



# **Law for Scottish lawmakers**

A JUSTICE guide  
to the law



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# About JUSTICE

Established in 1957 by a group of leading jurists, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. We are a membership organisation, composed largely of legal professionals, ranging from law students to the senior judiciary. In Scotland, JUSTICE’s work is carried out predominantly by our volunteer members.

Our vision is of fair, accessible and efficient legal processes, in which the individual’s rights are protected, and which reflect the country’s international reputation for upholding and promoting the rule of law. To this end:

- We carry out research and analysis to generate, develop and evaluate ideas for law reform, drawing on the experience and insights of our members.
- We intervene in superior domestic and international courts, sharing our legal research, analysis and arguments to promote strong and effective judgments.
- We promote a better understanding of the fair administration of justice among political decision-makers and public servants.
- We bring people together to discuss critical issues relating to the justice system, and to provide a thoughtful legal framework to inform policy debate.

A key goal is to provide evidence-based analysis to inform the development of new

law and policy and to propose practical solutions to legal problems for law-makers, judges and public servants.

An important part of this work is done with decision makers in Parliament and Government, where we work to provide practical briefings on the law for officials, MPs, MSPs and Peers, free from party political influence

This guide is designed to provide a basic introduction.

Key concepts and legal terms are highlighted in **‘bold’**. A brief plain English description follows.

Fuller information is provided in end notes.

Signposts on where to find further legal advice and support are provided in Chapter 7, with clickable links to further information and contacts.

We use the term **‘MPs’** and **‘MSPs’** throughout the guide as shorthand. We hope that this material will be useful to **MSPs and to their staff.**



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# Welcome

As the Chair and Vice-Chair of JUSTICE Scotland we are pleased to open this new guide to the law for Scottish lawmakers. Following the introduction in 2015 of Law for Lawmakers for a Westminster audience, it is designed to provide a basic introduction to some of the core legal and constitutional principles with which parliamentarians grapple on a daily basis at Holyrood. We hope it will prove a useful ‘pocket guide’ for MSPs as well as their staff.

Since its recent inception in 2012, JUSTICE Scotland has worked hard to engage with all political parties on a non-partisan basis. Each represents a different political tradition, but we work through JUSTICE with parliamentarians to raise the profile of legal problems with constitutional significance for our justice system and for the rule of law. JUSTICE works to create a useful bridge between politics and law, between public servants and the legal community.

In these times of political and constitutional change we face significant questions about the nature of our democracy and the foundation

of the United Kingdom. This guide doesn’t provide answers to those questions but does provide a basic glossary to help inform discussion and debate. At its heart is a shared understanding – stepping beyond party politics – of the role that Parliament plays in both making the law work and ensuring respect for the rule of law in practice.

If you have any questions about the guide, or the legal impact of this Parliament’s work, JUSTICE has a small but dedicated team of lawyers ready to provide further support and assistance where they can.

*Derek Ogg QC*  
Chair, JUSTICE Scotland

*Catherine Smith*  
Vice-Chair



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# Foreword

*Lord President of the Court of Session;  
Lord Justice General of the High Court of Justiciary*

We are at a crucial point in the development of the Scottish legal system. Political uncertainty over the United Kingdom’s departure from the European Union, and the place of Scotland in the future world order, are only two of the important issues which the Scottish Parliament will have to grapple with in the coming months and years.

The legal consequences of the anticipated political change may be very significant. They will require legislative alterations to the substantive law, especially in those areas which have been heavily influenced by the EU. As law-makers, Scottish Parliamentarians will be responsible for many of these alterations.

The courts’ role is primarily to interpret the laws which are laid down by Parliament and not to create their own legislation. An important part of the courts’ function is to determine matters of public law; that is to say disputes involving an individual or organisation on one side and the state on the other. This booklet is intended to be a handy guide, which

explains how this is done. It describes the constitution and the structure of the courts. It outlines the key principles of public law and the procedures and rules by which the courts determine cases against the state. It provides a summary of the principles by which the courts review administrative and legislative acts. It is not intended to be comprehensive. It is instead a reference into which the Parliamentarian can dip on an occasional basis.

I congratulate the authors in having achieved the aim of presenting the substance and practice of the law, which can sometimes be unnecessarily over-complicated, in a concise and readable way.

*The Right Hon Lord Carloway  
March 2017*



# Chapter 1: Law for lawmakers

## Introduction

As the makers of our laws, as our representatives, and in holding the Scottish Government to account, MSPs wear many hats. Each of these roles requires MSPs to grapple with the law every day. However, whilst the legal profession has always been well-represented in politics, politicians are not elected for their ability as lawyers. This is no bad thing. A Parliament full of aspiring lawyers would not only run the risk of focussing on legal technicality rather than policy goals, but could also be deeply dull.

Nonetheless, a clear understanding of how law and the legal system works, its principles and its limitations is vital for MSPs seeking to understand how our constitution, our Government and our society is regulated and how the rights of individuals are protected or enforced.

This short guide briefly introduces some of the key legal and constitutional principles which MSPs encounter in their work. It is designed to start a conversation about the bridge between politics and the law, and to encourage discussion about independent legal support for MSPs.

**On any one day, an MSP might be asked to consider the law in a number of ways:**

**In the Chamber:** Every new Bill presented to Parliament is a proposal to change the law. These vary in their legal complexity and their significance.

**Conducting scrutiny:** The Scottish Parliament’s Committees work hard to hold the government to account. This work can include checking whether Ministers and agencies are acting lawfully and carefully examining proposed legislation.

**In their constituency:** MSPs regularly help constituents with their problems, including on immigration, housing and eviction, access to health and social care services, and challenges to local authority decision-making.

## The UK constitutional context

The starting point for any conversation on the law is always the constitution. The UK is rare in having no single constitutional document. Instead, our constitution is found in an accumulation of principles, conventions, precedents and pieces of legislation. Although you can’t download a copy or borrow the constitution from the library, this doesn’t make the rules

and principles that determine how our government works any less significant.

One of the most important constitutional developments in the UK relates to the increasing amount of power which is devolved from the UK Parliament to Scotland, Wales, and Northern Ireland, and more recently, to major cities.

Our political discourse has recently been dominated by constitutional issues, including our relationship with the European Union, the scope of devolution, the protection of human rights and, ultimately, the future of the United Kingdom itself. This guide does not set out to provide answers to those questions, but may help readers explore the constitutional and legal principles which lie behind them.

## The UK’s ‘unwritten’ constitution

The UK is commonly said to have an ‘unwritten constitution’. This shorthand is popular but could be misleading. It might suggest that we have never bothered to think properly about the rules which govern the relationships between the institutions of state. In fact, those rules have evolved over centuries of thought and practice, and they continue to do so. This makes the constitution more difficult to grasp, but also means that it can adapt to the needs of our community.



The constitution is ultimately derived from a range of sources, many of which date from well before the creation of the United Kingdom, including ancient English ‘**statutes**’ like Magna Carta and the Bill of Rights 1689. These are joined by more modern statements from Parliament on how we run the country. For example, the Constitutional Reform Act 2005, the European Communities Act 1972, and the Acts which govern the devolution settlement all shape our constitution as it stands today.

Less simple to identify are the conventions which underpin our constitution, including our system of ‘**prerogative powers**’. These are powers which traditionally belonged to the Crown by reason of its sovereign power alone. In practice, however, they are now exercised by the central government on behalf of the Crown. These include powers such as deploying UK Armed Forces and signing binding international treaties.

The ‘**common law**’, which is a set of legal rules that have been developed by the courts over time, is also an integral part of our law. It is the source of many important principles about who holds power in our constitution – and how that power is exercised.

*Devolution: Scotland’s constitution*

In many ways, the constitutional position of Scotland is more clearly defined.

The Claim of Right Act 1689 set out that the abdicating King James II of England and VII of Scotland had over-reached his executive powers and therefore forfeited the Scottish Crown. The Claim of Right also asserted that the monarch is answerable to the law and to the people, which cemented the idea of Scotland as a popular sovereignty.<sup>1</sup>

The Acts of Union 1706 and 1707 then united England and Scotland. Although they created a union, it was not ‘perfect’ and preserved the distinct traditions. The treaty further contributed to the particular character of Scotland’s constitutional position, preserving Scotland’s distinct nationhood within the union.<sup>2</sup>

The Scottish Parliament and Scottish Government were since created by an Act of Parliament, the Scotland Act 1998 and their powers and limits are defined by that legislation.

“ There shall be a Scottish Parliament.”

The Scotland Act 1998, Section 1(1)

“ There shall be a Scottish Government, whose members shall be (a) the First Minister, such Ministers as the First Minister may appoint..., and (c) the Lord Advocate and the Solicitor General for Scotland”

The Scotland Act 1998, Section 44(1)

As with any piece of legislation, it can be amended by the UK Parliament,<sup>3</sup> and was so amended by the Scotland Acts 2012 and 2016. One such amendment declares that the Scottish Government and Parliament are permanent features of the UK’s constitutional arrangements that can only be abolished by a Scottish referendum.<sup>4</sup> The final say on interpretation of the Scotland Act lies with the courts, and ultimately the Supreme Court of the United Kingdom. For that reason, the Scotland Act is sometimes described as ‘Scotland’s Constitution’. Equivalent legislation creates the devolution settlement for Wales and Northern Ireland.<sup>5</sup> The devolution settlement is often described as ‘**asymmetric**’, as the scope of devolution varies across each of the nations.

The scope of the Scottish Parliament’s powers are defined by the concept of ‘**legislative competence**’.

“ An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.”

The Scotland Act 1998, Section 29(1)

There are two main elements to legislative competence. The first is that ‘**reserved**’ matters remain under the sole control of the UK Parliament and are outwith the Scottish Parliament’s legislative competence. These include areas such as foreign policy, defence and energy. The Scotland Act only lists those areas which are reserved, all other matters are ‘**devolved**’ and are delegated to the primary control of the Scottish Parliament. The reserved matters are set out in two ways. A list of reserved subject areas is contained in Schedule 5 to the Scotland Act 1998 and a list of legislation which is reserved and may not be amended by the Scottish Parliament is set out in Schedule 4.<sup>6</sup>

Under all three devolution settlements, the UK Parliament may still make legislation which applies in devolved areas of responsibility but it will not normally act without the consent of the devolved Parliament or Assembly (**‘the Sewel Convention’**). Where the Scottish Parliament is invited to give consent, this is done by means of a **‘Legislative Consent Motion’** or **‘LCM’**.<sup>7</sup> The list of reserved matters can be amended by primary or secondary legislation of the UK Government. These are known as **‘section 30(1) orders’**. A recent example was the section 30(1) order used to permit the Scottish Parliament to pass the Scottish Independence Referendum Act 2013.

The second main element of the Scotland Act is the incorporation of human rights protections and EU law within the Scotland Act itself. Any legislative provision that is incompatible with **‘convention rights’** is automatically outside legislative competence. Convention rights are the same set of rights under the European Convention on Human Rights which have been brought into UK law by the Human Rights Act 1998. Any provision which would breach EU law is also automatically outside legislative competence, so long as the UK remains a member of the European Union.

A number of mechanisms are provided to police legislative competence. Any person introducing a Bill in the Scottish Parliament must make a statement on whether it falls within the parliament’s legislative competence. The Presiding Officer must also independently assess legislative competence. After a bill is passed, but before Royal Assent, it may be challenged in the Supreme Court by any of the UK or Scottish Government’s law officers. Following enactment, legislative competence of any law can also be challenged in the courts by anyone directly affected by the law.

SUMMARY

- The UK has no written constitution, but is governed by constitutional principles set in practice.
- The powers of the Scottish Parliament are constrained by the Scotland Act 1998 which sets out the legislative competence of the parliament.
- Some policy areas are explicitly reserved to the UK Parliament. All other policy areas are devolved.
- Human rights protection and EU law is built into the Scotland Act and governs both the parliament’s powers and the acts of the Scottish Government.

Constitutional principles  
*Parliamentary sovereignty and the rule of law*

The UK constitution rests on two core common law principles. The first is that the UK Parliament is sovereign. The second is that we are all – including the government of the day – governed by the rule of law.

“The sovereignty of Parliament and the supremacy of the law of the land... may appear to stand in opposition to each other, or to be at best only counterbalancing forces. But this appearance is delusive; the sovereignty of Parliament...favours the supremacy of the law, whilst the predominance of rigid legality throughout our institutions evokes the exercise and thus increases the authority of Parliamentary sovereignty.”

A V Dicey, *Introduction to the Study of the Law of the Constitution*<sup>8</sup>

Parliamentary sovereignty

It is a core principle of our constitution that the UK Parliament is the primary source of legislative authority for the UK. This principle is a common law rule recognised by courts over centuries.

“Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change.”

[www.parliament.uk](http://www.parliament.uk)

Exactly how far the doctrine can be pushed has occasionally been questioned but, for practical purposes, it remains the basis on which the constitution is said to operate.<sup>9</sup>

As already discussed, the Scottish Parliament does not enjoy parliamentary sovereignty equivalent to that of the UK Parliament. The courts can overrule the Scottish Parliament’s legislation if it falls outwith legislative competence and have now done so on a small number of occasions. However, the courts have also made clear that the special status of the Scottish Parliament as a directly elected representative body will be recognised by the courts when assessing the validity of its decisions.<sup>10</sup>

The rule of law

The ‘**rule of law**’ lies at the heart of modern democracy, but it is a phrase much used and little explained.

The rule of law does not mean ‘rule by lawyers’. While it is often said that the judiciary is the ultimate guardian of the rule of law, this is not the same as saying that the view of judges will always trump Parliament’s intention.<sup>11</sup> What it *does* mean is that no government can do anything unless it can point to the law which gives it the power to do so.

This makes sure that government bodies and other agencies can’t interfere with our freedom without Parliamentary approval; we are all, including government, equal before the law. The now 800 year-old Magna Carta – which guarantees against unlawful detention and punishment without due process – provides one of the earliest examples of the rule of law in action.

Similar constitutional concepts developed in Scotland prior to the Union. For instance, the Claim of Right Act 1689, an Act of the former Scottish Parliament, contains provisions rejecting the extra-judicial use of imprisonment.<sup>12</sup>

As a common law rule, the impact of the rule of law is best understood by looking at how it works in practice. We do this in Chapter 2.

The separation of powers

The principle of the ‘**separation of powers**’ requires that all three arms of the state – the legislature, the executive and the judiciary – perform their constitutionally distinct roles independently of each other:

- The executive is responsible for formulating and implementing policy;
- The legislature oversees the work of the executive, and creates the law to reflect policy; and

- The judiciary interprets, enforces and applies the resulting legal rules.

This allows for a system of ‘**checks**’ and ‘**balances**’ designed to ensure that each institution works within the constitution.

At the UK level, the executive comprises the government, including the Prime Minister, Cabinet Ministers and the Crown. The legislature – Parliament – comprises the House of Commons, the House of Lords and the Crown, and the judiciary comprises the judges in the courts and tribunals system. In Scotland, the executive is the Scottish Government, being the First Minister and the Scottish Ministers; the legislature is the Scottish Parliament; and the courts and tribunals operate as in the rest of the UK.

Unlike in some countries, the separation of powers between institutions in the UK and Scotland is by no means absolute. As at a UK level, Scottish Ministers are members of the executive but simultaneously sit and vote in the Scottish Parliament. While this means that the government can vote as part of the legislature, it also means that Scottish Ministers remain subject to the rules of the Scottish Parliament.

Nevertheless, the independence of each of our institutions remains critically important.

The relationship between the legislature and the courts is also based on respect for their different constitutional functions. For

the UK Parliament, Article 9 of the Bill of Rights 1689 prevents domestic courts from directly calling into question the proceedings of Parliament. This is known as the concept of ‘**parliamentary privilege**’. For the Scottish Parliament, similar rules are built into Section 41 of the Scotland Act 1998.

Some of the checks that each of these bodies perform on each other are explored in this guide. Parliament can make laws which affect how both the executive and the judiciary work. Parliament sets the budget with which the executive has to work. When Ministers act unlawfully, we can ask the courts to step in.

SUMMARY

The separation of powers means that Ministers, Parliament and the courts each respect their different – and independent – roles in the constitution.

The independence of the judiciary

The constitutional role of the judge is to decide cases fairly and in accordance with the law. A judge subject to outside influence cannot discharge his or her responsibility to provide impartial justice.



SUMMARY

To fairly decide disputes between individuals – and between people and public bodies – judges must be independent.

While the Constitutional Reform Act 2005 and, for Scotland, the Judiciary and Courts (Scotland) Act 2008, set the principle of judicial independence in statute, it is a long-standing principle of the common law which underpins the right to access to justice, the rule of law and the separation of powers.

“[I swear that] I will do right to all manner of people after the laws and usages of this realm, **without fear or favour, affection or ill will.**”

The Judicial Oath

Judges must be free from influence by the other branches of government, business, political parties, other judges, the press and media, and any other organisation or individual which might sway them in their decision-making.

Independence from Parliament and the executive is particularly important. It is vital that the judges who adjudicate on the law are independent from those who make and implement it.



Unelected but democratic

“It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true...that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.”

Lord Bingham, *Belmarsh* <sup>13</sup>

Preservation of this impartiality has a number of consequences:

- The judiciary must be institutionally and functionally separate from the other branches of government.
- Judicial independence also assumes that the other branches of government will refrain from personal attacks on individual judges and undue criticism of judicial decisions. The First Minister, Scottish Ministers, the Lord Advocate and MSPs all have an explicit duty to uphold the independence of the judiciary. The Government is barred from seeking to influence judicial decisions. <sup>15</sup>

Judicial appointments

Historically, the Lord Chancellor’s office comprised elements of executive, legislative and judicial power for the UK. The highest court in the UK was technically a committee of the House of Lords. Today, the Lord Chancellor has no judicial role and the new Supreme Court of the United Kingdom is entirely separate from the legislature and executive.

In Scotland, the Lord President is head of the Judiciary. Responsibility for the Scottish Courts and Tribunals Service was transferred to the Lord President. It is no longer within the remit of the Scottish Government to help preserve the operational independence of the courts.

Independent bodies are responsible for judicial appointments and remuneration within their jurisdiction. For example, the Judicial Appointments Board Scotland handles judicial recruitment, overseeing a merit-based selection process consisting of online applications, shortlists and selection days. The Board has a statutory duty to select candidates solely on merit, although diversity must also be taken into account. <sup>14</sup>

- Finally, and crucially, both actual bias and the appearance of bias are barred. In the famous *Pinochet* case, a House of Lords decision was overturned because one of the judges was linked to a charity which intervened in the case. There was no suggestion that the judge had not acted independently, but the appearance that he *could have done so* meant the case had to be heard again. <sup>16</sup>

*Institutional competence and respect*

Points of constitutional crisis in the history of the UK have been exceptionally rare. Generally, the principles of parliamentary sovereignty and the rule of law reinforce the distinct constitutional responsibilities of Parliament and the judiciary.

Just as the UK and Scottish Parliaments recognise that it would not be proper to comment on live disputes, the courts recognise that there are boundaries to their expertise. For example, in judicial review cases, judges will not substitute their own decision for that of a public authority. They pay particular respect to the decisions of specialist tribunals and bodies appointed by the parliaments, and are sensitive to the limits of their ability to make decisions about resource allocation or socio-economic policy (see Chapter 4).

Historically this has been called ‘**judicial deference**’ to either parliament or to the executive. It is an illustration of the distinct ‘**institutional competence**’ of the branches of government, with each recognising the importance of respect for the separation of powers when performing their proper constitutional role.

*Other key features of the constitution*

There are a range of other conventions and principles which form part of the UK constitution which we cannot cover in detail. Most are grounded in the common law and reflected in the Ministerial Code, the Civil Service Code or in the Cabinet Manual. In Scotland, the Scottish Ministerial Code applies and a separate (but very similar) version of the Civil Service Code exists. <sup>17</sup> These documents are a helpful guide to the work of Ministers and officials and they are often used by Parliament in its scrutiny work. Examples of well-known constitutional conventions include:

- The Queen does not withhold Royal Assent for any law passed by Parliament or the Scottish Parliament.
- The principle of ‘collective cabinet responsibility’ means that all Ministers take responsibility for all of the government’s decisions, even if they

disagree with them privately.

- The UK intends to abide by its obligations in international law.

*Our legal system*

The UK does not have a single legal system. Instead, our constitution recognises three distinct legal jurisdictions: in England and Wales, Scotland, and Northern Ireland, each with its own system of courts and laws.

SUMMARY

The three legal jurisdictions in the UK – in England and Wales, Northern Ireland and Scotland – have their own laws, judges and courts but share many common principles.

This section provides an introduction to the court system in Scotland, noting the equivalent courts in England and Wales.



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The courts and tribunals

The Supreme Court unifies the three legal jurisdictions of the United Kingdom. It has the power to give the last word on appeals from all jurisdictions and on all types of law in the UK (with the exception of its limited power in Scots criminal cases). The Supreme Court will generally only consider issues of major public importance.

Aside from the Supreme Court, each of the three jurisdictions has its own system of courts and tribunals, which share many similar features.

Criminal courts

In Scotland, minor criminal cases are allocated to the Justice of the Peace courts. More serious criminal cases go to the Sheriff Court to be considered by a Sheriff sitting either alone or with a jury.<sup>18</sup> The Sheriff Appeal Court will hear appeals in summary cases. The most serious cases are prosecuted in the High Court of Justiciary, which also acts as the final court of appeal for all Scots criminal cases.<sup>19</sup> Only when criminal cases raise issues relating to European Union law or Convention rights can the UK Supreme Court become involved, and then only so far as required to resolve these ‘compatibility issues’.<sup>20</sup>

In England and Wales and Northern Ireland, all criminal cases begin life in the magistrates’ court. These are courts made up of lay magistrates sitting with a legally qualified adviser, or of District Judges sitting alone. Serious criminal cases go to the Crown Court for trial before a jury. If permission to appeal is granted, appeals go to the Criminal Division of the Court of Appeal, and, from there, to the Supreme Court.

One important difference is that, in Scotland, the choice of court for criminal cases is a matter for the prosecutor who determines the venue according to the gravity of the offence. This means that, unlike in England and Wales and Northern Ireland, there is no right to a jury trial.

Civil courts

In Scotland, civil cases are heard in the local Sheriff Court or in the Court of Session, depending on the type of case and its value. The Court of Session is Scotland’s highest civil court and hears only the most valuable cases or those involving judicial review. In the Court of Session, a case will normally be heard by a single judge sitting in the ‘Outer House’. Very occasionally, civil jury trials will be held in certain types of cases. Appeals can be heard by the Sheriff Appeal Court and/or three senior judges in

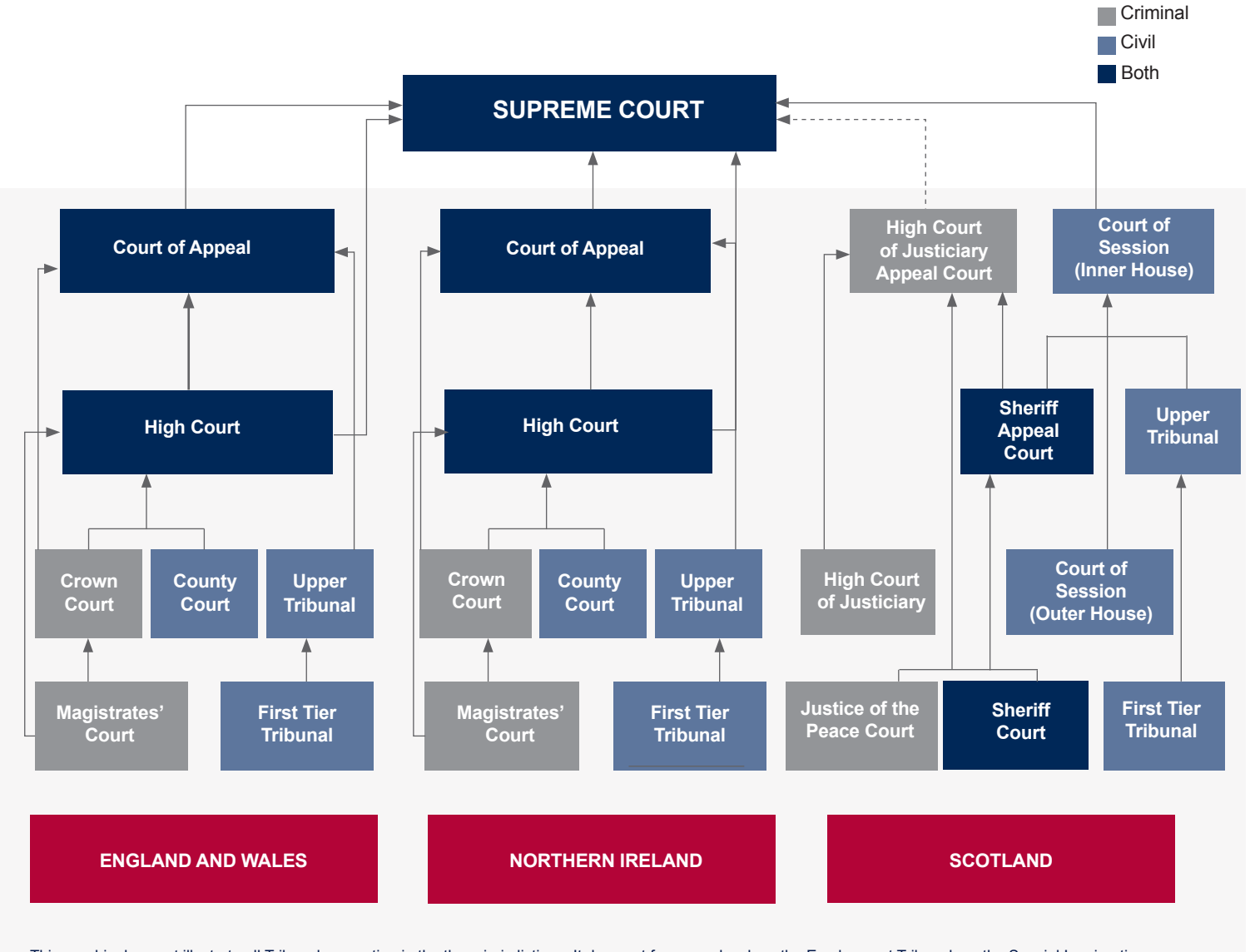
the ‘Inner House’ of the Court of Session. Where permitted, appeals can go from the Inner House to the Supreme Court.<sup>21</sup> Lower value cases are heard in the Sheriff Appeal Court and then, if necessary, the Inner House of the Court of Session.

Civil cases in England and Wales are usually dealt with by the county courts. Some complex, sensitive or high-value claims are heard in the High Court. Certain specialist issues also have their own ‘division’ of the High Court; the Family Division of the High Court hears family cases and the Administrative Division deals with judicial review. Where permitted, appeals go to the Civil Division of the Court of Appeal and on to the Supreme Court. The courts in Northern Ireland adopt the same model.

Tribunals

Tribunals are bodies that, just like courts, must decide on legal disputes between individuals. They are designed to adopt more informal procedures and focus on specialist areas of law. For example, specialist tribunals hear cases relating to health and social care entitlements, immigration and asylum claims, competition disputes and employment matters.<sup>22</sup>

The United Kingdom court system



This graphic does not illustrate all Tribunals operating in the three jurisdictions. It does not for example, show the Employment Tribunals or the Special Immigration Appeals Commission. Appeals from the High Court of Justiciary in Scotland to the Supreme Court are only possible in respect of ‘compatibility issues’.





## Chapter 2: The rule of law

“Wherever law ends, tyranny begins.”  
John Locke, 1690<sup>23</sup>

“The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based”  
Lord Hope,  
*Axa General Insurance*, 2011<sup>24</sup>

Imagine arriving home to discover that the Home Office has commissioned agents to rifle through your papers, looking for evidence that you’ve committed an offence. The Minister argues that since there’s no law to stop him, the government can do what it likes. That’s just what happened in England in 1765.

In a classic illustration of the rule of law in action, in *Entick v Carrington* the High Court of England and Wales decided that public bodies could only act according to the powers which the law granted them. The government suspected Mr Entick of sedition and had unlawfully sent its agents to look for evidence. The state was not above the law.<sup>25</sup>

It is hard to overstate the importance of the rule of law. It sits alongside parliamentary sovereignty as a pillar of the constitution. It is declared to be a “continued constitutional principle” by the Constitutional Reform

Act 2005 and the Legal Services (Scotland) Act 2010.<sup>26</sup> The Scottish Ministerial Code binds Scottish Ministers to “comply with the law, including international law and treaty obligations, and to uphold the administration of justice and to protect the integrity of public life”.<sup>27</sup> The Scottish Civil Service Code requires civil servants to “comply with the law and uphold the administration of justice”.<sup>28</sup>

“The hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless.”

Tom Bingham, 2010<sup>29</sup>

### What is the rule of law?

Lord Bingham of Cornhill, one of the most respected jurists of the modern age, identified a number of its key features.<sup>30</sup>

#### Elements of the rule of law

- No-one is above the law, and the law **applies equally to everyone**, unless objective differences mean people should be treated differently.
- The law must be **accessible and understandable**. Everyone should be able to find out what the law is. The law should be **certain and predictable**. Individuals should be able to **plan their actions** based on the law.
- Legal rights and responsibilities are **decided according to rules of law**, not by the exercise of general discretion.
- Ministers and public officials must exercise their powers **reasonably and in good faith**. They must only use their powers for the purpose for which they were conferred, and **must not exceed the limits of their powers**.
- The state must provide **accessible ways for people to resolve legal disputes between them**. Justice should not be **excessively delayed**, or **inordinately costly**.
- Individuals are entitled to a **fair trial** in the determination of their legal rights and responsibilities. This includes the principle that **judges be independent and impartial**.
- The state must comply with its obligations in **international law**.
- The law must provide adequate **protection of fundamental human rights**.



SUMMARY

The rule of law means that we are all equal before the law, including the government.

In practice, this means that there are limits on public power designed to make sure it is exercised fairly.

However, the rule of law is best explained by looking at how it has been applied to real life cases.

Some key features of the rule of law

Equality before the law

“Every person within the [UK] enjoys the equal protection of our laws...He who is subject to law is entitled to its protection.”

Lord Scarman, *Khawaja*<sup>31</sup>

The law must apply equally to everyone, regardless of their status, background or wealth. It should not impose arbitrary distinctions between some individuals and others. Laws that do this are inconsistent with the rule of law.

“Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities.”

Baroness Hale, *Belmarsh*<sup>32</sup>

By requiring that legal rules must generally be applicable to us all, the equality principle also provides a defence against arbitrary government.

“Equality is not merely abstract justice...there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”

Justice Jackson, *Railway Express Agency, US Supreme Court*<sup>33</sup>

This doesn’t mean that Parliament can never distinguish between different classes or groups. The key is whether there is an ‘**objective justification**’ for the difference.<sup>34</sup> Distinctions between groups of people must be based on rational, objective evidence. A law preventing people with red hair from being teachers would fail the test.<sup>35</sup> However, treating children who have committed crimes differently to adults

is justified by reference to their limited maturity, experience and capacity.

Access to justice

Rights in law mean little unless they can be interpreted and applied by a body with the power to enforce them. A tenant whose deposit has been unfairly withheld by a former landlord should be able to go to court to get it back. A person whose home has been unlawfully searched by the police should be able to challenge his or her treatment in court.

Access to justice in action

Suspecting that letters to and from his solicitor were being censored, a prisoner challenged the prison governor’s power to censor inmates’ correspondence.

This censorship of prisoners’ legal correspondence was unlawful: the right of access to a court was a fundamental common law right. It could not be limited except by Parliament’s express provision. Parliament hadn’t granted prison governors this power of censorship, and so it wasn’t permitted.

“It is a principle of our law that every citizen has a right of unimpeded access to a court... [It] is a ‘basic right’. Even in our unwritten constitution it must rank as a constitutional right.”

Steyn LJ, *Leech*<sup>36</sup>

Respect for the rule of law requires access to justice for all, irrespective of economic or social status. This means that it shouldn’t be too expensive or time-consuming for an individual to access the courts, tribunals or other dispute resolution mechanisms. This rule reaches back to Magna Carta which famously said “*To no one will we sell, to no one will we deny or delay, right or justice*”.<sup>37</sup>

“There is the old taunt, the familiar taunt, about His Majesty’s courts being open to all just as the grill room at the Ritz hotel is open to all.”

Sir Hartley Shawcross<sup>38</sup>

It also sits behind the decision of the UK Parliament to make provision for legal aid (Sir Hartley used this Ritz comparison when introducing the first UK statute on legal aid in 1948).

Open justice

It is a well-accepted feature of the right to access to justice that justice is best done in public.

“The right to know and effectively challenge the opposing party’s case is a fundamental feature of the judicial process. The right to a fair trial includes the right to be confronted by one’s accusers and the right to know the reasons for the outcome. It is fundamental to our system of justice that, subject to certain established and limited exceptions, trials should be conducted and judgments given in public.”

Lord Hope, *Bank Mellat*<sup>39</sup>

Exceptions to this principle can be justified in the public interest, for example, by providing screens to protect witnesses or hearing some evidence in private to limit publicity and to protect the identities of children. However, these exceptions are closely examined. In very limited circumstances, the principle of open justice must bend in order for the court to do justice.

Some limited exceptions

For example, the UK Parliament has permitted one party to be shut out of court for part, or all, of the hearing of a civil case involving evidence which might be damaging to national security.<sup>40</sup> However, the Supreme Court has indicated that this kind of exceptional measure must be a matter of last resort.<sup>41</sup>

Transparency and legal certainty

“The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.”

Lord Diplock, *Black-Clawson International*<sup>42</sup>

The law must be clear and intelligible enough to allow people to regulate their conduct. This doesn’t mean that we must all be lawyers, or the law so simple that we can read it as easily as the newspaper. However, it does mean that there must be a clear answer about what the law is, and that answer must be reasonably accessible. In practice, this means that: (a) the law must be made public; (b) it must be ‘**prospective**’ and not ‘**retroactive**’ (i.e. forward-looking, not making behaviour unlawful after the event); and (c) it must be relatively stable, with fair warning given of any significant change.

The need for transparency and accessibility affect the making of law by the Scottish Parliament and the development of the common law by the judiciary.

For example, where an Act of the Scottish Parliament gives discretion to a Scottish Minister or other public official, that discretion cannot generally be completely



unfettered or undefined. If it were, it would be extremely difficult for individuals to know how the discretion might affect them in practice. Might it be at the whim of how the decision-maker felt that day?

To avoid this, criteria for the exercise of a power are likely to be provided by Scottish Parliament. In addition, those powers must be exercised in accordance with the ordinary principles of the common law, subject to judicial review by the courts (we return to judicial review and the application of public law in Chapter 4).

*Protection of individual rights*

“It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

**Preamble, Universal Declaration of Human Rights 1948**

“What we now term human rights law and public law has developed through our common law over a long period of time. The process has quickened since the end of World War II ... the growth of the state has presented the courts with new challenges to which they have responded by a process of gradual adaption and development of the common law to meet current needs.”

**Lord Toulson, *Kennedy***<sup>43</sup>

The UK courts have a history of protecting individual rights through the common law, as a fundamental part of the rule of law (see Chapter 5). The incorporation of human rights and European law in the Scotland Act 1998 has given the Scottish courts a much more direct role in scrutinising legislation from the Scottish Parliament than is the case for UK legislation.

**The rule of law in the Scottish Parliament**

A number of Acts of the Scottish Parliament have been challenged in the courts, including the Protection of Wild Mammals (Scotland) Act 2002 (to ban hunting of foxes with hounds), the Damages (Asbestos-related Conditions) Scotland Act 2009 and the Alcohol (Minimum Pricing) (Scotland) Act 2012. So far, most challenges have failed; however, in 2016, the UK Supreme Court found the data-sharing provisions within the ‘named persons scheme’ in the Children and Young People (Scotland) Act 2014 to be in breach of Article 8 of the ECHR.<sup>44</sup>



Image © Scottish Parliamentary Corporate Body

# Chapter 3: Introduction to the law

In common with the other jurisdictions within the UK, the primary sources of Scots law are legislation made by, or under the authority of, the UK Parliament and Scottish Parliament (also known as ‘**statutes**’) and the ‘**common law**’ as developed and applied by the judiciary from the historical approaches of the courts in similar cases.

Uniquely in the UK, Scotland is a ‘**mixed legal system**’, meaning the common law also relies on legal principles collected by prominent lawyers of the past centuries known as the ‘**institutional writers**’. These principles were themselves drawn from the surviving records of the developing legal systems of continental Europe and the mid-to-late Roman Empire.

Some EU law has direct effect in the UK. Other international law does not generally have direct effect in the UK unless explicitly incorporated. This is discussed further in Chapter 6.

**SUMMARY**

Scotland is a distinct legal jurisdiction. England and Wales form a single jurisdiction (although some laws differ between England and Wales). Northern Ireland is the third jurisdiction of the UK.

Technically, there is no such thing as ‘UK law’. But much legislation applies equally across the UK jurisdictions.

Law can be found in statute (also known as legislation) and in the common law.

Statute law is made by, or under the authority of, the UK Parliament and Scottish Parliament and the common law is developed by the judiciary.

The development of both kinds of law can be informed by international law, which are rules agreed by the UK with other states.

## Primary and subordinate legislation

Much of an MSP’s time in Holyrood is spent scrutinising, debating and voting on proposed legislation.

**Laws passed by Parliament: a quick guide**

‘**Primary legislation**’ is an Act of the Scottish Parliament (or Act of Parliament in the case of the UK Parliament).

An ‘**enabling Act**’ is an Act which sets out a legal framework for making secondary legislation.

‘**Subordinate legislation**’, often called ‘secondary legislation’ or ‘delegated legislation’, is legislation made by the government or certain public bodies under powers delegated from parliament by an enabling Act. The most common forms of subordinate legislation are Scottish Statutory Instruments (SSIs) (or Statutory Instruments (SIs) in the UK context).

This statutory law sits at the core of our legal system. Acts of the Scottish Parliament and their UK equivalents are also known as ‘**primary legislation**’ because they are made by the parliament and generally cannot be amended except by the parliament.<sup>45</sup> Acts of the UK Parliament cannot be struck down by the courts (in line with the doctrine of Parliamentary Sovereignty) but the courts may issue a Declaration of Incompatibility where Convention rights are breached and may ‘disapply’ parts which conflict with EU law. Acts of the Scottish Parliament may be struck down by the courts if they are

outwith the Parliament’s **‘legislative competence’**, which includes where Convention rights or EU law has been breached.

Many Acts create a basic legal framework but don’t deal with the detail needed to make the law work in practice. Instead it gives Scottish Ministers (or their UK counterparts) and other bodies the power to create **‘subordinate legislation’**: detailed and often technical rules which govern the actual operation of the law within the legal framework set by the enabling Act. Subordinate legislation is also used to give effect to some EU law that is not directly applicable.

A huge amount of subordinate legislation is produced, far outweighing the amount of primary legislation each year. This important source of law is often essential to make the law work in practice.

Making legislation work

- The Procurement Reform (Scotland) Act 2014 sets out the key principles and general guidance for public procurement in Scotland. The detailed scheme is set out in the Procurement Regulations (Scotland) 2016, a piece of subordinate legislation originally drafted by the Scottish Government.
- Similarly, while the Court of Session Act 1988 deals with the powers and jurisdiction of the Court of Session, the detailed procedural rules of court are laid out in an Act of Sederunt, which is subordinate legislation made by the Lord President.

Importantly, public authorities can only create subordinate legislation within the limits set by the **‘enabling’** Act. If the legislation exceeds the scope of the delegated power, the courts can strike down the secondary legislation as unlawful (legislation like this is sometimes called **‘ultra vires’** meaning ‘beyond the powers’).

**Making legislation**

The Scottish Parliament website provides detailed guidance on the passage of primary and subordinate legislation. A summary of the passage of a Bill is set out below.

All Acts of the Scottish Parliament start life as Bills. In order to become law, they must be approved by parliament and receive

Royal Assent. Bills progress through a number of stages: First Stage (a vote on the general principles of the Bill), Second Stage (consideration and report by the appropriate committee(s) of Parliament) and Third Stage (debate of the whole Bill). The Second and Third Stage provide an opportunity for detailed consideration and amendment of a Bill’s provisions.<sup>46</sup>

Secondary legislation is afforded less parliamentary time and is subject to less scrutiny as a result. In general, there are three ways in which subordinate legislation receives parliamentary approval. Under **‘negative procedure’** subordinate legislation cannot come into force until 28 days after being placed before the Scottish Parliament. It becomes (or remains) law unless MSPs pass a motion to annul it within 40 days. **‘Affirmative procedure’** subordinate legislation can become law only after the Scottish Parliament has voted to approve it. **‘Laid no-procedure’** (also known as ‘no procedure’ or ‘laid only’) subordinate legislation is subject to technical scrutiny by Scottish Parliament. It does not require approval and cannot be annulled.

Stages in the passage of a Public Bill

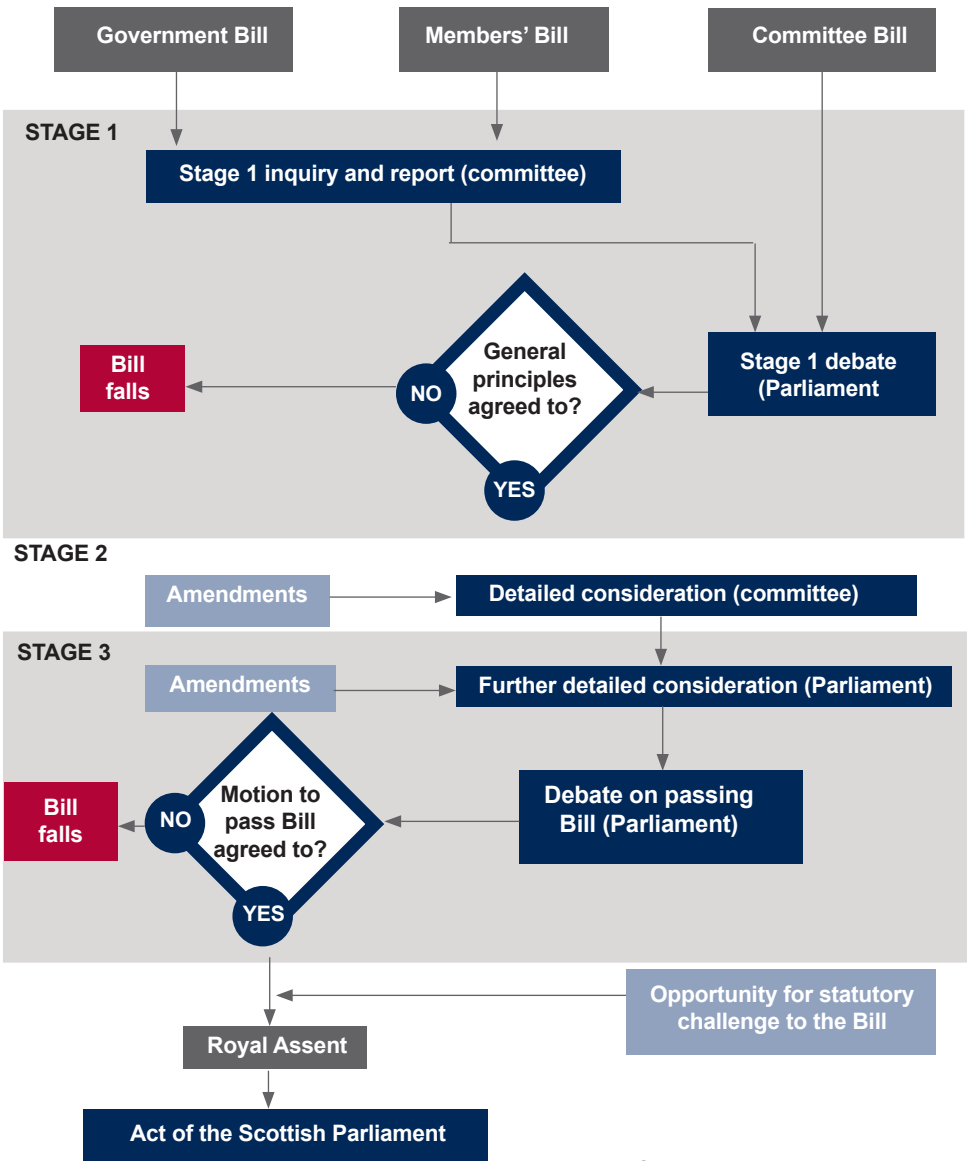


Diagram © Scottish Parliament (www.parliament.scot)

Scrutinising delegated powers

The **Delegated Powers and Law Reform Committee** will consider the enabling provisions of any Bills introduced into the Scottish Parliament. It will look at whether the extent to which powers are delegated is necessary and appropriate to ensure sufficient parliamentary scrutiny is maintained. Scottish Government Bills are generally accompanied by a Delegated Powers Memorandum designed to explain to the Scottish Parliament why the government considers certain powers and discretions, including the power to make delegated legislation, are needed.

The Committee will also consider all draft subordinate legislation to be laid before the Scottish Parliament. Where the Committee deems it appropriate it will draw parliament’s attention to any specific issues it identifies.



## The common law

The ‘**common law**’ is the body of law created by the courts setting ‘**precedents**’ in individual cases. It is one of the core sources of law in each of the jurisdictions in the UK. Many principles are shared, despite having been developed by different courts and through the application of different precedents.

Generally, the common law and statute law co-exist peacefully. There are many important areas of common law where Parliament has passed very little or no legislation – for example, in the law of negligence. Even within the same area of law, statute and the common law often exist alongside, and complement, each other. For example, the right to freedom of expression is protected both as a fundamental principle of the common law and by the Human Rights Act 1998 (‘HRA’).

In keeping with the principle of parliamentary sovereignty, if there is any direct conflict between statute and the common law, the statute will prevail. If the courts develop a rule that the Scottish Parliament doesn’t like, MSPs can legislate to override it.<sup>47</sup> On the other hand, where legislation is vague or unclear in its application, the common law can help fill gaps, either unplanned or unanticipated. We cover these rules of statutory interpretation in some more detail, below.

## The role of judges

The judge’s role is to interpret, apply and enforce the law passed by Parliament and to develop and apply the common law.

### Statutory interpretation

When courts interpret and apply statutes, they are trying to reach the legal outcome which Parliament wanted to create. This isn’t always straightforward.

For example, some statutes use deliberately broad language, giving judges the flexibility to interpret and apply the law, depending on the facts of any individual case. At other times legislation is simply unclear, or gives an unquantified degree of discretion to individuals who hold public power. Then again, even where the meaning of the law appears obvious, its application to an unforeseen set of facts may be far from clear.

To help them, judges use a number of common law rules of ‘**statutory interpretation**’, including:

- The ‘**literal rule**’: Judges must start with the ‘ordinary meaning’ of legislation. Judges are seeking to enforce the will of Parliament, and the first insight into the will of Parliament is the ordinary meaning of the words which Parliament has approved.

- The ‘**golden rule**’: In some circumstances, a phrase might legitimately have more than one literal and valid interpretation. In others, adopting its literal meaning might lead to an absurd result. The golden rule allows judges to adopt the interpretation that is reasonable in light of the statute read as a whole. It is sometimes referred to as the presumption that Parliament does not intend to create absurdities.

### Statutory interpretation in action

Parliament criminalised the act of causing an obstruction “*in the vicinity of*” an air force station. One defendant argued that because he had caused a disruption *inside* an air force station he hadn’t committed an offence. The court interpreted “*in the vicinity of*” to mean “*in or in the vicinity of*”. A literal interpretation would have had the absurd outcome of frustrating the purpose of the statute – which was to prevent interference with the armed forces in their work.<sup>48</sup>

- The ‘**mischief rule**’: In some cases, the intended practical effect of a measure is far from clear from the actual text of an Act. Judges may use the mischief rule to identify the problem that the statute was trying to remedy and interpret it in a way that meets the intention of Parliament.

### Pepper v Hart

If primary legislation is ambiguous or obscure, the courts may refer to Hansard and the Official Report when interpreting the meaning of a particular provision.<sup>49</sup> Clear statements of purpose by the Minister responsible for steering the Bill through Parliament may help the court to give effect to Parliament’s intention in passing it. For this reason, Ministers often take care to make clear statements about a Bill’s intended effect as it passes through Parliament. These statements are usually called ‘*Pepper v Hart*’ statements after the case which established the rule. However, the courts will not treat such statements as conclusive.<sup>49</sup> The use of Explanatory Notes to accompany legislation means that the courts are referring to Hansard and the Official Report less frequently.<sup>50</sup>

- **Implied repeal:** Where two Acts of Parliament clash, the later Act stands and the conflicting provisions of the earlier one fall away.

Some statutes have been considered to be so constitutionally significant by the courts that the doctrine of implied repeal may not apply to them. For example, it has been suggested that the Bill of Rights 1689, the European Communities Act 1972, the Human Rights Act 1998 and the various devolution statutes can only be repealed expressly.<sup>51</sup>

- **Fundamental rights:** Special considerations arise when there is a direct conflict between a statute and fundamental principles of the common law. Examples of these principles include the presumption in favour of open justice, the right to equal protection by the law and the right to freedom of expression. The courts will try to interpret any ambiguous statute, as far as is possible, in a way that is consistent with the common law principle in question. It is presumed that Parliament intends to respect fundamental rights. Any step to restrict these core principles must be done explicitly (see also Chapter 5).

- **Parliamentary directions:** Judges will also follow clear instructions on statutory interpretation given by Parliament. Examples of such instructions are included in the European Communities Act 1972 (‘ECA’) and in the HRA. The courts have a statutory duty to interpret legislation in a way that is both compatible with the law of the European Union and in “so far as is possible” respects the individual rights guaranteed by the HRA (see also Chapters 5 and 6).

### Developing the common law

Judges are also responsible for developing the common law. In areas not governed by statute, judges maintain the application and interpretation of the rules of common law.

### Common law in action

- When Mrs Donoghue ordered a bottle of ginger beer in a Scottish café, she didn’t expect to find a dead snail inside. When she fell ill after drinking the ginger beer, she sued Mr Stevenson, the manufacturer. The House of Lords found that the manufacturer should have taken reasonable care to ensure that the beer was safe to drink – and the common law of negligence was born.<sup>52</sup>
- Prior to 2009, rape and other sexual offences were governed by the common law. In 2001, the High Court of Justiciary overturned the common law rule, said to originate with the institutional writer Hume, which meant that force was a necessary element in rape. This reflected a developing understanding of women’s reactions to non-consensual sex which meant the old common law rule was unsustainable.<sup>53</sup>

‘**Precedent**’ is the principle that the decisions of higher courts create legal authorities which lower courts must follow. It is how the common law develops. It creates consistency of practice and a common understanding about the scope of the law, but allows for evolution to meet changing practices.

Precedent only operates within jurisdictions. Scottish courts are not bound by the decisions of English courts (except the Supreme Court of the UK considering

a Scottish case). But the legal systems and many laws are so similar that it is very unusual for any significant difference to emerge and the Scottish courts frequently refer to decisions of the English courts.<sup>54</sup>

Latin in the Law

Court judgments set out the reasons for the court's decision. Different parts of the judgment have different effects. The part which explains the legal rules on which the decision is based is still called by its Latin name – the '**ratio decidendi**'. Under the doctrine of precedent, this part of the decision is binding on lower courts.

The other parts of a judgment are known as '**obiter dicta**'. This might include the judge's views on the current state of the law, or on what the decision might have been if the case had slightly different facts. This commentary is not binding, but it can be persuasive.

**What about international law?**

**International treaties** are agreements between countries that are legally binding in international law. These might be bilateral agreements between the UK and just one other state. For example, extradition treaties typically set out the process for transferring suspected criminals between the UK and other countries. Or they might be multilateral and lay down obligations for a much wider group of countries. For example, the United Nations exists because of a single treaty agreed to by most nations of the world.

Some international treaties may create dispute resolution processes which may be binding on signatory states. For instance, the European Convention on Human Rights created the European Court of Human Rights; and some trade agreements provide a trans-national process of arbitration to create a single, simplified route to resolving disputes.<sup>55</sup>

International law also includes rules of '**customary international law**'. These are rules whose legal force develops over time. A rule becomes binding when it is (a) followed consistently by many countries for many years; and (b) countries have followed the rule in question because they treat it as law. An example of a rule of customary international law is the prohibition on torture.

In some countries, international law is automatically treated as part of the domestic legal system (these are called '**monist**' systems). The UK is not such a system – it is a '**dualist**' legal system – which treats international and domestic law as two separate legal orders. That means that before international treaties have any effect they must be made part of domestic law by Parliament.

By contrast, **customary international law** is regarded as being a source of law. Customary international law can be considered by our courts and, if there is no wider constitutional problem, may be treated as part of our law.

The '**presumption of compatibility**' is a common law rule for the construction of statutes. When construing a statute, the presumption is that the UK or Scottish Parliament intended to respect its international obligations. In the event of ambiguity, the interpretation which is consistent with the UK's international law obligations is preferred.

More detail on international law is provided in Chapter 6.

## Chapter 4: Public law and judicial review

Every day, public bodies, including Ministers in both the UK and Scottish Governments and local authorities, take a variety of decisions and perform a range of public functions which impact on constituents' daily lives.

Public bodies must respect public law principles designed to ensure that their actions are lawful and that they do not abuse their power or neglect their duties.

For MSPs, public law can provide a helpful starting point for the scrutiny of the work of public agencies, civil servants and Ministers alike. It can also help shape the scope of statutory powers and duties.

If public bodies act outside the bounds of public law, their decisions can be challenged in court through a process called '**judicial review**'.

“Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power.”

Sedley LJ, *Dixon*<sup>56</sup>

Delegated or secondary legislation – rules, regulations or other statutory instruments

SUMMARY

Public law operates as a check on the abuse of public power. In practice, this means that public decisions must be lawful and follow a fair procedure.

If the work of a public body is challenged, the courts may conduct a judicial review.

Judicial review is not concerned with whether a decision was right, but whether it was lawful.

Judicial review is a last resort and claimants have to bring a claim promptly.

### What is judicial review?

Judicial review is a remedy of last resort. The courts will not look at a public decision if there is another means of putting right something which has gone wrong.

*Which decisions can be challenged?*

Many different kinds of public decisions are subject to judicial review. Any type of action or decision can be subject to the courts' scrutiny, as can failures or refusals to act. The key test for whether a decision can be challenged is generally to ask if the relevant decision maker was exercising a '**public function**'.

Delegated or secondary legislation – rules, regulations or other statutory instruments

made by public bodies acting under the delegated authority of the UK Parliament or Scottish Parliament – can be struck down by the courts if they breach the principles of public law. It is presumed that Parliament intends these important delegated powers to be exercised lawfully.

However, the activities of the UK Parliament itself are not subject to judicial review and Acts of Parliament cannot be ruled invalid by judges exercising judicial review. At most, the courts can make a '**declaration of incompatibility**' in some human rights cases and can '**disapply**' primary legislation if it is contrary to EU law (see Chapters 5 and 6).

By contrast, because the Scottish Parliament has express limits on its legislative competence by reason of section 29 of the Scotland Act 1998, acts of the Scottish Parliament are not law if they are found to be outwith legislative competence. As a result the Court of Session and the UK Supreme Court are empowered to set aside any such Act in whole or in part.



What kind of review?

Judicial review doesn’t give a judge the power to step in and have another go at making a disputed decision. A judicial review claim is not an appeal on the merits of a decision, and the judge will not substitute his or her own view for that of the decision maker.

This is particularly important when the relevant decision maker is a specialist in their field with a great deal of experience which the court does not have (a medical professional, for example). In all cases, the concern for the court is not whether a decision was right, but whether it was **lawful**.

Judicial review or ‘appeal’

When it creates a new power, Parliament may make a decision or an action subject to ‘**statutory appeal**’. Unlike judicial review, an appeal court or tribunal may have the power to retake a decision from scratch, rechecking the law and the evidence, and substituting their own view for that of the original decision-maker.

What are the ‘grounds’ for judicial review?

There are a number of reasons why a decision may be unlawful. These reasons are called ‘grounds’ for judicial review:

- ‘**Illegality**’: A decision-maker might make a mistake in law, might try to do something which it has no power to do, or might exercise their power unlawfully. This includes a failure to follow EU law, including EU Directives (for so long as the UK remains in the EU), or to comply with the requirements of the Human Rights Act 1998 (‘**HRA**’).
- ‘**Irrationality**’: Where the decision-maker has made an unreasonable decision or failed to take relevant matters into account.
- ‘**Procedural unfairness**’: Where the decision-maker has failed to follow relevant procedures or has shown bias.

These traditional labels for the grounds for judicial review are not rigid, and individual cases can fall under more than one category. For example, a decision-maker who reaches a conclusion without all the necessary facts might act both illegally and unfairly.

Illegality

If a public body misinterprets the law when making a decision, uses a power for a purpose it was not designed for, or acts ‘**ultra vires**’, then it has acted unlawfully, and its decision may be set aside for ‘**illegality**’. *Ultra vires* means beyond its powers – doing something it doesn’t have the power to do. A decision may also be unlawful if it is so unfair that it amounts to an abuse of power.

In the 1980s the Strathclyde Regional Council was required by statute to provide a supply of “wholesome water”. It had been co-operating with the Health Board in the progressive fluoridation of the water supply. However, the Court held that “wholesome” meant “free from contamination and pleasant to drink.” The local authority therefore did not have the power to add fluoride to water to improve the general dental health of the population.<sup>57</sup>

Where a discretion – including a power to make secondary legislation – is exercised in a way which is inconsistent with the fundamental principles of the common law, this will also be unlawful.

Applying prison rules to prevent a prisoner meeting with a journalist was inconsistent with the common law protection offered to free expression and the principle of legality.<sup>58</sup>

A judicial review can also check whether a public body has complied with its duty under the HRA to respect individual rights (see Chapter 5). A judge can also look at whether public decisions breach European Union law or the European Communities Act 1972 (see Chapter 6).

Irrationality

A decision can be successfully challenged if it is ‘**irrational**’. A decision is irrational if no reasonable decision maker could justify it (often called ‘**Wednesbury unreasonableness**’, after the case that established the principle).<sup>59</sup>

This is a high threshold and it is relatively rare for the courts to find that it has been met. One judge has said that it should generally apply only “*to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*”.<sup>60</sup>

Wednesbury unreasonableness

In *Wednesbury* itself, a local council decided that cinemas would not be allowed to admit children under 15 on Sundays. In a challenge to the decision, local cinema owners argued that it amounted to an irrational restriction on their licence. Rejecting the challenge, the court held that so long as the council had not reached a decision so unreasonable that no reasonable body could ever have come to it, it had discretion to set whatever limitations it saw fit. This very high threshold was not reached, and so the restriction on cinema entry was allowed to stand.

However, the ‘intensity of review’ will depend on the type and circumstances of the challenge. If a decision interferes with the fundamental common law rights of an individual or a group of people a judge may look more closely at the decision taken and can expect a higher standard of justification from the public body. This is sometimes called ‘anxious scrutiny’ in the case-law. Both the original decision maker and the court may be required to exercise this extra-close scrutiny in such cases.

A number of actions might render a decision both illegal and irrational. These might include failing to think about matters relevant to the decision, thinking about things which are irrelevant, or making a decision based on plain errors of fact.

Unfairness

A challenge can be brought if a public body has made a decision without observing the proper procedure or where a decision breaches the ‘principles of natural justice’.

Express procedural requirements

Failure to comply with an express procedural requirement – whether statutory or self-imposed – is the clearest example of procedural unfairness. These can include, for example, a right:

- To be given notice of proceedings;
- To be heard or consulted before a decision is taken; and/or
- To be given reasons for a decision after it has been made.

Greenpeace successfully challenged a decision to proceed with the building of new nuclear power plants. The Secretary of State had set his own rules for public engagement. The court considered the quality of the consultation process and decided it was inadequate. The decision had to be taken again, with the benefit of fuller engagement by the public.<sup>61</sup>

“ When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise.”

Lord Fraser, *Ng Yuen Shiu* <sup>62</sup>

A fair hearing

Public bodies must also respect the common law principles of ‘**natural justice**’. These require decision makers to act impartially and give the parties involved a fair hearing.

This can include a right to be heard and a right to receive reasons for a decision. A decision can be challenged if a public authority has exhibited ‘**real or apparent bias**’. It is very rare for a public body to be proved to be biased, but a decision may be unlawful if there is enough evidence to show a ‘**real possibility**’ that it was. <sup>63</sup> Decision-makers should be above reproach and a real appearance of bias is enough to undermine their authority. <sup>64</sup> In other words, this will be considered from an objective standpoint by a court, which will generally ask how an informed neutral observer would view the particular conduct.

In some circumstances there will be a ‘**legitimate expectation**’ that a public authority will act in a certain way. For example, the public might legitimately expect to be consulted before a long-standing practice is changed. A breach of

this kind of expectation can be grounds for review.

A home for life?

Ms Coughlan – a person with severe disabilities – challenged a local authority’s decision to close her residential care home, on the basis that she had been promised that the residence would be her home for life. The court held that Ms Coughlan had a legitimate expectation that she would be allowed to stay in the care home, and that for the council to go back on this promise would be so unfair as to amount to an abuse of power. <sup>65</sup>

Proportionality

In some claims involving EU law or the HRA, the court will look at whether a particular decision is ‘**proportionate**’. This involves the judge asking whether the impact of a decision is proportionate to its aim. The court can check whether the public authority has gone further than is necessary to serve the public interest (see Chapters 5 and 6).

In cases involving fundamental common law rights, the courts have resisted adopting a general proportionality test. However, there is some indication that courts may in substance apply a proportionality test when deciding whether a decision is lawful.

Whether applying a ‘**proportionality**’ test or applying ‘**anxious scrutiny**’ to the question of whether a decision is reasonable, these decisions are ones where the courts can play a special role in checking whether public decisions respect individual rights. MPs and MSPs may consider this when creating new powers or duties for public bodies.

Proportionality and the common law

The Supreme Court considered a challenge to the Home Secretary’s attempt to strip a suspected terrorist of his British citizenship. The court noted that – when looking at an interference with fundamental rights, such as citizenship – **anxious scrutiny and proportionality tests may produce very similar results.** <sup>66</sup>

Who can bring a judicial review?

A person or body must have ‘**sufficient interest**’ in a decision to bring a claim for judicial review. <sup>67</sup> Sometimes this interest will be obvious, for example if they have been refused asylum. However, a claimant does not have to have a financial or legal interest in the decision, nor does it need to be the most obvious challenger.

Community groups and NGOs have brought judicial review claims on the basis that they represent the public interest. <sup>68</sup>

However, claims cannot be brought by someone who simply does not like a decision or who disagrees with the policies of the decision maker. <sup>69</sup>

Who has sufficient interest?

The Christian Institute and three other interest groups were found to have sufficient interest in public policy relating to family issues to challenge the ‘named person’ provisions of the Children and Young People (Scotland) Act 2014. <sup>70</sup>

How does judicial review work?

Judicial review is a three-stage process:

- First, decision-makers must be given an opportunity to correct their mistakes. Generally claimants should write a formal letter setting out a summary of their concerns. In rare, urgent, cases, for example, if someone is due to be deported, this step might not be enforced by the court.

Watch the clock

Applications for judicial review must be made promptly and in any case within three months of the challenged administrative act. <sup>71</sup> This time keeps running even after the pre-action letter is sent.

- If the decision-maker thinks its decision is right or refuses to change its mind, the claimant can then ask for ‘**permission**’ to bring a claim for judicial review. <sup>72</sup> You must have a ‘**real prospect of success**’ and ‘**sufficient interest**’ to get permission.

- If the court considers there is a case to answer, there will be a full judicial review hearing.

Permission stage

There can be no judicial review without the court’s permission. This check is intended to avoid timewasting challenges to public decisions. <sup>73</sup> Judges can think about permission without hearing arguments, ‘**on the papers**’. If they refuse, the claimant can ask for an oral hearing. <sup>74</sup>

Who pays for a judicial review?

The legal and other costs of judicial review claims are generally decided in the same way as civil claims, namely that the loser pays the costs of the winner, and the conduct of the parties is taken into account.

A person who brings a judicial review faces the risk that they might have to pay all the costs of the public body if they’re wrong. Legal Aid may be available to claimants who qualify in terms of the civil legal aid rules.

What can the court do?

If a challenge succeeds, the court has a wide range of options. None of these ‘**remedies**’ are automatic, but are granted at the discretion of the court:

- **Reduction of a decision:** The court can tell the decision-maker to re-take the decision lawfully (commonly called ‘**quashing**’ the decision).
- The public body can lawfully arrive at the same conclusion or result a second time, but it must follow the proper process and consider all evidence reasonably in doing so. The court might give guidance on the law which the decision-maker needs to follow.



- **A declaration:** The court can make a ‘**declarator**’ that the decision-maker got it wrong and acted unlawfully, explaining why. This remedy might mean that its decision stays in place because quashing it wouldn’t be appropriate. If a public body has changed its decision while the case was going on, the judge might use a declaration to give clearer guidance for future cases and other public bodies.
  - **Compensation:** Compensation or ‘**damages**’ cannot be sought in a claim for judicial review. However, a judge can hear other claims where compensation is available at the same time, including a claim that a public authority has been negligent, or a claim for damages under the HRA, for example.
- For an individual to seek compensation in connection with a judicial review is relatively uncommon.

## England, Wales and Northern Ireland

The law on judicial review in England and Wales and Northern Ireland is very similar. The grounds of review are broadly the same and the courts refer to each other’s case law.<sup>75</sup> The location of the public body determines where a challenge should start.

### England

In England, the High Court deals with most judicial review cases, though the Upper Tribunal also has jurisdiction in, for example, immigration cases. As in Scotland, an applicant must obtain permission from the court before proceeding, and in order to get permission, the applicant must have an **arguable case** and show **sufficient interest**. As in Scotland, there is a three month time limit for making the application. As discussed above, once permission is granted, the principles which the courts apply in determining applications for judicial review are virtually identical in Scotland and England.

### Northern Ireland

Although many familiar public law questions are routinely raised in Northern Ireland, the highly political context has created some unique elements to judicial review.<sup>76</sup> The (amended) Northern Ireland Act 1998 has been described as a ‘**constitution**’<sup>77</sup>

for Northern Ireland, and in subsequent judicial review proceedings the importance of paying “*particular attention*” to it has been noted.<sup>78</sup> The Northern Irish courts also appear to have taken a slightly different approach to the administrative acts that are subject to judicial review.<sup>79</sup>

### Wales

As England and Wales share a legal system, the situation for judicial review in Wales is identical to that in England, except for ‘**devolution issues**’.

### Devolution issues

Both the Scottish Parliament and the Scottish Government are subject to limits on their legal competence to legislate or to carry out administrative acts. Those limits are found in the Scotland Act 1998, sections 29 and 57(2). ‘**Devolution issues**’ are challenges which require the court to consider whether the devolved legislatures or executive administrations have acted within the boundaries of their devolved powers or ‘**competences**’. This can also include checking EU law and human rights compatibility (see Chapters 5 and 6 below). Such challenges may be made in Scotland, Wales or Northern Ireland.

# Chapter 5: Rights and the individual

## SUMMARY

Scots law protects individual rights in a range of different ways, including through the common law, legislation and the European Convention on Human Rights.

Both the UK and Scottish Parliaments have also provided further protection for a broad range of rights in other primary legislation, including the right to equality, children’s rights and the rights of mental health patients.

## Introduction

There is no one document where you can find all of the human rights and civil liberties that people living in Scotland enjoy.

The European Convention on Human Rights (‘the Convention’), however, does provide for a wide range of individual, family and collective rights.

Since the UK became the first country to ratify the Convention in 1950, the UK Government has also agreed to treaties which further protect the rights of women; children; and disabled people; help stamp out racism; protect the rights of refugees fleeing persecution; and recognise the international prohibition on torture (see Chapter 6).

The UK Government agrees to such treaties on behalf of the whole of the UK, but where those treaties address devolved

matters, it is the responsibility of the devolved institutions to ensure protection of the rights they enshrine.<sup>80</sup> While the UK Government ratified, for example, the UN Convention on the Rights of the Child (‘UNCRC’), matters such as education and children’s health are devolved to Scotland. The Scottish Parliament has therefore legislated for a duty on the Scottish Government to ensure that the UNCRC is implemented in Scotland.<sup>81</sup>

There is also a wide network of statutes of both the UK and Scottish Parliaments that work to protect human rights. For example, the Equality Act 2010 prevents discrimination on the ground of protected characteristics, such as gender and race, and the Forced Marriage (Protection and Jurisdiction) (Scotland) Act 2011, which protects people from being forced into marriage.

Additionally, some rights, which would today be defined as human rights, have long been protected by judge-made common law.

These rights are discussed, debated and applied every day in Scottish courts, within government and other public bodies, and in the Scottish Parliament.

This Chapter will look at:

- (a) rights at common law,
- (b) *what* rights are protected and reinforced by the Convention,

(c) *how* the Convention is applied, principally in Scotland, but also in the UK as a whole, and

(d) the role and purpose of the European Court of Human Rights (‘ECtHR’ or ‘the Strasbourg Court’).

One important piece of Westminster legislation, which supplements the anti-discrimination right in the Convention, is also explained at the end of the Chapter. This is the Equality Act 2010.

## Common law rights

Before we look at the ‘what’ and ‘how’ of the Convention, it is important to recognise that Scottish courts protected individual rights well before 1999 through Scottish common law.

Indeed, in 1949, Lord President Cooper’s view<sup>82</sup> was that “it is still **the common law of Scotland that ... defines all the main rights** and duties of the Scottish citizen.”<sup>83</sup> For example, the long-recognised rule that a warrant to search a property must be specific in terms of the object of the search protects individuals against arbitrary intrusions in the home by police.<sup>84</sup>

More recently, the UK Supreme Court held that the common law should be “*the natural starting point in any dispute*” involving civil liberties or human rights.<sup>85</sup> Thus the common law might protect human rights in new ways not required by the Convention

or it may already protect rights so that courts do not have to directly apply the Convention.<sup>86</sup>

The courts use the common law to protect individual rights in a number of ways:

- Acts of public bodies or officials can be challenged on the basis that the act was founded on an error of law. For example, the Highland Council successfully challenged a decision to withdraw the sleeper rail service to Fort William.<sup>87</sup>
- The acts of public authorities remain subject to judicial review, tested against a standard of legality, rationality<sup>88</sup> or procedural propriety, where those acts interfere with fundamental rights protected by the common law.<sup>89</sup>
- Theoretically, in an extreme case where an Act of the Scottish Parliament contradicted “fundamental rights or the rule of law”, it could be struck down at common law.<sup>90</sup>

However, the protection of the common law has limits. This is demonstrated by the fact that it has been established that the right to vote is not one that exists at common law,<sup>91</sup> though it is thankfully protected in legislation.

But what happens when neither statute nor the common law is able to protect a human right? A good example is the case

of *Campbell* and *Cosans*. Two mothers from Bishopbriggs and Cowdenbeath did not want their children to be punished by the belt at school. They, like many others, were unable to secure a remedy at home but won their case in the ECtHR,<sup>92</sup> which said that parents had a right under Article 2 of Protocol 1 to exempt their children from this punishment. In due course, this decision led to the abolition of physical punishment in Scottish schools.

Where rights are recognised in the common law, they offer valuable protection. However, it is not clear that the common law protects every right guaranteed by the Convention. In some cases the protection offered may be less effective.

As late as 2010, there was no right in Scots law to receive legal advice when being questioned by police. When Peter Cadder took this issue to the UK Supreme Court, it identified “clear and consistent” case law by the ECtHR that this was a violation of the Convention.<sup>93</sup> Therefore, thanks to the right to fair trial in Article 6 ECHR, you have the right of access to a lawyer prior to being interviewed. This allows every person detained by the police the opportunity to fully understand the legal implications of their arrest and being questioned by police, and what their rights are in that context.

### The European Convention on Human Rights

The Convention was the fundamental legal component of the European response to fascism and the horrors of the Second World War. UK Ministers, diplomats and lawyers were central players in its development. Indeed, it was a Scottish Lord Chancellor, Sir David Maxwell Fyfe (a prosecutor at the Nuremburg Trials), who chaired the Committee responsible for drafting the Convention.

The Convention is not an instrument of the European Union (‘EU’), but one of the Council of Europe. The Council of Europe is an older institution established in the aftermath of the Second World War. Made up of 47 Member States, it is larger than the EU and includes many non-EU States (including Russia), but EU countries are required to comply with the minimum standards of the Convention.

The Convention rights are mirrored in, and supplemented by, the EU Charter of Fundamental Rights (see Chapter 6).

#### What are the Convention rights?

The rights in the Convention and its additional protocols, which the UK has agreed to protect, are now central to the protection of human rights and civil liberties in Scotland, the UK and across Europe. These rights are shown in the box.

Convention rights <sup>94</sup>
Right to life (Article 2)
Prohibition of torture and inhuman or degrading treatment or punishment (Article 3)
Prohibition of slavery and forced labour (Article 4)
Right to liberty and security (Article 5)
Right to a fair trial (Article 6)
No punishment without law (Article 7)
Right to respect for private and family life (Article 8)
Freedom of thought, conscience and religion (Article 9)
Freedom of expression (Article 10)
Freedom of assembly and association (Article 11)
Right to marry (Article 12)
Right to an effective remedy (Article 13)
Right to enjoy each of these rights without discrimination (Article 14)
Right to the peaceful enjoyment of property (Article 1, Protocol 1)
Right to education (Article 2, Protocol 1)
Right to free elections (Article 3, Protocol 1)

These rights require to be implemented in different ways. Public bodies may be required to refrain from doing something (called a ‘**negative obligation**’). Sometimes, however, to protect a right properly, public authorities might have to take steps to make sure that a right actually works in practice (a ‘**positive obligation**’).

For example, the right to life means public bodies must not kill people unlawfully (a negative obligation). However, any suspicious deaths must also be properly investigated and a system must exist to deter and punish those who do take others’ lives unlawfully (a positive obligation).

#### Are Convention rights absolute?

The rights in Articles 8 to 11 ECHR are not ‘**absolute**’; they are ‘**qualified rights**’. This means that they can lawfully be limited where it is necessary to consider the competing rights of other people or the wider community. For instance, freedom of expression is sometimes limited in order to prevent incitement to violence.

These limits are only lawful if they are ‘**proportionate**’ to a ‘**legitimate aim**’. This means that the seriousness of the impact on individual rights must be weighed against the public interest goal which any limitation seeks to serve.

Legitimate aims are identified in each of

Articles 8 to 11, and include important public interest goals such as the prevention and detection of crime and the protection of the rights of others. A limitation will not usually be proportionate if there are less intrusive means of meeting the same goal.

Finally, where a right is limited in this fashion, any such limitation must be prescribed by a rule of law which is sufficiently clear.



Example of a qualified right

Article 10(1) protects the right to free expression:

*“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”.*

Article 10(2) explains its limits:

*“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

Other Convention rights are referred to as ‘**absolute rights**’. For example, under no circumstances can a State infringe the prohibitions on torture or slavery.

Some of these rights, however, have express or inherent limits. The right to liberty, for example, expressly allows for detention in defined circumstances, including where there is a “*reasonable suspicion of having committed an offence*” and “*after conviction by a competent court*”.

Balancing rights?

Deciding whether a limitation is ‘**proportionate**’ or necessary can mean looking at competing rights and interests in some detail. This balancing exercise is performed by the UK and Scottish Governments, their civil servants, local authorities, the Westminster and UK Parliaments and, importantly, by judges throughout Scotland and the rest of the UK.

This involves looking at evidence of how seriously a measure will affect someone’s rights in practice; how much this change will impact on other people or the public interest; and whether there are less intrusive ways to solve a problem.

For example, Ms Eweida complained that a ban on her wearing a small cross to work was a violation of her right to religion. She won. There was no evidence of a risk to the public or of any significant impact on anyone else. It was disproportionate for her employer to prevent her from wearing it.<sup>95</sup>

*Derogation*

States are able to ‘**derogate**’ from (meaning, expressly limit) some Convention rights in times of war or other public emergencies “*threatening the life of the nation*”.<sup>96</sup> For Scotland’s purposes, it would be the UK Government that would do this as the Member State to the Convention, by notifying the Council of Europe.

For example, after 9/11, the UK derogated from the right to liberty to provide for the detention of foreign terrorist suspects without trial as part of its counter-terrorism strategy. The House of Lords struck down the secondary legislation which provided for derogation as it only applied to foreign nationals suspected of terrorism. Such limits must be no more than strictly required by the circumstances – and the fact that British terror suspects were not subject to the same restrictions showed that there were other, less intrusive, ways of combating terror threats.

“The rule of law is inherent in these and other articles of the Convention, and to be lawful an interference with Convention rights must also be compatible with the rule of law..”

**Lord MacFadyen, Calder, 2006**<sup>97</sup>

Some Convention rights are ‘**non-derogable**’. These include the right to life and the prohibitions on torture and slavery.<sup>98</sup>

How is the Convention applied in Scotland?

Introduction

The UK legal system is a ‘dualist’ one, meaning that while the Convention is binding on the UK in international law, the UK Government must do more than ratify it for it to be effective in domestic law.

The two important international obligations on the UK are:

- Article 1 ECHR, which requires the UK to make sure that everyone within its “*jurisdiction*” enjoys each of the rights it guarantees. This generally applies to people in the UK, but can include rare circumstances where the UK exercises control over an area or an individual overseas (for example, to some conduct by UK troops).<sup>99</sup>
- Article 13 ECHR, which requires that effective remedies are available when things go wrong. For instance, the effective criminal prosecution of murder is considered one necessary effective remedy for the protection of the right to life (Article 2 ECHR).

The Convention in action

A Scottish prisoner who was in a two-person cell challenged his lack of integral sanitation, which had required him to “slop out”. This was deemed to be “degrading treatment” under Article 3 ECHR. The Court of Session therefore ordered the Scottish Prison Service to prevent the practice of slopping out and awarded the prisoner damages.<sup>100</sup>

Two long term prisoners convicted of serious crimes challenged the Scottish Independence Referendum Act 2013 because it did not allow them to vote in Scotland’s Independence Referendum in 2014. Article 3, Protocol 1 ECHR requires States to “*hold free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*.” Both Houses of the Court of Session<sup>101</sup> and the UK Supreme Court<sup>102</sup> found that as the ECtHR had decided that this rule did not apply to referendums – only parliamentary general elections – the disenfranchisement of the prisoners in the referendum was lawful.

The police policy of ‘containing’ or ‘kettling’ protesters was challenged as a violation of the Article 5 right to liberty, after a number of G20 demonstrators were detained for several hours without food or access to toilets. After challenges in the UK and Strasbourg, judges clarified that the policy was proportionate and lawful, if certain safeguards were in place, including a time-limit, provision for release in some circumstances and access to water and toilet facilities.<sup>103</sup>

Domestic legislation, passed by Westminster or the Scottish Parliament, was required for courts in the UK to apply the Convention as part of domestic law. It has become part of Scots law in two different ways.

First, through the Scotland Act 1998 (‘the Scotland Act’), which applies to the **competences devolved to Scotland**. Second, through the Human Rights Act 1998 (‘HRA’), which applies across **the whole UK**. Through these Acts of the UK Parliament, the Convention has developed into a fundamental component of human rights law in Scotland and the UK.

The Scotland Act 1998: Devolution and Convention rights

The Convention has a particular constitutional significance to Scotland.<sup>104</sup> Convention rights apply more forcefully to the devolved institutions than they do to the UK Parliament. The Scottish Parliament cannot make any law which is outside of its legislative competence. A law will be outside of the Parliament’s competence if it is incompatible with the Convention.

### The Scotland Act 1998

Any Act of the Scottish Parliament is not law - that is, it would be immediately struck down by the courts - if it is deemed to be incompatible with a Convention right (Section 29(2)(d)).<sup>105</sup> This is different from Acts of the UK Parliament (see below).

The Scottish Government cannot make secondary legislation or do (or fail to do) anything else that is incompatible with Convention rights (Section 57(2)).

Where the compatibility with a Convention right of an Act of Parliament or an act or omission by the Scottish Government is considered by a court, this is known as a “devolution issue” (Schedule 6, paragraph 1).

### The Scotland Act in action

The first case in which a provision of an Act of the Scottish Parliament was ‘struck down’ under the Scotland Act was *Salvesen v Riddell*.<sup>106</sup> The Agricultural Holdings (Scotland) Act 2003 was outside the legislative competence of the Scottish Parliament. This was because it violated the rights of some landlords of agricultural tenancies to the peaceful enjoyment of their possessions (Article 1, Protocol 1 ECHR). However, the court made an order suspending the effect of its decision to allow the incompatibility to be resolved by the Scottish Parliament.

The latest ‘striking down’ was in *Christian Institute and others v Lord Advocate*.<sup>107</sup> In this case, the UK Supreme Court decided that certain provisions of the ‘Named Person’ scheme were a violation of the right to private and family life. The Scheme provided for information about ‘relevant changes in a child or young person’s life’ to be shared between healthcare, education and other personnel of public authorities. The provisions could not be justified under the Article 8(2) ECHR balancing requirements as they were deemed not to be “in accordance with the law” – they lacked clarity and safeguards to protect children’s data. In response, the Scottish Government is reviewing the relevant provisions of the Children and Young People (Scotland) Act 2014 so as to make the necessary changes and has delayed implementing the ‘Named Person’ scheme.

### The role of the Scottish Parliament

The Scottish Parliament has an important function in protecting Convention rights. All Bills presented to the Scottish Parliament by anyone entitled to do so must state that the Bill is within the Parliament’s legislative competence<sup>108</sup>. As we know, this means, among other things, that the Bill should be compatible with the Convention. The Presiding Officer must also give his or her opinion on whether the Bill is compatible.<sup>109</sup>

### Scottish Parliamentary Committees

Various committees scrutinise legislation and consider wider societal issues against human rights standards. Such Committees include the Equalities and Human Rights Committee, the Justice Committee and the Social Security Committee.

For example, the Equalities and Human Rights Committee is considering human rights implications of Brexit in this new session of Parliament.

Like all of the Scottish Parliament’s Committees, they can call government Ministers and public bodies to give evidence and can make recommendations.

### The Human Rights Act 1998<sup>110</sup>

After a number of high-profile cases – including the ‘gays in the military case’ – which highlighted the limits of the common law,<sup>111</sup> Parliament passed the HRA. It protects Convention rights on a UK-wide basis.

The impact of Convention rights on legislation passed by the UK Parliament under the HRA is different to their interaction with Scottish legislation. Acts of the UK Parliament cannot be struck down by the courts, which must only interpret them, ‘*so far as it is possible to do so*’, in a way which is compatible with the Convention.<sup>112</sup> However, secondary legislation which can’t be read in a way that respects Convention rights can be struck down by the courts.

As a result, courts have a duty to try to interpret even *unambiguous* legislation in a way that respects Convention rights. However, there are limits to this power. The courts cannot give express statutory words a meaning inconsistent with their plain language or one which would ‘*go against the grain*’ of the statute.<sup>113</sup>

### The Human Rights Act

- Public authorities must act in a way that respects our rights unless a statute passed by the UK Parliament stops them from doing so (Section 6 HRA).
- Courts must read and apply all legislation ‘**in so far as is possible**’ in a way that respects Convention rights (Section 3 HRA).
- Courts have no power to ‘**strike down**’ Acts of the UK Parliament which breach Convention rights. Instead, they can issue a ‘**declaration of incompatibility**’, which says that the statute is incompatible with Convention rights. Whether to change the law – or not – remains a matter for Parliament alone (Section 4 HRA).
- Courts must ‘**take into account**’ the case law of the ECtHR. They are not required to follow it. They are not bound by the HRA to agree with the ECtHR, and all lower courts must follow the UK Supreme Court’s rulings even if it adopts a view which is different to that of the Strasbourg Court (Section 2 HRA).

### The public duty to respect rights

The Act creates a duty on all public authorities, including the devolved institutions of Scotland, Wales and Northern Ireland, to act compatibly with Convention rights.<sup>114</sup> This is designed to make sure individuals’ rights are respected without any need for the courts to get involved. If a public body falls short, a claim can be considered by the courts and a judge can overturn a decision or direct a public body to stop acting unlawfully. Damages are available under the HRA, but compensation is generally fairly limited.

‘**Public authority**’ includes bodies such as government departments, local authorities and the courts. It also covers public hospitals, prisons and schools, for example. Such bodies in Scotland fall within devolved competence (health, criminal justice and education, respectively).

The duty also applies to private bodies when they perform ‘public functions’. So, the public duty can, in some circumstances, apply to publicly funded providers of social housing and some private health facilities.<sup>115</sup>

### Declarations of incompatibility

Where an Act of the UK Parliament cannot be read in a way that is compatible with Convention rights, the courts may make a ‘**declaration of incompatibility**’.<sup>116</sup>



When this occurs, the Act remains in force but the incompatibility is brought to the attention of Parliament. However, there is no legal obligation on government to change the law – in this way, the HRA respects the legislative sovereignty of Parliament.

Declarations of incompatibility are extremely unusual (only 20 final declarations have been made since the HRA was brought into force).<sup>117</sup>

*Fast-track ‘remedial orders’*

The UK Government may respond to a declaration of incompatibility through a fast-track **‘remedial order’**. This is a procedure whereby a violation of Convention rights can be fixed quickly by Parliament.<sup>118</sup> It allows the government to use secondary legislation to change the law within 60 days at the most.

A remedial order may also be used where there has been no declaration of incompatibility by a UK court, but there has been a decision of the ECtHR finding the UK in breach of the Convention (see below). Again, these are very rare.

The national human rights institutions

The Equality and Human Rights Commission is an independent statutory body responsible for protecting and promoting equality and human rights in Great Britain. It has a range of legal powers, including running formal inquiries and investigations, intervening in litigation and bringing some judicial review proceedings on its own initiative. The EHRC has specific duties under the HRA and the Equality Act 2010, set by Parliament.

The Scottish Human Rights Commission (‘SHRC’) was created by the Scottish Parliament and reports to it. The SHRC has general functions and duties concerning human rights issues that relate to devolved matters, including promoting human rights in Scotland. In particular it: encourages best practice; monitors law, policies and practice; conducts inquiries into the policies and practices of Scottish public authorities; intervenes in civil court proceedings; and provides guidance, information and education. Its current work includes monitoring the implementation of Scotland’s National Action Plan for human rights.<sup>119</sup>

The SHRC is recognised at the international level as an Independent National Human Rights Organisation and has ‘A’ status under the ‘Paris Principles’ (the UN guide for grading these bodies).

Separate bodies exists to protect equality and human rights in Northern Ireland, the **Equality Commission for Northern Ireland** and the **Northern Ireland Human Rights Commission**.

The Future of the Human Rights Act

The HRA has been subject to criticism, including by the current UK Government, which has made a manifesto commitment to publish proposals for a new British Bill of Rights during this Parliament. This would involve repealing the HRA.

The Scottish Government opposes this and it is not yet clear how these proposals would be reconciled with the devolution settlement. The HRA is reserved to the UK Parliament, but human rights are not. As we have seen, the rights in the Convention are relevant to a variety of devolved matters.

The European Court of Human Rights

The European Court of Human Rights (‘the ECtHR’ or ‘Strasbourg court’), based in Strasbourg, interprets and applies the provisions of the Convention. The UK – together with each of the other States of the Council of Europe – has agreed to “*abide by the final judgment of the court*”.<sup>120</sup>

The ECtHR is made up of judges from each of the States of the Council of Europe. Nominations are made by individual States, but judges are elected by the Parliamentary Assembly of the Council of Europe (which includes MPs from each of the countries in the Council).

Since 1960, the UK has allowed individuals to take cases against it to the Strasbourg Court. This route is one of last resort. The ECtHR will refuse to hear a claim if there is an effective domestic remedy which the applicant has ignored, such as an appeal to a higher court. If a case is **‘manifestly illfounded’** the court can also refuse to hear it.

Where a country breaches the Convention, the Court may require it to:

- pay compensation to affected individuals,
- stop doing whatever is causing the problem, and/or
- adopt **‘general measures’** to prevent the

violation from happening again – often this means changing the law.

Taking into account judgments from the Strasbourg court

UK courts must “take into account” judgments from the ECtHR (Section 2, HRA). These decisions are not directly binding on UK courts.

In practice, UK courts will follow the Strasbourg Court’s decisions if they are not:

“...*inconsistent with some fundamental substantive or procedural aspect of [UK] law and whose reasoning does not appear to overlook or misunderstand some argument or point of principle*”.<sup>121</sup>

This means that courts in the UK can refuse to adopt the ECtHR’s approach in cases where it would not work in our system.

For example, the ECtHR backtracked from finding that the UK rules on hearsay evidence in criminal trials were in breach of Convention rights after the UK Supreme Court forcefully disagreed in a carefully reasoned judgment.<sup>122</sup>

These differences of opinion create a **‘dialogue’** between the courts.

A conversation about rights?

The Strasbourg Court decided that prisoners serving a ‘whole-life tariff’ – serious offenders with a life sentence, where a judge has confirmed that they should spend their whole life in jail – should have an opportunity for their sentence to be reviewed. Without one, a whole-life term would constitute inhuman and degrading punishment (Article 3 ECHR). The Court of Appeal in England and Wales considered this judgment and said that the existing law – interpreted under the HRA to comply with Article 3 – provides for sufficient opportunity to ask for early release to be considered. Thinking about its position again, with the benefit of the Court of Appeal’s explanation of the way in which UK law works, the Strasbourg court has now agreed.<sup>123</sup>

There are a number of technical terms used in relation to the work of the Strasbourg Court. The two most significant are:

- The *‘living instrument’*

The ECtHR treats the Convention as a **‘living instrument’**. This means it is interpreted with reference to present day conditions, and in the light of changing moral standards or scientific developments. For example, over the past 50 years, the protection offered to the rights of gay and transgender people has changed significantly.<sup>124</sup>

The right of people with disabilities not to be discriminated against has also been recognised by the ECtHR, despite the fact that it is not mentioned in the original text of the Convention.<sup>125</sup>

- The ‘margin of appreciation’

States have a ‘**margin of appreciation**’ in the application of some rights.

This means that, in some cases which involve striking a balance between a legitimate public interest and the impact on an individual right (discussed earlier in this Chapter), the ECtHR may allow the government room – or a “margin” – to take a decision which is best suited to local law, policy and practice.

This is because the primary responsibility for protecting individual rights lies with States. The role of the Strasbourg Court is a ‘supervisory’ one. There may be a range of acceptable ways of responding to a problem, each of which might adopt a different strategy, while all meeting the requirements of the Convention.

The ECtHR recognises that national institutions are better placed to make local decisions than an international court. A wider margin of appreciation is allowed in cases raising issues of social and moral controversy where there is a lack of consensus among the Member States, such as assisted dying.<sup>126</sup> The countries of the Council of Europe have decided that the

Convention should be amended to reflect this principle in its preamble.<sup>127</sup>

### Protecting Convention rights in Parliament

#### Pre-Charge Detention in Terrorism Cases

After 9/11, Parliament was persuaded to introduce an extended period of pre-trial detention for terrorist suspects of up to fourteen days (in ordinary criminal cases, police have up to seven days to act before a person must be charged or released). In 2006, the Government sought to increase pre-charge detention to 90 days – with suspects held for almost three months without charge. Parliament refused, but extended the period to 28 days.

This measure was controversial and criticised by the UK Parliament Joint Committee on Human Rights, which expressed concern about the compatibility of the measure with a number of rights, most importantly, Article 5(3), which guarantees the right to be informed “promptly” of any charge. The Protection of Freedoms Act 2012 saw Parliament reduce this period again to fourteen days. Each of these debates saw MPs engage in detailed consideration of the unfairness of detention without charge and its consistency with Convention rights.

### Protecting Convention rights in Parliament

#### DNA and privacy

Until 2008, the UK National DNA Database retained the fingerprints and DNA of people never convicted of any offence, including children. In *S and Harper*, the ECtHR held that this blanket policy of indefinite retention was disproportionate and incompatible with the right to privacy. The ECtHR rejected the UK government’s argument that this retention was necessary to prevent crime or disorder or to protect the rights of others as the blanket retention of information did not strike “a fair balance between the competing public and private interests”.<sup>128</sup>

In 2009, the government proposed measures to retain the DNA of innocent people after arrest for up to six years (with provision for further extension). Following criticism, including from MPs, the Protection of Freedoms Act 2012 provides for DNA samples to be deleted after six months and for most DNA profiles and fingerprints to be destroyed after three years (subject to extension in some cases). This process involved close consideration of the balance to be struck between the right to privacy and the role played by DNA retention in the prevention and detection of crime.

### Protecting Convention rights in Parliament

#### Prisoner voting

In *Hirst v UK*<sup>129</sup>, the Strasbourg Court held that the UK’s blanket ban on prisoners voting in general elections was inconsistent with the obligation to hold free elections (Article 3, Protocol 1, which includes a right to vote). The Strasbourg Court held that conditions curtailing the right to vote must maintain the integrity and effectiveness of the right, and must be imposed in pursuit of a legitimate aim in a way that is proportionate. The blanket ban on prisoner voting did not fulfil these requirements. This decision has since been upheld by the Supreme Court.<sup>130</sup> It has also been confirmed by the ECtHR, although that Court has refused to offer prisoners any compensation.<sup>131</sup>

The UK does not have to give all prisoners the vote following this ruling. It can still stop prisoners voting without breaching the Convention. However, it cannot continue a ‘blanket ban’ if the UK wants to comply with its international law commitments.

In December 2013, a Select Committee of both Houses of the UK Parliament recommended that all prisoners serving sentences of less than 12 months should be entitled to vote. However, the ban remains in force. The UK will remain in breach of the Convention until Parliament acts to change the law.

### The Equality Act 2010

Although the common law enshrines the right of us all to the equal protection of the law, Article 14 of the Convention and the HRA protect only against discrimination in the enjoyment of other Convention rights.<sup>132</sup>

These guarantees are supplemented by the Equality Act 2010, which provides freestanding equality protection in the UK.

The Equality Act replaced a patchwork of anti-discrimination laws, and is for the first time a holistic legal framework for equal treatment in the law.<sup>133</sup> The Act applies in England, Scotland and Wales. It has limited effect in Northern Ireland, which has its own equality legislation.

#### Introduction

The Equality Act protects individuals against discrimination on the basis of ‘**protected characteristics**’. These are:

- disability;
- gender reassignment;
- pregnancy and maternity;
- race (including ethnic or national origins, colour and nationality);
- religion or belief;
- age;
- marriage and civil partnership;
- sex; and

- sexual orientation.

The Equality Act creates a wide-ranging framework for the protection of equality. It contains five key prohibitions:

- **Direct discrimination:** When a person is treated less favourably than another in a similar situation because they have, or are wrongly believed to have, a protected characteristic;
- **Indirect discrimination:** When a rule generally applies to everyone, but affects a particular group unfairly. If there aren’t fair reasons – known as objective justification – for the treatment, this will be unlawful;
- **Failure to make reasonable adjustments** to practices or premises to avoid disadvantaging disabled people;
- **Harassment:** Unwanted conduct related to a protected characteristic that has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment; and
- **Victimisation:** When a person takes legal action against discrimination or harassment and is subsequently victimised because of doing so.

The Act also protects someone from discrimination which happens because they are believed to be in a particular group or because they are associated with someone with protected characteristics. This latter protection is important for carers.<sup>134</sup>



If the reason they are treated differently is connected to their relationship with a person with disabilities, it may be unlawful.

### When does the Equality Act 2010 apply?

The Equality Act 2010 applies to both private and public bodies, including employers and service providers whether public or private. For example, it applies to small and large businesses, schools, hospitals, transport providers, banks, hotels, landlords and shops.

Equality law in action

A school excluded a Sikh boy – who was required to wear a turban as part of his religious observance – for non-observance of its uniform policy. The policy banned all headgear and made no exception for religious dress. By applying the rule without exception, the school was unlawfully discriminating against him.<sup>135</sup>

It applies to employment and recruitment, to services, to education and to housing, and to the decisions of public bodies (see below).

Come one, come all

Anyone providing the public with goods, services or facilities must do so without discriminating on the basis of any protected characteristic.

If a pub refuses entry to a group because they are Irish Travellers, then they have discriminated against them because of their race.<sup>136</sup>

A B&B owner who refuses to let a room to a gay couple discriminates on grounds of their sexual orientation.<sup>137</sup>

A bank could only be accessed by steps, with no working lift or ramp and with an ATM that couldn't be reached by wheelchair users. It is in violation of the equality duty to make reasonable adjustments to make its branch accessible to people with disabilities.<sup>138</sup>

*Disability and reasonable adjustments*

In recognition of the social barriers faced by people with disabilities, the Equality Act 2010 can require ‘**reasonable adjustments**’ to be made in order to ensure that people with disabilities receive the same opportunities, as far as this is possible, as someone who is not disabled.

Changes need to be made if a disabled person will be at a ‘**substantial disadvantage**’ if they are not made. This means facing a barrier which is not ‘**minor**’ or ‘**trivial**’. However, a change need only be made if it would be ‘**reasonable**’ taking into account a range of circumstances, including the nature of the change and its impact on the person with a disability.

A college disability officer who is blind asks for reasonable adjustments to be made to allow him to continue to do his job. The college invests in software to help him do his job, but five years later it still doesn't work. He can bring a successful claim under the Equality Act 2010.<sup>139</sup>

Changes can include providing someone with aids to help them do their job properly, changing the entrance to a shop to ensure that someone can get in or approaching how you do business differently. Service providers should anticipate and make adjustments if their service might affect disabled people as a class.

A solicitor usually only sees clients in his office. He has a client who suffers from agoraphobia and arranges to meet her at home, recognising the need for a reasonable adjustment to his usual practice.

In addition to the duty to make reasonable adjustments, it is unlawful to discriminate against someone for a reason “*arising as a consequence*” of their disability, without a proportionate justification.<sup>140</sup> One example where this may apply is where someone takes prolonged time away from work for reasons connected with their disability.

### Equal pay

The Equality Act 2010 continues to protect the presumption in law that men and women should earn equal pay for equal work. It enables women to challenge unequal pay and terms.<sup>141</sup>

Equal pay for equal work

251 women working for a local council recently won their Supreme Court claim for equal pay. Working as classroom assistants, support for learning assistants or nursery nurses, they were paid less than a group of mostly male groundskeepers and refuse workers who were entitled to substantial bonuses. The Supreme Court rejected the Council's case that because they worked in different places there could be no claim.

The decision benefited thousands of women working across different local authorities. The Court emphasised the purpose of the law, in addressing historical undervaluing of work traditionally done by women.<sup>142</sup>

The Inner House of the Court of Session applied the general principles set out by the Supreme Court in case against Glasgow City Council.<sup>143</sup> It gave a broad interpretation to the meaning of “associated employer” in section 1(6) (c) of the Equal Pay Act 1970. The Court found that Glasgow City Council was an associated employer of two LLPs, City Parking (Glasgow) and Cordia (Services), to which the Council had transferred its staff for services it would no longer provide. This meant that female claimants working for the LLPs would be allowed to compare their pay with male employees working for the Council.

### The public sector equality duty

The Equality Act also contains a **public sector equality duty**. This requires public bodies, in the performance of their functions, to give ‘**due regard**’ to three statutory equality needs:<sup>144</sup>

- The need to eliminate discrimination, harassment and victimisation;
- The need to advance equality of opportunity; and
- The need to foster good relations between different people when carrying out their activities.

The duty requires public bodies to consider each of these needs in a rigorous and open-minded way, whenever decisions which may affect equality are being taken. The aim is to make sure that the impact on potentially disadvantaged groups is considered at the policy-making stage.

Most public bodies are also required to comply with ‘**specific**’ duties to publish information showing their compliance with the equality duty and setting equality objectives.

What is a public body?

The public sector equality duty and the specific public sector equality duties apply to a range of public bodies specified by Parliament. This includes Ministers and government departments, local authorities and most public agencies.

Scotland

The Equality Act 2010 applies to Scotland and the power to legislate for equality is broadly reserved to Westminster. The Scotland Act 2016 proposes new powers to give the Scottish Parliament a greater ability to supplement the protections in that Act, including in respect of socio-economic inequality.

Northern Ireland

Although the Equality Act 2010 doesn’t apply in Northern Ireland (with a few limited exceptions), many of the same protected characteristics are protected from discrimination by a patchwork of earlier legislation.<sup>145</sup> Many features are similar. For example, Section 75 and Schedule 9 of the Northern Ireland Act 1998 provide for a single public sector equality duty. There are, however, a number of important differences. These include:

- the prohibition on age discrimination only applies to employment issues;

- some new protections against disability-related discrimination don’t apply in Northern Ireland; and
- protection against discrimination in private clubs is more limited in Northern Ireland.

The Equality Commission for Northern Ireland has recommended wholesale reform of equality law in Northern Ireland.<sup>146</sup>

Equality in Parliament

- The current Scottish Parliament continues to have a gender and ethnic imbalance, with only 45 women MSPs (out of 129 (35%)), and two (1%) MSPs from ethnic minority backgrounds, compared to around 5% of the Scottish population.<sup>147</sup>
- Parliamentary Committees often examine how government departments and public bodies meet their duties towards people with protected characteristics. For example, the Equal Opportunities Committee January 2016 report *Removing Barriers* made recommendations to the Scottish Government on how to tackle the under representation of ethnic minorities in the public sector.<sup>148</sup>
- The Cross Party Disability Group was convened to, amongst other things, increase awareness and raise the profile of rights for disabled people in the Scottish Parliament.<sup>149</sup>

Chapter 6: EU and international law

In earlier Chapters, we have explored how the UK legal system works and how individual rights are protected by law and statute. In this section, we look in more depth at how UK law is affected by the law of the European Union and wider international law.

The European Union

In 1957, representatives from six states signed the Treaty of Rome, creating the European Economic Community. In the aftermath of the Second World War, the Community was intended to secure peaceful co-operation and security as well as economic unity amongst European states. The UK joined in 1973.

The **European Union** (‘EU’), today draws together 28 states from across the continent. It promotes a common, pan-European approach to many political and economic issues. Following the EU Referendum vote in June 2016, the UK will now leave the EU, on current estimates by around April 2019. An understanding of the scope and influence of EU law for people living in the UK remains relevant for shaping our new relationship with the EU. A crucial part of the “Brexit” process will be to consider how the protection of rights, introduced through EU law over the period of the UK’s membership. The UK Government has indicated an

intention to legislate to repeal the European Communities Act 1972, and replace it with an Act which will incorporate rights and protections into domestic law. Fundamental issues, such as free movement of workers, remain uncertain.

The analysis which follows sets out the current position, but clearly events will have a significant and ongoing effect on the relevance of this information.

Understanding EU law

The European Economic Community started life as an economic union, characterised by the operation of a single internal market for the free movement of persons, goods, money and services, with the removal of barriers to trade between member states.

Today EU law covers a broad range of areas. For example, the EU now has ‘**competence**’ – the authority delegated to it by the member states – to develop policy and law in relation to agriculture, fishing, business, energy, health, justice, human rights, the environment and transport.

Free movement and EU citizenship

The free movement of goods, services and people has been the central pillar of the EU since its inception.

In 1992, the member states recognised the concept of EU citizenship, which is enjoyed by all citizens of the member states of the Union. A citizen of any EU member state enjoys the right to move to, live and work in, any EU member state. A Danish architect is free to join a firm in Belgium, an Irish student to study at a French university, and a British pensioner to retire to Spain or Portugal.

In addition to free movement, EU citizens also enjoy a range of other rights, including the right to vote for and stand as a candidate in the European Parliament elections, and the right to receive diplomatic and consular protection in any EU country.

There are a number of EU institutions which are responsible for developing and overseeing EU law. These include:

- **The European Commission:** Draws up proposals for law and policy on behalf of the Union. Once adopted, it works to ensure the correct implementation of decisions of the Council and Parliament.
- **The Council of the European Union:** This comprises Ministers from each of the member states and works



to determine law and policy within Europe. It reviews and amends the legislative proposals of the Commission as well as determining the law and policy agenda within Europe. Law is agreed by qualified majority vote. Together with the European Parliament, these bodies are the key decision-makers for the Union.

- **The European Parliament:** This comprises Members of the European Parliament elected in constituencies across Europe once every five years; it reviews and amends legislative proposals from the Commission and Council and calls for political and legislative action. It shares decision-making responsibility with the Council (on a ‘**co-decision**’ basis).
- **The Court of Justice of the European Union** (‘CJEU’): Comprises judges from each member state. It interprets EU law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions.<sup>150</sup>

There are different types of EU law, which take effect in different ways:

- **Treaties:** The primary law of the EU is contained in two treaties – the Treaty on the Functioning of the European Union (‘TFEU’) and the Treaty on European Union (‘TEU’). Together these treaties are sometimes called ‘**the Lisbon treaty**’. They set out the objectives

of the EU and the principles to be followed by the Member States in achieving those objectives.

Secondary EU legislation is used to obtain these objectives in practice. There are different types of secondary legislation, the most important of which are ‘**regulations**’ and ‘**directives**’.

- **EU regulations** automatically bind the UK when they come into force, without the need for new UK legislation. In practice, these rules automatically trump inconsistent domestic law.
- **EU directives** set out binding goals that member states must achieve, but they leave the decision as to how best to achieve that result to each member state. They give countries time to decide how to change the law. If they are not implemented within that period, or are badly or only partially implemented, individuals can still rely on their provisions against the state. In cases between individuals, the courts will interpret domestic law in line with the directive as far as it is possible to do so.

- **Judgments of the Court of Justice of the European Union:** The case law of the Court is binding on member states. It will be applied by domestic judges when they are thinking about questions involving EU law.

The goal of setting common standards in key policy areas would be undermined

if each member state were able to pick and choose which EU laws to apply. So, members of the EU agree that EU law will have ‘**supremacy**’. This means that, in practice, EU law will trump inconsistent national law. They are ‘**directly effective**’, which means that they confer rights on individuals which can be enforced against other individuals, and against the state.

Driving discrimination law

“The Court has repeatedly held that the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure.”

Court of Justice of the European Union, *Schröder*<sup>151</sup>

One example of the impact of EU law is in driving change in anti-discrimination law across Europe. The right to equal pay between men and women has been recognised by the EU ever since its inception, and was an influential factor in the introduction of the Equal Pay Act 1970 on the eve of the UK’s accession.

More recently, a series of EU laws on non-discrimination was directly responsible for the introduction of many of the equality rights we now enjoy in the UK. Decisions of the Court of Justice of the European Union continue to inform the development of our law under the Equality Act 2010.

EU law in the UK

The **European Communities Act 1972** (‘ECA’) provides for EU law to have direct effect in domestic law. It also allows Ministers to use secondary legislation to implement changes to EU law which may be needed as a result of EU directives.

In practice ‘**direct effect**’ means that any legislation – including primary legislation – which is incompatible with EU law is ‘**disapplied**’. This means the law will stay on the statute books, but will stop having any effect in so far as it is inconsistent with the European provisions.

Individuals can directly enforce positive rights created by directives against the state, but not against other individuals.<sup>152</sup> However, the European Communities Act 1972 requires courts to interpret national law in a way that respects any EU law that applies. This means that in areas with an EU law connection, EU law can play an important role in domestic disputes.

EU law and fundamental rights

Respect for the fundamental rights of EU citizens is one of the general principles of EU law. It is drawn from the constitutional traditions common to member states, and upheld by the Court. The Treaty on the European Union explicitly recognises a role for the EU in upholding human rights.<sup>153</sup>

It also states that fundamental rights as protected by the European Convention on Human Rights are part of EU law.<sup>154</sup>

The Court of Justice of the European Union

Only the CJEU can declare EU legislation unlawful. If a question is raised about the legality of an EU measure, a domestic judge can refer the matter to the CJEU for an answer.

UK courts also have the power (and in certain circumstances, an obligation) to send cases to the CJEU to ask them to clarify the interpretation of EU law. These ‘**preliminary references**’ take place during the course of a case before the national court. The CJEU will answer the questions about the specific point of law referred, but will generally leave the final decision on the case to the domestic courts.

Unlike the European Court of Human Rights, individuals can’t generally take complaints about EU law to the Court of Justice. There is an exception for individuals who have been affected directly by the activities of the European institutions, for example persons or companies subject to EU sanctions.

The Charter of Fundamental Rights of the European Union

The **Charter of Fundamental Rights of the European Union** (‘the Charter’) was agreed by the member states of the EU and came into force in 2009.

It is binding on EU institutions and member states when they are acting to give effect to EU law. The rights in the Charter include key political rights – such as the right to liberty and security – and also some social and economic rights, such as the right to equal pay for men and women.

The purpose of the Charter is to codify, rather than extend, the rights of EU citizens, and it is binding on EU institutions developing EU law.

The Charter provides an important addition to the protection offered by the ECHR and the HRA:

- It protects social and economic rights which are not in the ECHR or the HRA.
- Where Convention rights protected by the ECHR are also covered by the Charter, it can provide greater protection than the Human Rights Act.

If an Act of Parliament clearly violates both the Charter and the Convention, the European Communities Act 1972 will require the offending Act to be disapplied. The only remedy available under the HRA would be a declaration of incompatibility.

### The Charter in action

Two employees at a foreign embassy wanted to sue their employers in the Employment Tribunal, alleging unfair treatment, race discrimination and breaches of the rules on working time. Their case was barred by the application of the State Immunity Act 1972 and they complained that this was incompatible with the right to a fair hearing under both Article 6 HRA, and Article 47 of the Charter. The language of the State Immunity Act 1972 was plain. The only remedy open under the HRA was a declaration of incompatibility. However, in so far as the claim related to EU law – race discrimination and working time – the State Immunity Act 1972 was set aside and their claim could proceed. The rest of their case was struck out.<sup>155</sup>

## EU legislation and Parliament

MPs and MSPs receive copies of EU documents and explanatory notes to keep them up-to-date with developments that may affect the UK and their constituents.

MPs on the House of Commons European Scrutiny Committee and Peers on the House of Lords European Scrutiny Committee (and its various Sub-Committees) have particular responsibility for scrutinising EU laws that the government puts to Parliament.<sup>156</sup> The reports of these Committees are designed to help inform Parliament in its

consideration of the work of the EU and its impact on domestic law and policy.

In some areas the UK has to decide whether to ‘**opt-in**’ to a new EU law. The Committees closely scrutinise these decisions, and the wider role of the UK Government in the adoption of new EU law.

The Culture, Tourism, Europe and External Relations Committee of the Scottish Parliament has, amongst its responsibilities, the obligation to scrutinise proposals for European Union legislation; the implementation of European Communities and European Union legislation; any European Communities or European Union issue; and the development and implementation of the Scottish Administration’s links with countries and territories outside Scotland, the European Union (and its institutions) and other international organisations.

### *Ensuring UK legislation reflects EU law*

The UK Parliament is responsible for considering changes to UK legislation designed to implement EU law. This is often done through secondary legislation under the European Communities Act 1972. However, major changes are regularly made by primary legislation. For example, the Data Protection Act 1998 was intended to implement the Data Protection Directive, adopted in 1995.

The Scottish Parliament has this responsibility in relation to devolved areas, such as fisheries, agriculture, the environment, and justice. Section 29 of the Scotland Act 1998 obliges any Act of the Scottish Parliament to be compatible with EU law.

The role of both Parliaments in ensuring compliance with EU law is particularly important in relation to the implementation of EU directives. Directives will require domestic law to make them work. Directives which aren’t implemented well – or on time – may be given direct effect by the courts.

## International law

This section expands on the relationship between UK and international law and highlights some of the UK’s most important international obligations for individuals. It also identifies key ways in which international law might impact on the work of Parliament.

## How does international law affect our law?

In the UK, international law is treated as separate and distinct from domestic law. This ‘**dualist**’ approach means that international law is not automatically part of domestic law. This means ‘**treaty**’ obligations and ‘**customary international law**’ which bind the

UK do not automatically create rights and obligations which individuals can enforce in the domestic courts.

### *Treaties*

Treaty-making is the responsibility of the Crown, exercised typically by the Foreign Secretary. Parliament plays an important role in ‘ratification’, the process which determines whether a treaty will bind the UK internationally. No international treaty will bind the UK unless it has been laid before the UK Parliament and neither House objects.<sup>157</sup> The UK Parliament always has the opportunity to debate the implications of a treaty and could vote against the UK being bound by the treaty. Within their devolved competences, Scotland and Northern Ireland also have particular responsibilities for the UK’s international obligations.

Once ratified, Parliament may decide to ‘incorporate’ the UK’s international obligations into domestic law. Ratification binds the UK in international law, but further steps are very likely to be needed before the obligations take effect in domestic law. For example:

- The UN Convention against Torture 1984 requires states to make acts of torture a criminal offence. The UK ratified the Convention in 1988. The Criminal Justice Act 1988 then created a framework for the prosecution of acts of torture.

- The Scottish Parliament enacted the International Criminal Court (Scotland) Act 2001 which expressly seeks to give effect to the obligations under the Rome Statute 1998.

### *Unincorporated treaties*

A treaty can be ratified (and therefore internationally binding) but not formally incorporated into domestic law. The ‘unincorporated’ treaty obligations remain binding on the UK in international law, and will also remain relevant to the UK and Scottish Parliaments’ consideration of law, policy and practice. The rule of law assumes that the UK intends to comply with its obligations in international law.<sup>158</sup>

The Ministerial Code imposes an overarching duty on Ministers to comply with the law, which is interpreted as including international law and treaty obligations.<sup>159</sup> This duty is expressly set out in the Scottish Ministerial Code.<sup>160</sup> This also means that international law will be relevant to the interpretation of domestic legislation and to the development of the common law.

In considering what constitutes the ‘interests of children’ for the purpose of the Children Act 2004, the Children and Young People’s Commissioner Scotland must have regard to the UN Convention on the Rights of the Child, as must the court if called upon to interpret this provision.<sup>161</sup>

The way in which judges interpret the law – both statutory law and common law – can be informed and influenced by the interpretation of treaties.<sup>162</sup> Where an international law obligation is relevant to an issue before a Scottish court, the judges may look at that obligation to help them reach an interpretation which meets our international obligations in practice. For example, in deciding a disability discrimination case under the Human Rights Act 1998, the Supreme Court considered the UK’s obligations under the UN Convention on the Rights of Persons with Disabilities.<sup>163</sup>

Some treaties also provide specific international mechanisms for their interpretation and enforcement. The Court of Justice of the European Union is one example. Although a treaty generally has no formal binding effect in domestic law (absent ‘incorporation’), Ministers, officials and Parliament will be aware that the UK’s adherence to the treaty obligations is being monitored internationally by other treaty parties.



Customary international law

It is generally accepted that customary international law is a source of the common law of Scotland. Scots courts have been clear that “a rule of customary international law is a rule of Scots law”.<sup>164</sup> However, there is no absolute right to bring a claim before the Scottish courts solely on the basis of customary international law.

Whether a person can bring a case relying on a rule of customary international law depends on: (a) the subject matter of the dispute; (b) whether the claim has any other basis in domestic law; (c) the importance of the dispute; (d) the complexity of the issue, and (e) whether there is any constitutional objection (for example, a clash between the rule of custom and an important democratic principle recognised by the common law).<sup>165</sup> Irrespective of whether a particular customary international rule can be directly enforced in the domestic courts, it can influence the general development of the common law.

Customary international law also influences the work of Parliament. For example, reporting on the UK’s involvement in Kosovo, the House of Commons Select Committee on Foreign Affairs considered the development of customary international law on humanitarian intervention.<sup>166</sup>

International human rights law

The post-war political settlement included the development of international treaties which protect minimum standards of individual rights in international law. The UN Declaration of Human Rights, agreed in 1948, has been joined by a framework of specific guarantees designed to protect the most vulnerable communities in every society.

The UK ratified the International Covenant on Civil and Political Rights (‘ICCPR’) and the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’), in 1976. Every few years, the UK submits a ‘periodic report’ on its performance to the bodies set up to monitor compliance with those treaties in practice. These are the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights respectively.

Other key human rights treaties ratified by the UK include:

- The Convention relating to the Status of Refugees (‘the Refugee Convention’);
- The Convention on the Elimination of Racial Discrimination (‘CERD’);
- The Convention on the Elimination of all Forms of Discrimination against Women (‘CEDAW’);
- The UN Convention against Torture (‘UNCAT’);
- The Convention on the Rights of the Child (‘CRC’); and
- The Convention on the Rights of Persons with Disabilities (‘CRPD’).

These treaties all have their own individual monitoring mechanisms. The comments and recommendations of the UN Committees in relation to the UK can inform the work of public agencies, government departments and Parliament.

The UK accepts the ‘right of individual petition’ in relation to both CEDAW and CRPD. This means that people in the UK who think that UK law, policy or practice is unlawful can take their complaint directly to the relevant UN Committee.<sup>167</sup>

Ratifying the Convention on the Rights of Persons with Disabilities

The CRPD (and its Optional Protocol) was ratified by the UK in June 2009. This obliges the UK to take concrete action to comply with its obligations under the CRPD.<sup>168</sup>

In 2012, the UK Parliament’s Joint Committee on Human Rights published a report on the right of disabled people to independent living within the context of the CRPD. It found that the government had not conducted an assessment of the cumulative impact of budget cuts and other reforms on disabled people. It regretted that the CRPD had not yet played a significant role in the development of policy and legislation in the UK.

Since ratification, the Supreme Court has confirmed that it will consider the CRPD in disability cases brought under the HRA, where it can assist the court in its interpretation of Convention rights.<sup>169</sup>

Torture and practice at home?

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘UNCAT’) was ratified by the UK in 1988.

The UK has also signed the Optional Protocol to UNCAT (‘OPCAT’), which establishes a system of unannounced and unrestricted visits by independent international and national monitoring bodies to places where persons are deprived of their liberty.

The UK National Preventive Mechanism (‘NPM’) established under the OPCAT is currently made up of 20 visiting or inspecting bodies who visit places of detention such as prisons, police custody and immigration detention centres. The NPM is coordinated by HM Inspectorate of Prisons (‘HMIP’). The Joint Committee on Human Rights has recommended a number of reforms to UK law in the light of our UNCAT obligations.<sup>170</sup>

Children’s rights and the UNCRC

The UN Convention on the Rights of the Child is an international treaty ratified by the UK. The UK government has committed to ensuring that children have the rights guaranteed to them under the UNCRC. The UNCRC influences the way in which Convention rights protected by the HRA are applied by the domestic courts of Scotland, as well as England and Wales.<sup>171</sup>

The Convention has been referred to with approval by the Scottish courts when interpreting the provisions of the Children (Scotland) Act 1995.<sup>172</sup> The Scottish Parliament has further legislated in the Children and Young Persons (Scotland) Act 2014 for a continuing duty upon Scottish Ministers and public authorities to consider the steps necessary to secure further or better effect of the UNCRC requirements in Scotland.



## Chapter 7: Want to know more?

### Where next for legal help?

This guide is designed as a basic introduction to laws which most affect the work of MSPs, their staff at Holyrood and Scottish MPs and their staff at Westminster.

However, many parliamentarians face constituents with complex legal problems on a weekly basis. They also deal with difficult legal questions in their work in parliament. This section is designed to help provide some easy signposts to where further help and support is available.

### Can my constituent get legal aid?

Legal Aid in Scotland is provided by the **Scottish Legal Aid Board**<sup>173</sup>. All individuals are entitled to free legal assistance if arrested, detained or questioned at a police station, if they are arrested and appear from custody in the Sheriff or Justice of the Peace Court and in certain other specific circumstances. Legal aid may be available for a wide range of other legal advice and representation, but means tests may apply.

Whether a person is able to get legal aid will depend on whether the issue they need advice on involves Civil Law, Criminal Law or involves the Children's Hearing system. In order to get legal aid an individual must contact a solicitor who is registered with the Scottish Legal Aid Board; a **'Solicitor Finder'** can be found on their website.<sup>174</sup>

### Criminal legal aid

The Scottish Legal Aid Board gives funding to help people who qualify to get legal advice, or for a solicitor to act for them in court. The help an individual can get will depend on:

- the seriousness of the charges they face
- whether they are in custody
- whether they plan to plead guilty or not guilty

A person who is detained or arrested by the police must be offered access to legal advice before they are interviewed. In most cases this will involve the police calling the **Scottish Legal Aid Board's Solicitor Contact Line** who can pass a message onto a suspect's own solicitor, provide legal advice over the telephone or send the **Police Station Duty Solicitor** to give advice at the police station. Advice over the telephone, from a Police Station Duty Solicitor or from a suspect's own solicitor if they have previously instructed them is free.

A person who is then held by the police in custody to appear in court or is released on an undertaking to appear on a specific later date is entitled to use the services of the **Duty Solicitor** when they first appear in court for free. If they wish to use their own solicitor a means test will be applied by the Scottish Legal Aid Board.<sup>175</sup>

A suspect who is not held in custody and

is later cited by the Procurator Fiscal to appear in court cannot use the Duty Solicitor and has to use another solicitor. It may be possible for that individual to get **Advice by Way of Representation** from a solicitor of their choice if that solicitor is registered with the Scottish Legal Aid Board. A means test will be applied.

An accused who appears on summary complaint in the Sheriff Court or Justice of the Peace Court and pleads not guilty can then get Criminal Legal Aid for the trial and any following deferred sentence, but will have to show they are financially eligible, and that it is **"in the interests of justice"** to grant legal aid – in short, that it would be unfair to them, the court, or someone else if they did not have a solicitor.

An accused, who first appears in the Sheriff Court on Petition for a more serious crime, is automatically entitled to legal aid while they remain in custody and can choose to use either the Duty Solicitor or their own solicitor. Once they have been released on bail, or fully committed for trial, their solicitor should apply for criminal legal aid. There is no "interests of justice" test in solemn cases and the Scottish Legal Aid Board only has to consider whether paying for legal assistance would cause too much hardship to the accused or his dependants.

A convicted person who wishes to appeal against their conviction or sentence can



obtain legal aid. A means test will apply unless legal aid was in place at trial. There is no merits test as such an appeal can only proceed to a hearing with the leave of either the Sheriff Appeal Court or High Court of Justiciary (depending on whether it is an appeal arising from a summary or solemn case).

Civil legal aid

Civil legal assistance helps people to get legal advice or to put their civil case in court. It may be free or they may have to pay something towards it and in some cases a contribution will be required from an individual with an income above a certain level.

Of course some civil disputes can be resolved without going to court and then an individual can get **Civil Advice and Assistance**. This helps pay for advice from a solicitor on any matter of Scots law – for example, to try to settle a dispute without going to court. As well as giving advice about the matter, a solicitor can:

- Give advice on whether there is a legal case to take forward
- Try to negotiate with the other party to settle it
- Give advice on whether to apply for legal aid to take the matter to court
- Write letters or get medical or expert reports.

- Apply for civil legal aid

If an individual qualifies financially for **Civil Legal Aid or Civil Advice and Assistance** they may need to pay a contribution towards the cost of the case. If they win or keep money in the case, they may have to pay up to the full cost of the work done by their legal team.

Civil legal aid covers...

- Divorce and other matters affecting families and children
- Trying to get compensation for injuries after an accident or for medical negligence
- Housing matters such as rent or mortgage arrears, repairs and eviction
- Debt and welfare rights
- Matters relating to immigration, nationality and asylum
- Adults with incapacity - guardianship and intervention orders
- Arranging a power of attorney

Children’s hearings

The **Scottish Children’s Reporter Administration** runs the system of **Children’s Hearings** in Scotland.<sup>176</sup> Generally children are referred to a Children’s Hearing because the Children’s Reporter has concerns about them.

Legal aid is available for children or an adult, such as a parent, involved in the upbringing of a child who is going to or has been to a children’s hearing. This form of legal aid also covers court hearings that are connected to children’s hearings. In this context a ‘child’ means someone under 16 or up to 18 if that child had been placed on a compulsory supervision order by a children’s hearing. A means test is generally applied and in some cases a contribution will be required from an individual with an income above a certain level.<sup>177</sup>

How can an individual access legal aid?

Individuals who are detained or questioned in a police station must be given access to legal advice. The way to access legal aid is to contact a legal aid solicitor, who will apply for legal aid on their behalf.

Evidence is key

Applicants should provide their legal aid solicitor with as much evidence as possible – particularly in relation to their financial circumstances, and the merits of the case.

England, Wales and Northern Ireland

The Scottish Legal Aid Board only funds advice and representation in respect of Scots Law. In England and Wales and Northern Ireland, independent legal aid schemes will determine access to legal aid.

In each jurisdiction, means and merits tests apply to most legal aid. In England and Wales there are wide areas of the civil law; including consumer and contractual disputes, most immigration claims, private family law cases, personal injury cases, advice on making a will and defamation claims for which legal aid is not available.

As in Scotland in both jurisdictions a merits test requires that the applicant demonstrate an objective basis for their case, as well as showing that it is reasonable to use public funds towards it.

More detailed information on the legal aid schemes in England and Wales and Northern Ireland can be found online.<sup>178</sup>

When legal aid is not available

Many parliamentarians will see constituents who are looking for help because they are not eligible for legal aid and cannot afford legal advice. Although MSPs and MPs may not be able to provide legal advice, they often do provide support. They can help individuals understand their options and often help people to better explain their complaints in correspondence.

MSPs and their surgeries build relationships with local law centres and advice services, and are able to refer individuals for help on a local level. Some national sources of legal advice and support are outlined, below.

Where next for advice?

**Citizens Advice Scotland** gives generalist free advice and information from its local bureaux. Information and contact details can be found online at their website.

There are a range of other independent local advice agencies. **AdviceUK** provides details of agencies in Scotland, England and Wales.

Local help can be found through the **Scottish Association of Law Centres**. Many Scottish Local Authorities operate advice services for residents with housing, benefits and money and debt issues.

**LawWorks** provides details of free legal advice services provided by law students at Edinburgh, Aberdeen and Strathclyde Universities.

The **Faculty of Advocates’** Free Legal Services Unit provides free legal representation subject to a referral from certain agencies listed on their website.

The **Law Society of Scotland** ‘Find a Solicitor’ facility on its website can help source an appropriate solicitor

The **Equality Advisory and Support Service** may be able to provide advice in some equality cases.

Some solicitors, and through them advocates, may offer advice on ‘fixed-fee’ or ‘no-win, no-fee’ conditional fee arrangements.

The **Scottish Legal Aid Board** can advise on eligibility for legal aid and court processes.

**ACAS** gives advice on employment matters and provides mediation for employment disputes.

*In Northern Ireland*

**Citizens Advice Northern Ireland**.

**Advice NI** for free advice on tax, benefits and debt problems.

The **Equality Commission Northern Ireland** may be able to give free advice on matters relating to discrimination.

*In England and Wales*

**Citizens Advice in England and Wales**.

Local law centres in England and Wales can be found through the **Law Centres Network**.

**LawWorks** provides details for local free legal advice from solicitors.

The **Bar of England and Wales Pro Bono Unit** offers free legal representation, subject to a referral by a Citizens Advice Bureau, a law centre or an MP.

The **Personal Support Unit** provides support in civil proceedings. They are based at a number of courts across the country.

The **Equality Advisory and Support Service** may be able to provide advice in some equality cases.

## Legal help and support at Holyrood

There are a number of sources of legal support available at Holyrood.

**The Scottish Parliament’s Information Centre** (SPICe) is the key resource for MSPs to find information on bills passing through parliament and the parliamentary process.<sup>179</sup> Research briefings and fact sheets are available across all areas of the Parliament’s competence. In particular, on justice matters, there are regular briefings on the operation of the justice system and, on parliament and government, broader constitutional and electoral matters are considered.

**Certain Parliamentary Committees** will have considered a matter in more detail and can direct to relevant expertise. These include:

- The Justice Committee and its sub-committee on Policing
- the Delegated Powers and
- Law Reform Committee. The latter’s clerks are often a very helpful source of information for MSPs.

**The Non-Governmental Bills Unit** can provide advice for any MSPs who are considering lodging a proposal for a Members’ Bill.

## Legal help and support at Westminster

### *The House of Commons*

There are also number of sources of legal support available at Westminster:

- The **House of Commons Library** – and their colleagues in the House of Lords – will be the first port of call for many MPs seeking help on legal issues. The Library provides impartial and independent professional research support to MPs and their staff.

They produce briefings on most topical areas of interest and on all Bills progressing through Parliament.

- The **Office of Speaker’s Counsel** (‘OSC’) provides legal advice and support to Mr Speaker, the Clerk and all the departments of the House as an institution.

**The Office does not advise Members and their staff**, but is always happy to assist Members to find an alternative source of advice or to indicate where an answer may be found.

- **Specialist Select Committees:** There are a number of Select Committees in both Houses which may already have produced a report on a matter of legal interest.

These Committees have access to their own dedicated legal advisers and specialist clerks.

- Many **All-Party Parliamentary Groups** exist for MPs and Peers with an interest in legal issues. These include groups on Legal and Constitutional Affairs, Legal Aid and the Rule of Law.

## Legal help and support from others

JUSTICE has worked with MPs on legal issues within our expertise since our creation in 1957. JUSTICE Scotland was launched in 2012 and aims to provide similar assistance to MSPs. In areas where we work, we regularly receive and answer questions from parliamentarians. Information about our work, and details on how to contact our staff, is available at the JUSTICE website.

A significant number of organisations outside both Parliaments may be willing to help MSPs, MPs and their staff on legal issues within their area of expertise. These include professional bodies, universities and academics, expert practitioners and civil society organisations.

### *Professional bodies*

- Law Society of Scotland
- Law Society of England and Wales
- Law Society of Northern Ireland
- Faculty of Advocates
- Bar Council
- Bar of Northern Ireland

### *Academic bodies*

Many academic institutions and individual academics are happy to assist Parliamentarians on issues within their field of interest. Those which work on legal and constitutional issues include:

- The Centre on Constitutional Change at the University of Edinburgh
- The University College London Constitution Unit
- The Bingham Centre for the Rule of Law
- LSE Institute of Public Affairs (Constitution Project)

### *Other sources of help*

Specialist organisations with legal expertise work in many of the areas where MPs will receive most calls for help.

## Equality and Human Rights

MSPs, MPs and staff with questions about equality and human rights issues may find the **Scottish Human Rights Commission**, the **Equality and Human Rights Commission**, or the **Northern Ireland Human Rights Commission** helpful. For equality questions in Northern Ireland, contact the **Northern Ireland Equality Commission**.

**Liberty** is a campaign organisation working on human rights and civil liberties in the UK. Liberty also runs an **advice line** on these issues, which is open to the public.

Both **Amnesty International** and the **British Institute of Human Rights** work on human rights issues in the UK.

Many other organisations work actively on specific human rights issues in the UK, focusing on, for example, health, children or disability. Many will have specialist legal expertise which MPs and staff may find useful. Note that this list is not exhaustive:

- [Age UK](#)
- [Together \(Scottish Alliance For Children’s Rights\)](#)
- [The Equality and Diversity Forum](#)
- [Inclusion Scotland](#)
- [Fair Trials](#)
- [Scottish Child Law Centre](#)

- [Howard League Scotland](#)
- [Scottish Association for Mental Health](#)
- [REDRESS](#)
- [Reprieve](#)
- [The Prison Reform Trust](#)
- [The Public Law Project](#)
- [Scottish Women’s Rights Centre](#)
- [Rape Crisis](#)
- [Ethnic Minorities Law Centre](#)

### *Immigration*

MSPs, MPs and their caseworkers may regularly handle questions about immigration law. The following contacts may be helpful:

- [Scottish Refugee Council](#)
- [The Immigration Lawyers Practitioners Association](#)
- [The Joint Council for the Welfare of Immigrants](#)

### *Housing*

MSPs, MPs and their caseworkers may regularly handle questions about housing law. The following contacts may be helpful:

- [The Housing Law Practitioners Association](#)
- [Shelter Scotland](#)



# References

1 This was first proclaimed in the Declaration of Arbroath 1320, which asserted that Robert the Bruce ruled Scotland with the consent of the people and subject to him maintaining the integrity and independence of Scotland as a nation.

2 C. Russell, *James VI and I and his English Parliaments* (OUP, 2011), Ch. VII, "The Union", pps. 126-7.

3 David Howarth, David Feldman (Ed), *Law in Politics, Politics in Law* (2014), Chapter.3.

4 See s63A Scotland Act 2016.

5 The Northern Ireland Act 1998 (which was founded on the terms of the Good Friday Agreement) and the Government of Wales Act 1998. Both have been subsequently amended.

6 The Scottish Parliament is also prevented from legislating so as to create law that would be law of a country other than Scotland or to remove the Lord Advocate from his role as independent prosecutor and investigator of deaths in Scotland.

7 These were previously called 'Sewel Motions' and may still be referred to by this name. See s28(8) Scotland Act 1998 as amended.

8 AV Dicey, Introduction to the *Study of the Law of the Constitution* (1885), p.494.

9 In the 1953 case of *McCormick v Lord Advocate*, 1953 SC 396; 1953 SLT 255; [1953] ScotCS CSH\_2, the then Lord President stated that the principle was not part of Scotland's constitutional history, and doubted it could be said to be true for a UK Parliament founded by a treaty between nations. In more recent judgments, the Supreme Court has hinted that the common law may limit parliamentary sovereignty, for example the non-binding opinion of Lord Hope in *Jackson v the Attorney General* [2005] UKHL 56, which was a case about the Hunting Act 2004.

10 See, for instance, the decision of the Supreme Court in *Axa General Insurance Limited v HM Advocate*, [2011] UKSC 46; [2012] 1 A.C. 868; 2012 S.C. (U.K.S.C.) 122; 2011 S.L.T. 1061.

11 As noted by Lord Hughes (dissenting in part) in *R (Evans) v Attorney General* [2015] UKSC 21 (the 'black spider memos' case) at [154].

12 Developments were not always equivalent. For instance, torture was made illegal in England some time before Scotland, leading to instances where those accused of crime were subject to 'extraordinary rendition' from England to be tortured in Scotland.

13 *A and others v Secretary of State for the Home Department* [2004] UKHL 56 at [42]

14 s12-14 of the Judiciary and Courts (Scotland) Act 2008.

15 s1 of the Judiciary and Courts (Scotland) Act 2008.

16 Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2) [1999] 2 WLR 272. Interestingly, this was a case where one of the Scottish judges applied the principles already established in Scots law into English law.

17 These documents are available online from the respective government websites.

18 The Court Reform (Scotland) Act 2014 has introduced a new Sheriff Appeal Court which started to hear appeals in September 2015.

19 *McInnes v HM Advocate* [2010] UKSC 7 at [5] (Lord Hope).

20 Criminal Procedure (Scotland) Act 1995, section 124(2), as amended. Once the compatibility issue is resolved, the Supreme Court must remit the case back to the High Court for disposal, meaning that the High Court of Justiciary remains the final court of appeal for all criminal matters in Scotland.

21 The new Sheriff Appeal Court introduced by the Court Reform (Scotland) Act 2014 started to hear civil appeals in January 2016. The Act has also introduced a new Personal Injury Court, which commenced operating in September 2015.

22 The UK tribunal system is largely arranged on a two-tier basis. The First-tier Tribunal comprises lots of different chambers dealing with disputes in the first instance. Appeals from the First-tier go to the appropriate chamber in the Upper Tribunal. From there, you can appeal to the Courts of Appeal (England and Wales and Northern Ireland), or to the Court of Session (Scotland). Some specialist tribunals, such as

the Employment and Employment Appeals Tribunal, and the Competition Appeal Tribunal, make up separate jurisdictions which exist outside the two-tier structure.

23 Locke, *Second Treatise of Government* (1689), chap. XVII, s.202, p.400.

24 *AXA General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46, at [51], citing himself in *R (Jackson and others) v Attorney General* [2005] UKHL 56

25 *Entick v Carrington* [1765] EWHC KB J98.

26 See s1 Constitutional Reform Act 2005 and s1(a)(i) of the Legal Services (Scotland) Act 2010. Section 15 of the proposed 2014 Scottish Independence Bill stated "[t]he principle of the rule of law continues to apply in Scotland".

27 The Scottish Ministerial Code at [1.2], available online at <http://www.gov.scot/Publications/2016/08/1393>.

28 The Civil Service Code (Scottish Executive version) at Paragraph 6, available online at <http://www.gov.scot/Resource/Doc/923/0110016.pdf>.

29 Bingham, *The Rule of Law* (2010), p.9.

30 Bingham, *The Rule of Law* (2010).

31 R (*Secretary of State for The Home Department*) ex parte *Khawaja* [1983] 2 WLR 321, p.111.

32 *A v Secretary of State for the Home Department* ('*Belmarsh*') [2004] UKHL 56 at [237].

33 *Railway Express Agency Inc v New York* (1949) 336 U.S. 106 at [112].

34 See Bingham, *The Rule of Law* (2010), p.55.

35 *Short v Poole Corporation* [1926], Ch.66, at p. 90, 91, (Warrington LJ)

36 *R v Secretary of State for the Home Department ex p. Leech* [1993] 3 WLR 1125, at p.210.

37 Magna Carta (1215), Article 40.

38 HC Deb, 15 Dec 1948, Vol 549, Col. 1221.

39 *Bank Mellat v HM Treasury* [2013] UKSC 38 at [81]. Although Lord Hope dissented in this case – meaning he disagreed with its outcome

– this summary of the principle of open justice is uncontroversial.

40 See Justice and Security Act 2013.

41 See also, *Bank Mellat v HM Treasury* [2013] UKSC 38 at [3] and [74].

42 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, at p.638.

43 *Kennedy v The Charity Commission* [2014] UKSC 20 at [133].

44 *Christian Institute and others v Lord Advocate* [2016] UKSC 51

45 In an exception to this rule, Parliament can authorise Ministers to amend primary legislation in a later statutory instrument ('secondary legislation'). This practice is commonly known as a 'Henry VIII Clause' and is generally subject to close scrutiny by Parliament. Locke, *Second Treatise of Government* (1689), chap. XVII, s.202, p.400.

46 For a description of the equivalent process in the UK Parliament, see the JUSTICE publication for MPs and Peers, *Law for Lawmakers*.

47 For instance, the Damages (Asbestos-related Conditions) Scotland Act 2009 was introduced specifically to reverse the decision of the courts that pleural plaques, being in themselves harmless, could not form the basis for a compensation claim. The subsequent legal challenge to the legislation (Axa, Petitioner) was rejected by the House of Lord's successor, the UK Supreme Court (see Chapter 1).

48 *Adler v George* [1964] 2 QB 7.

49 *Pepper v Hart* [1993] AC 593.

50 *Wilson v First County Trust* (No.2) [2003] UKHL 40 at [66].

51 *Thoburn v Sunderland City Council* [2002] EWHC 195 Admin at [62].

52 *Donoghue v Stevenson* [1932] AC 562. The 'Paisley Snail' has become known as the origin of the law of negligence, not just in Scotland and England but in common law jurisdictions across the world – although it may never have existed. Once the legal point had been settled, the manufacturer's settled the case and Mrs Donoghue's claims were never examined by the court.

53 Lord Advocate's Reference 1 of 2001, 2002 SLT 466. Such judicial activism is sometimes controversial on the basis that it is really a matter for the Scottish Parliament to amend Scots Criminal Law. Common law sexual offences have now been superseded by the Sexual Offences (Scotland) Act 2009.

54 The opposite occurs too but less frequently, as the size of the jurisdictions mean it is relatively unusual for cases in Scotland to consider points before similar points have been taken in England. An exception has been in the human rights area where the enforceability of human rights in the Scotland Act 1998 meant many of the leading early human rights cases considered by the Supreme Court were Scottish cases.

55 The controversial dispute resolution mechanisms of the proposed Transatlantic Trade and Investment Partnership between the EU and the US are one example

56 *R v Somerset County Council and ARC Southern Ltd, ex p Dixon* [1998] Env LR 111

57 *McCull v Strathclyde Regional Council* 1983 SLT 179

58 *R v Secretary of State for the Home Department Ex p. Simms* [2000] 2 AC 115.

59 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

60 *Council of Civil Service Unions and Others v Minister for the Civil Service Respondent* [1985] A.C. 374 (Lord Diplock).

61 *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* (No 2) [2007] EWHC 311 (Admin). In another example, the court found that the public consultation process regarding the proposed third runway at Heathrow was invalid as it was based on out-of-date figures, see *R (Hillingdon and others) v Secretary of State for Transport* [2010] EWHC 626 (Admin).

62 *AG of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 at p.638.

63 Southey, Weston and Bunting, *Judicial Review: A Practical Guide* (2012), p.51 citing *R v Gough* [1993] AC 646 at p.661G.

64 A good example of the need to avoid apparent as well as actual bias is the Pinochet case, considered in Chapter 2.

65 *R v North and East Devon Health Authority (ex parte Coughlan)* [2001] QB 213.

66 *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

67 Court of Session Act 1988, s 27B(2)(a).

68 *R v Secretary of State for Trade and Industry ex p Greenpeace Ltd* [2000] 2 CMLR 94.

69 *R v Somerset County Council and ARC Southern Ltd, ex p Dixon* [1998] Env LR 111

70 *Christian Institute and others v Scottish Ministers* 2016 SC 47, at paragraphs 41-43. (The case was appealed to the UK Supreme Court, but not on this issue. See chapter 2)

71 Court of Session Act 1988, s 27A.

72 Court of Session Act 1988, s27B.

73 *R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 at p.643 (Lord Diplock).

74 Court of Session Rules, rule 58.8.

75 C. Himsworth, *Judicial Review in Scotland*, in Supperstone, Goudie, Walker and Fenwick (eds.), *Judicial Review*, 5th Edn (2014), para.22.9.1. See also, for example, in Re Board of Governors of Loreto Grammar School's Application for Judicial Review [2011] NIQB 30.

76 Anthony, Himsworth, Lewis J and Lloyd Jones LJ, *Devolution*, in Supperstone, Goudie, Walker and Fenwick (eds.), *Judicial Review*, 5th Edn (2014), para.22.5.1.

77 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.

78 *Re McComb's Application for Judicial Review* [2003] NIQB 47.

79 For a summary of judicial review in Northern Ireland see Dickson, *Law in Northern Ireland* (2013) at pp.130-134.

80 There is no strict legal obligation on the Scottish Government or Parliament to implement the UK's international obligations: *Whaley v HM Advocate* [2007] UKHL 53, at [8] and [9], Lord Hope.

81 Section 1, Children and Young People (Scotland) Act 2014.

82 In response to a perceived and apparently



- undesirable proliferation of statute law.
- 83 The Scottish Legal Tradition, Lord Cooper of Culross (published for the Saltire Society by Oliver and Boyd, 1949. (Saltire Pamphlets: no. 7)).
- 84 *Webster v Behune* (1857) 2 Irv. 596; *Bell v Black and Morrison* (1865) 5 Irv. 57.
- 85 *Kennedy v The Charity Commission* [2014] UKSC 20 at [46] (Lord Mance).
- 86 *A v BBC* [2014] UKSC 23 at [56] and [57] (Lord Reed).
- 87 *Highland Regional Council v British Railways Board* 1996 S.L.T. 274.
- 88 *West v Secretary of State for Scotland* 1992 SC 385, at [413] (Lord Hope)
- 89 See *Eba v Advocate General for Scotland* [2011] UKSC 29, at [46] and [47], and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at [410] (Lord Diplock).
- 90 *AXA General Insurance v Lord Advocate* [2011] UKSC 46, at [51] (Lord Hope) and [149] (Lord Reed)
- 91 *Moohan and another v The Lord Advocate*: [2014] UKSC 67, at [34] (Lord Hodge); [2014] CSIH 56, at [17] (Lady Paton).
- 92 *Campbell and Cosans v UK* (1991) 13 E.H.R.R. 441.
- 93 *Cadder v Her Majesty's Advocate* [2010] UKSC 43
- 94 Human Rights Act 1998, Schedule 1, Parts 1 and 2.
- 95 *Eweida v British Airways plc* [2010] EWCA Civ 80. Ms Eweida lost her case before the Court of Appeal. She did however win at the European Court of Human Rights, after the Equality and Human Rights Commission, Liberty and others intervened in the case (*Eweida and others v the UK* (2013) 57 EHRR 8).
- 96 Article 15(1) ECHR. See also s14 Human Rights Act 1998.
- 98 Article 15(2) ECHR.
- 99 *Al-Skeini v the UK* [2011] ECHR 1093.
- 100 *Doherty, Philbin and Logan v Scottish Ministers* [2011] CSIH 58
- 101 *Moohan, Gillon v Lord Advocate* [2013] CSOH 199; [2014] CSIH 56.
- 102 *Moohan and another v Lord Advocate* [2014] UKSC 67, at [10] (Lord Hodge).
- 103 *Austin v the UK* (2012) 55 EHRR 14; *Austin and Another v The Commissioner of Police of the Metropolis* [2007] EWCA Civ 989.
- 104 As it does to Wales and Northern Ireland too.
- 105 Similar restrictions exist in relation to the powers of Ministerial office holders in the Northern Irish and Welsh Assemblies (s24(1) Northern Ireland Act 1998 and s81 Government of Wales Act 2006).
- 106 *Salvesen v Riddell* [2013] UKSC 22.
- 107 *Christian Institute and others v Lord Advocate* [2016] UKSC 51, see also chapter 2 of this Guide.
- 108 Section 31(1), Scotland Act 1998. It used to be that only Bills introduced by the Scottish Government required a statement in respect of legislative competence, but this was amended to include all other Bills – MSPs' Members' Bills, Committee Bills and Private Bills – by section 6 of the Scotland Act 2012.
- 109 Section 31(2), Scotland Act 1998.
- 110 For further reading, see Blackstone's Guide to the Human Rights Act 1998, 7th Edn, (2015).
- 111 The 'gays in the military case' was decided at English and Welsh common law, but nothing indicates the decision would have been different in Scotland.
- 112 Section 3, Human Rights Act 1998.
- 113 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, at [33] (Lord Nicholls).
- 114 Section 6, Human Rights Act 1998.
- 115 *YL v Birmingham City Council* [2007] UKHL 27. See also *Weaver v London and Quadrant Housing Trust* [2009] EWCA Civ 587 (social housing) and *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610 (publicly funded mental health care in a private facility).
- 116 Section 4, Human Rights Act 1998.

- 117 There have been 29 declarations so far. 20 of these are 'final'. This means that they are no longer subject to any appeal.
- 118 Section 10, Human Rights Act 1998.
- 119 The Scottish Human Rights Commission website provides helpful information on its duties and history, at <http://www.scottishhumanrights.com/>. Scotland's National Action Plan for human rights can be found here: <http://www.scottishhumanrights.com/scotlands-national-action-plan/>.
- 120 Article 46 ECHR.
- 121 *Manchester City Council v Pinnock* [2010] UKSC 45, at [48] (Lord Neuberger).
- 122 *R v Horncastle* [2009] UKSC 14.
- 123 *Hutchinson v UK*, App No. 57592/08, 3 February 2015. This case is currently being considered by the Grand Chamber of the European Court of Human Rights. A limited number of cases can be reconsidered by the Grand Chamber (17 judges of the Court sitting together).
- 124 *Shalk and Kopf v Austria*, App No. 30141/04, 24 Jun. 2010.
- 125 *Burnip v Birmingham City Council and another* [2012] EWCA Civ 629.
- 126 *Pretty v UK* (2002) 35 EHRR 1.
- 127 Protocol No. 15 amending the Convention (available online at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213>).
- 128 *S and Marper v UK* [2008] ECHR 1581.
- 129 *Hirst v the UK* (No 2) [2005] 42 EHRR 849.
- 130 *R (on the application of Chester)* (Appellant) *v Secretary of State for Justice* (Respondent); *McGeoch (AP)* (Appellant) *v The Lord President of the Council and another (Respondents)* [2013] UKSC 63.
- 131 *McHugh and Others v UK App. No 51987/08*, 10 February 2015.
- 132 The UK has not yet ratified Protocol 12 to the European Convention on Human Rights which would provide a freestanding equality guarantee within the Convention.
- 133 Including the Equal Pay Act 1970, Sex

- Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Age) Regulations 2006, Equality Act 2006 and Equality Act (Sexual Orientation) Regulations 2007.
- 134 *Coleman v Attridge Law* [2008] All ER (D) 245.
- 135 *Mandla v Lee* [1983] 2 WLR 620.
- 136 *Howe v JD Wetherspoon*, 18 May 2015.
- 137 *Hall v Bull*, [2013] UKSC 73.
- 138 *RBS v Allen* [2009] EWCA Civ 1213.
- 139 *Lambert v Lewisham and Southwark College* (unreported), 21 May 2015. For case summary see the University College Union website at <https://www.ucu.org.uk/article/7540/Lewisham-and-Southwark-College-discriminated-against-blind-disability-officer-tribunal-rules>.
- 140 Section 15, Equality Act 2010.
- 141 Equality Act 2010, Part 5.
- 142 *Dumfries and Galloway v North* [2013] UKSC 45.
- 143 *Glasgow City Council and Others v Unison and Fox Cross* [2014] CSIH 27
- 144 Section 149, Equality Act 2010.
- 145 See Employment Equality (Age) Regulations (NI) 2006; Disability Discrimination Act 1995; Disability Discrimination (Northern Ireland) Order 2006; Equal Pay Act (NI) 1970; Sex Discrimination (NI) Order 1976; Race Relations (NI) Order 1997; Fair Employment and Treatment (NI) Order 1998; Equality Act (Sexual Orientation) Regulations (NI) 2006.
- 146 Equality Commission for Northern Ireland, Gaps in Equality Law in Great Britain and Northern Ireland (2014), available online at <http://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/2014/Gaps-in-Equality-Law-in-GB-and-NI-March-2014.pdf>.
- 147 SPICe, SPICe Briefing: Election 2016, 16/34, 11th May 2016, p. 20 at [http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB\\_16-34\\_Election\\_2016.pdf](http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-34_Election_2016.pdf). L. Audickas, *Ethnic Minorities in Politics and Public Life*, House of Commons Briefing Paper No. SN01156, 28th June 2016, p. 9, available at

- <http://researchbriefings.files.parliament.uk/documents/SN01156/SN01156.pdf>
- 148 Equal Opportunities Committee, *Removing Barriers: race, ethnicity and employment*, SP Paper 890, 1st Report, 2016 (Session 4), p. 1 available at <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/96080.aspx>.
- 149 See <http://www.parliament.scot/msps/disability.aspx>.
- 150 Fuller information about each of the institutions of the EU can be found online at [http://europa.eu/european-union/about-eu/institutions-bodies\\_en](http://europa.eu/european-union/about-eu/institutions-bodies_en).
- 151 C-50/96 Deutsche Telekom AG v Schröder [2000] IRLR 353 at [56].
- 152 Although under the doctrine of 'indirect effect', in many disputes between individuals courts will interpret national law in a way that conforms with EU law.
- 153 Article 6 TEU.
- 154 Art. 6(3)TEU. The EU is looking into ratification of the ECHR. This would make the EU a Contracting Party to that Convention. It would mean that individuals could make complaints against the institution as a whole before the European Court of Human Rights.
- 155 *Benkharbouche and Another v Embassy of the Republic of Sudan* [2015] EWCA Civ 33.
- 156 The House of Lords also has an EU Committee which performs a similar function.
- 157 s20(1) Constitutional Reform and Governance Act 2010. See also, Part 2 Constitutional Reform and Governance Act 2010.
- 158 See Chapter 2 of this Guide (The Rule of Law).
- 159 Interestingly, the Code was amended in 2015 to remove the express reference to international obligations.
- 160 For latest version, August 2016, see <http://www.gov.scot/Publications/2016/08/1393/0>.
- 161 As defined in ss2A and 6 Children Act 2004.
- 162 Although they tend to follow international consensus when doing so, see Lord Hope in *R v Asfaw* [2008] UKHL 31, at [53].
- 163 *P v Cheshire West and Chester Council and*

- Another* [2014] UKSC 19, [32].
- 164 Lord Advocate's Reference (No.1 2000) [2001] S.C.C.R. 296 at [23].
- 165 *R v Jones and Others* [2006] UKHL 16 at [27-31] (Lord Bingham); and *R (Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598 at [85].
- 166 Available online at: <https://www.publications.parliament.uk/pa/cm/199900/cmselect/cmfaff/28/2813.htm>.
- 167 A number of other treaties – including the International Covenant on Civil and Political Rights – have a similar mechanism to let individuals take their cases to an international body for review. The UK does not accept this route of complaint more generally.
- 168 Equality and Human Rights Commission, The Commission's work on UNCPRD. See <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/un-convention-rights-persons-disabilities>.
- 169 *P v Cheshire West and Chester Council and Another* [2014] UKSC 19 at [36].
- 170 See, for example, Joint Committee on Human Rights, Nineteenth Report of Session 2005-06, The UN Convention against Torture, HL 185/HC 701, available online at <https://www.publications.parliament.uk/pa/jt/200506/jtselect/jtrights/185/185-1.pdf>.
- 171 *HH v Deputy Prosecutor of the Italian Republic; F-K (FC) v Polish Judicial Authority* [2012] UKSC 25 at [98].
- 172 *White v White* 2001 SCLR
- 173 [www.slab.org.uk/public/](http://www.slab.org.uk/public/)
- 174 [www.slab.org.uk/public/solicitor-finder/index.html](http://www.slab.org.uk/public/solicitor-finder/index.html)
- 175 [www.slab.org.uk/public/criminal/eligibility/](http://www.slab.org.uk/public/criminal/eligibility/)
- 176 [www.scra.gov.uk/](http://www.scra.gov.uk/)
- 177 [www.slab.org.uk/public/criminal/eligibility/](http://www.slab.org.uk/public/criminal/eligibility/)
- 178 At [www.gov.uk/legal-aid/overview](http://www.gov.uk/legal-aid/overview) and [www.nidirect.gov.uk/legal-aid](http://www.nidirect.gov.uk/legal-aid) respectively.
- 179 It runs a blog on topical issues here <https://scottishparliamentinformationcentre.org/>



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**For more information on the work of the Faculty of Advocates, please contact:**

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**The legal profession in Scotland has two branches – advocates and solicitors. The Faculty of Advocates dates from at least 1532, when the Court of Session was established, and is the professional body to which advocates belong. Advocates hold a public office, and although they are admitted to that office by the Court, the Court has delegated to the Faculty the training and examination of intrants (those wishing to become advocates) and the exercise of professional discipline over advocates.**

Currently, there are around 450 practising advocates – senior (QCs) and junior counsel. In the words of the former Lord President, Lord Gill, the qualities to which the Faculty is dedicated are: “...a commitment to excellence, a commitment to scholarship and learning, a commitment to the noblest ideals of professional conduct and, above all, a commitment to justice for all in our society.”

Advocates specialise in advocacy – the art of pleading a case, in writing or orally, before courts and tribunals – and also provide expert legal advice, usually in the form of a written Opinion of Counsel. Advocates are self-employed, and they are instantly recognisable in court because they wear wig and gown. By virtue of having been admitted as an advocate, an individual is entitled to appear in all courts and tribunals in Scotland, as well as in the UK Supreme Court, the Court of Justice of the European Union and the European Court of Human Rights.

The Faculty’s cab-rank rule underpins access to justice for all the people of Scotland. It lays down that no advocate can refuse to act, without a good reason, for anyone who offers a reasonable fee, and means that all advocates are available to be instructed by any solicitor in Scotland, whether a small firm in Lerwick or Langholm or a large firm in Edinburgh or Glasgow. The Faculty is proud of its pro bono work, through the Free Legal Services Unit.

Members of Faculty also contribute to the development of the law in Scotland by providing articles and case commentaries on litigations in which they have been involved. Several advocates have had (and may continue to have) careers as academic lawyers, and have authored legal textbooks. Many advocates also speak at conferences on cases in which they have been involved, or on areas in which they are expert. Several hold positions as tutors in university Law Faculties.

The Faculty as a body frequently responds to law reform initiatives, whether from the Scottish Law Commission, the Scottish Government or the Parliaments at Holyrood and Westminster. Normally, when a consultation appears to the Faculty to relate to a matter on which it should comment, a subcommittee of members with relevant expertise is assembled to prepare a written response, which is then sent on the Faculty’s behalf. Sometimes, the Faculty will be asked to follow up this response by attending a meeting of the committee scrutinising the Bill implementing the proposed reform; in such situations, an advocate involved in the submission of the response will attend to assist members in any way he or she can.





**For more information on the work of the Law Society of Scotland, please contact:**

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**The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With its overarching objective of leading legal excellence, the Society strives to excel and to be a world-class professional body, understanding and serving the needs of its members and the public. The Society sets and upholds standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.**

The Society's website has a Find a Solicitor facility to assist members of the public in locating the contact details of law firms and individual solicitors throughout Scotland.

The Society has a statutory duty to work in the public interest, a duty which it is strongly committed to achieving through its work to promote a strong, varied and effective solicitor profession working in the interest of the public and protecting and promoting the rule of law. The Society seeks to influence the creation of a fairer and more just society through its active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and its membership.

The Society and its many specialist committees scrutinise legislation at both the Scottish Parliament and the UK Parliament, suggesting amendments to improve the law and responding to consultations across a range of public policy areas to help our Parliamentarians shape 'good law'. In 2016, the Society formed a Public Policy Committee whose focus is on proactive policy development.

It is therefore fundamental that the work of the Law Society continues to inform the work of MSPs. It will continue to issue briefings to MSPs, highlighting what it believes are the benefits of, or concerns with proposed legislative change. The Society will continue to provide an effective

research and evidence basis for its policy positions. As an indication of the work which it has undertaken over the last two operating years, between 1 November 2014 and 31 October 2015, the Society:

- responded to 101 consultations from the Scottish and UK governments and the European Commission;
- commented on 20 Scottish Parliament and 10 Westminster Parliament Bills;
- undertook 14 oral evidence sessions at the Scottish Parliament and 1 oral evidence session to the Scottish Affairs Committee of the UK Parliament;
- 74 per cent of the Society's proposed amendments to legislation were tabled by MSPs or MPs.

During the following year (2015/2016) the Society commented on 44 Scottish consultations and 18 Bills in the Scottish Parliament.

The Society will continue to consult and collaborate with many of the organisations involved with the legal sector as it strives to be a world class professional body. Insight, expertise and information which supports mutual understanding between parliament and the law, is invaluable.

In this publication, JUSTICE has succeeded in developing an important resource which can be relied upon as a user friendly and engaging point of reference for Scottish law makers.







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