights Inquiry into the proposed repeal of the Human Rights Act and replacement with a British Bill of Rights

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

In May 2015, the three UK Children's Commissioners and I submitted our Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland to the Committee on the Rights of the Child. One of our main concerns was the uncertain future of the human rights settlement in the UK, due to the Government's stated intention to repeal the Human Rights Act (HRA) 1998 and replace it with a Bill of Rights. We noted that repeal of the HRA was likely to be regressive, serving to undermine human rights protections and stall the development of a human rights culture across the UK.

The HRA has been vital in promoting and safeguarding children's rights in the UK and the European Court of Human Rights (ECtHR) has had a key role in developing the protections offered to children by the European Convention of Human Rights (ECHR). Their judgments have been influential in shaping judicial decisions and UK legislation. Furthermore, when UK courts are considering a claim by a child under the HRA, they increasingly give significant weight to the UN Convention on the Rights of the Child, particularly in the Supreme Court, whose decisions are binding on all Scottish courts. Examples of where the Convention on the Rights of the Child has been influential include:

- <u>Weight to be given to the best interests of children:</u> In 2011, the Supreme Court considered a deportation case and when it was permissible to remove or deport a non-citizen parent where this would mean that their children (UK citizens) would also have to leave.[1] ZH had an appalling immigration history, yet the Court considered that the Convention on the Rights of the Child imposed a binding obligation upon the

[1] ZH (Tanzania) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent)

authorities to give precedence to children's rights in welfare decisions and to seek the views of the children, aged 9 and 12. They decided not to impose punishments upon the children for the 'wrongdoings' of their parents and allowed the appeal.

- Treatment of young people in police custody: The claimant[2] challenged the Police and Criminal Evidence Act 1984 and its Code of Practice which treated 17 yr olds as adults not children, denying them the right to contact their parents when arrested or to have an appropriate adult present when questioned by the police. This was held to be contrary to article 8 ECRC read with the Convention on the Rights of the Child
- Severely disabled children and their rights to benefit: This concerned the rule which suspends Disability Living Allowance (DLA) to disabled children after 84 days in hospital. The 2015 case[3] related to boy who was 3yrs old at the time his DLA was suspended. The Supreme Court found that the rule discriminated against him and was contrary to Article 14 of the ECHR. Because the rule was secondary legislation, rather than an Act of Parliament, the Secretary of State was found to have acted unlawfully under S. 6 HRA. The Secretary of State was found to have breached his international law obligation to treat disabled children's best interests as a primary consideration as per article 3 (1) of the Convention on the Rights of the Child and article 7 (2) of the UN Convention on the Rights of Persons with Disabilities. These assisted the Court in finding a breach of Article 14 ECHR, because of the requirement to read the ECHR in harmony with the principles of international law.

In legal / constitutional terms, the HRA is a standard 'Bill of Rights' in that most of the rights contained within it can be legitimately and proportionately limited to protect other rights or interests. It requires UK courts to interpret domestic law as compatible with ECHR wherever possible, [4] making it unlawful for public authorities to act in a way which is not compliant with ECHR[5] and enables individuals claiming breach of their ECHR rights to pursue a remedy in the UK courts[6]. It is the one enforceable Bill of Rights in the UK that is universally applicable. The idea that the Government is about to 'cherry pick' the rights it considers trivial or valuable and who it considers worthy or unworthy of human rights protections is of concern, not least because the principle of universality, so key to the effective functioning of the human rights framework, will be rendered meaningless.

[2] HC (A Child), R (on the application of) v Secretary of State for the Home Department & Anor [2013] EWHC 982 (Admin) (High Court of England and Wales and not binding on Scottish Courts
[3] Cameron Mathieson, a deceased child (by his father Craig Mathieson) (Appellant) v Secretary of State for Work and Pensions (Respondent) [2015] UKSC 47 On appeal from [2014] EWCA Civ 286
[4] HRA 1998, S. 3
[5] HRA 1998, S. 6
[6] HRA, 1998, S. 7

It would be presumptious to comment until I see the Government's detailed proposals around a British Bill of Rights. The Conservatives' proposals set out in their 2014 document '*Changing Britain's Human Rights Laws*[7] do however provide an indication of policy direction and suggest a weakening of human rights protections and potential challenge to the EctHR and the Council of Europe. If repealing the HRA were to allow Parliament to pass laws that were incompatible with the ECHR, then I would see this as a regressive move which I could not support. My over-riding concern is that any proposed changes to the Human Rights Act (HRA) are progressive for children and young people and I will be responding in that vein.

2. ***What rights, if any, would a British Bill of Rights have to contain? How would a British Bill of Rights interact with Scotland's separate legal system?***

The UN Convention on the Rights of the Child does not currently form part of the UK or Scotland's domestic law as the ECHR does through the HRA. My office has been pressing for full incorporation of the UNCRC into domestic law for many years. My view is that repealing the HRA would be detrimental to this objective, although I will be continuing to push for this at domestic level.

In our submission to the UN Committee on the Rights of the Child, the UK Children's Commissioners highlighted where incorporation of the UN Convention on the Rights of the Child would make a difference to children's rights and cited the UK Supreme Court decision in SG v Secretary of State for Work and Pensions (2015) UKSC as an example. While the Court found that the imposition of a 'cap' on the amount of benefits payable to families without consideration of the best interests of children was contrary to article 3 CRC, this did not render it unlawful in domestic law. There was therefore no legal remedy for this finding of a violation of the CRC by the UK's highest courts. The case had to be argued on the grounds of discrimination against women as there was no specific protection for children's rights in this context.

This could also be an opportunity to expand on the definition of public authority under S. 6 of the HRA. Because of the increasing privatisation and contracting out of public services across local authorities, 'public authorities' are no longer easily defined. In short, we should be seeking opportunities to build on the protections already afforded by the HRA, not trying to roll them back.

[7] https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf

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

The arguments about sovereignty I find puzzling, not least because absolute sovereignty is difficult to define in an increasingly globalised world. Decision making across the UK is shared between Westminster, its devolved legislatures and with the EU institutions (eg through the European Communities Act, 1972 which makes EU law binding on UK law to the extent that it prevails over domestic law where there are inconsistencies in the latter).[8]

The issue of parliamentary sovereignty is addressed by Liberty, which considers the Prime Minister's main reason for replacing the HRA with a more 'specific' Bill of Rights, i.e. that it would 'protect' the UK from ECtHR jurisprudence on fundamental rights) They suggest that this is a misunderstanding of the ECtHR's 'margin of appreciation' doctrine.[9] They note that the ECHR provides a floor of basic rights across Europe and that a domestic bill will not provide 'get out clauses' from this. Moreover, a requirement to implement treaty obligations does not challenge the notion of parliamentary sovereignty, a fact also recognised by the Joint Parliamentary Committee on the Draft Voting Eligibility (Prisoners) Bill which found that

> *"the principle of parliamentary sovereignty is not an argument against giving effect to the judgment of the European Court of Human Rights. Parliament remains sovereign, but that sovereignty resides in Parliament's power to withdraw from the Convention system; while we are part of that system we incur obligations that cannot be the subject of cherry picking."*[10]

Most UK human rights cases do not even reach Strasbourg and are resolved by British courts applying the HRA. For those that do (four in 2014), the ECtHR frequently follows the conclusions of the domestic courts, suggesting that having the HRA makes it more likely that Strasbourg will find that the UK has not violated the ECHR and has relied on the domestic courts. One could argue that ongoing dialogue between the two court systems actually helps to protect the principle of parliamentary sovereignty.[11]

Furthermore, ECtHR decisions do not have automatic effect in UK law. The HRA expressly preserves sovereignty by ensuring that UK court decisions are limited to declarations of

[8] (1991) 1 All ER 70 ECJ Case C-213/89

[9] Liberty's Briefing on the Human Rights Act and the Conservative's Leadership's 2014 proposals or its repeal

[10] Joint Committee on the raft Voting Eligibility (Prisoners) Eligibility Bill, Report, Session 2013-14, para 11 (cited in Liberty)

[11] Before the introduction of the HRA, cases went to the Strasbourg Court. If we were to repeal the HRA and replace it with a Bill of Rights , but still be party to the ECHR this would remain the case

incompatibility (S. 4 HRA), much weaker than in other jurisdictions (and in Scotland) where there is a strike down power. Nor does the Court require the UK to amend British laws or determine what that legislation should be which is the domain of the UK and its devolved legislatures - under the Convention system and the HRA, parliamentary sovereignty remains intact. Prisoner voting is an ongoing issue because the UK has not implemented the ECtHR judgment. Until it does, the UK remains in violation of Article 1, Protocol 3. If the ECtHR holds that the ECHR makes it unlawful to ban all prisoners from voting, that is the position. If the UK flouts this ruling, it is breaching international law. As long as the UK is party to the ECHR, that remains the case. British courts can thus interpret the values in the HRA, as long as this does not 'weaken' ECHR protections. Much has been made about handing power over to Strasbourg judges when in fact Section 2 HRA requires courts to 'take account' of relevant decisions of the ECtHR, rather than be bound by them.

4. ***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?***

Making unpopular decisions is not the same as 'mission creep'. Such criticism of the ECtHR is not limited to the UK, but the sustained attack deployed by the Government, MPs and the popular press is unprecedented. As Sarah Lambert notes[12], this often starts from a specific judgment e.g. Hirst (prisoner voting rights), Vintner (whole life sentences) etc, although outrage has become a routine response to mildly controversial decisions. This is then used to systematically question the legitimacy of the ECtHR and then to justify why reform is necessary to curtail the Convention system. Lambert makes the point that such systemic criticism is absent from mainstream political debate in most Council of Europe countries and even in countries where a (temporary) increase in criticism has been felt e. g. in France and the Netherlands. This makes it difficult to have a genuinely open debate, in part due to limited public education around the HRA and how it works in practice which is in turn undermined by press coverage which tends to sensationalise the few 'unpopular' cases. Parties of all persuasions have also sought to distance themselves from the HRA rather than celebrate its successes.

[12] Reform, Repeal, Replace? Sarah Lambrecht: Criticism of the European Court of Human Rights: A UK Phenomenon? (UK Constitutional Law Association)

Much of the criticism associated with 'mission creep' has been levelled at the 'living instrument' doctrine in that it undermines the original intentions of the founders of the Convention. However, the ECHR was drafted in 1950. The ability to interpret the Convention as times and circumstances change is vital. It would be unrealistic and problematic to apply rights protections in Europe to 1950s standards - when homosexuality and marital rape were still legal and no one had heard of the internet or DNA testing. Judicial interpretation is a key part of the UK common law tradition.

5. ***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?***

I have concerns that repealing the HRA would remove the principle embedded in S 6 HRA that makes it unlawful for a public body to act in a way which is incompatible with the EHRC. This is an important duty and there is evidence to show that it is having a significant effect in changing the culture of public authorities, moving away from a litigious culture to one which is helping to balance competing interests and involving service users. Section 6 HRA has also provided a useful tool against which to measure professional practice for agencies working with those most vulnerable to neglect or abuse and particularly with children and families. This is helping to develop an awareness of children's rights.

6. ***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?***

Westminster can legislate to amend or repeal its own law and the HRA is a protected enactment under Schedule 4 of the Scotland Act (1998). The Scottish Parliament's consent would not be required for its repeal. It can also amend the devolution statutes so as to vary or remove the requirement to comply with the ECHR and enact a Bill of Rights, However, if HRA repeal were to affect devolved human rights matters in Scotland, the Sewel Convention would be triggered, requiring Parliament to seek consent before making legislative changes. Any replacement of the HRA or changes to the human rights provisions within the devolution Acts themselves would arguably trigger the Sewel Convention.

The Scotland Act (1998) provides that it is unlawful for the Scottish Parliament or Scottish Ministers to pass legislation or to act in a way which would violate Convention rights.[13] The Scottish Parliament or Scottish Ministers cannot do anything which is incompatible with Convention rights, a more robust model than the HRA. This has particular significance if the UK Government were to repeal the HRA and replace it with a Bill of Rights and in so doing impact on devolved areas, thereby triggering the Sewel Convention.

The First Minister has been clear that she would not agree to any weakening of domestic human rights protection and would seek cross-party support to block repeal of the HRA. If the vote on 11th October 2014 expressing confidence in, and support for, the Human Rights Act (by 100 votes to 10) is indicative of support, then this is guaranteed.

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

A piecemeal repeal of the HRA is likely to be problematic, leading to inconsistencies in how human rights are applied at domestic level. There are numerous scenarios:

- Westminster could repeal the HRA vis a vis English matters (and reserved matters)
- 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. 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'.*
- Westminster could ignore the Sewel Convention. However, caution is required. Mark Elliott notes that '*It is hard to think of a Convention that is more laden with political significance and invested with political clout - than the Sewel Convention. 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*[14]s15

[13] S. 29 (2) and S. 57 (2) Scotland Act 1998

[14] M. Elliott, ' HRA Watch: Reform, Repeal, Replace? Could the Devolved Nations Block Repeal of the Human Rights Act and the Enactment of a New Bill of Rights? UK Const. L Blog (16th May 2015)

8. 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?

Any weakening of the HRA would send negative ripple effects and international human rights protection would suffer as a result. Dominic Grieve, former Conservative Attorney General, noted that Russia has already used the UK's position on human rights to delay implementing ECtHR judgments.[16] Legislating to require Parliament to 'approve' Strasbourg judgments would inevitably result in the UK leaving the Convention. 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 position on the UK's continued membership of the ECHR is still unclear. However, the 2014 paper '*Protecting Human Rights in the UK'* (2014) provides guidance. This proposes that that the Council of Europe will have to accept a British Bill of Rights which will break the formal link between British courts and the ECtHR. A key part of this is that ECtHR judgments will be treated as advisory. If the Council of Europe does not agree, the suggestion is that the UK will be faced with no alternative but to withdraw from the ECHR. This is deeply concerning and one can only wonder if it is really the long term goal. Such a proposal is also legally impossible as it contradicts Article 46 of the Convention and would require amending the Convention to which the other 46 Contracting Parties must agree.

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[16] Why Conservatives Need the ECHR' http://www.ucl.ac.uk/laws/judicial-institute