BILL OF RIGHTS BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Bill of Rights Bill as introduced in the House of Commons on 22 June 2022 (Bill 117).

- These Explanatory Notes have been drafted by the Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

1 The Bill of Rights ("the Bill") will replace the Human Rights Act 1998 ("HRA)" and restore a common-sense approach to human rights in the United Kingdom ("UK") context. The Bill will protect people's fundamental rights while safeguarding broader public interest and respecting the will of elected representatives in Parliament.

2 The Bill will continue to give effect to the same rights and freedoms – the Convention rights – drawn from the European Convention on Human Rights ("the Convention"), but will include provisions to:

a. ensure rights are not interpreted over-expansively, and considered in view of the UK's distinct contexts;

b. increase democratic oversight of human rights issues;

c. reduce burdens on public authorities;

d. give great weight to the views of Parliament in considerations of public interest;

e. implement a permission stage to ensure trivial cases do not undermine public confidence in human rights;

f. recognise that responsibilities exist alongside rights;

g. ensure Parliament's role in responding to adverse judgments of the European Court of Human Rights ("ECtHR") in Strasbourg;

h. strengthen the right to freedom of speech;

i. recognise trial by jury as of fundamental importance to the UK criminal justice system;

j. limit the Bill's extraterritorial application;

k. ensure that the importance of public protection is given due regard in the interpretation of rights; and

l. provide that some rights cannot prevent the deportation of foreign criminals, except in very narrow circumstances.

Policy background

3 The Government's 2019 manifesto pledged to "*[…] update the Human Rights Act and administrative law to ensure there is a proper balance between the rights of individuals, our vital national security and effective government.*"

Consultation

4 On 14 December 2021, the Government published a consultation ("Human Rights Act Reform: A Modern Bill of Rights") on its proposals to reform the HRA and replace it with a modern Bill of Rights. The proposals considered the findings of the Independent Human Rights Act Review (IHRAR) which examined how the HRA works in practice and whether change is needed. The consultation closed on 8 March 2022, with over 12,000 responses received. A limited extension was granted on 19 April 2022 for those who would benefit from the assistance of an Easy Read or audio version of the consultation document. 106 participants attended ten official-led and three Minister-led events in support of the consultation – and during the extension period officials conducted two events aimed at groups working with and for people with disabilities.

Policy Context

Strengthen domestic institutions and the primacy of UK law

5 Under the HRA, the UK courts are directed to 'take into account' Strasbourg jurisprudence when interpreting the Convention rights domestically. In practice, this has meant that they closely follow interpretations of rights that have been taken by the ECtHR. The Bill will set out more considerations for courts when interpreting rights, not just Strasbourg jurisprudence – for instance consideration of the UK's own common law rights traditions, and the text of the rights themselves.

6 The Bill will encourage courts to take a more constrained approach to interpreting Convention rights, as compared to the current framework under the HRA. It will set the Strasbourg jurisprudence as a limit, making sure that court do not interpret rights more expansively than the ECtHR has or would. Within this limit, courts will not be bound by Strasbourg jurisprudence. The Bill will explicitly affirm the role of the Supreme Court as the ultimate judicial arbiter of the meaning of the Convention rights in domestic law.

Increase democratic oversight of human rights issues

7 Presently, under section 3 of the HRA, courts have a broad duty to interpret legislation to make it compatible with the Convention rights so far as it is possible to do so. The Bill will restore the habitual manner in which courts approach statutory interpretation. These measures aim to rebalance the relationship between the courts and Parliament by requiring that, where legislation cannot be read compatibly with the Convention rights using orthodox principles of construction, it should be for Parliament to address the issue.

8 The repeal of section 3 HRA will be accompanied by a regulation-making power allowing the preservation of the effect of interpretations made under that section. This is to ensure legal certainty in situations where an interpretation made under section 3 HRA is an established part of the legislative scheme.

9 The remedy will be available where a provision of primary legislation is not compatible with Convention rights will be a declaration of incompatibility. A declaration of incompatibility does not affect the validity or continued operation of the incompatible provision, but instead refers the issue to Parliament in relation to primary legislation, on the initiative of the Government, to consider whether, how, and to what extent to address the incompatibility.

10 The Bill will make declarations of incompatibility available as a remedy when subordinate legislation is found to be incompatible with the Convention rights and a court does not quash it or declare it invalid due to the incompatibility.

Reduce burdens on public authorities

11 The Bill will limit the imposition of positive obligations on the UK's public services without proper democratic oversight. It will do this by prohibiting the adoption by the domestic courts of interpretations of the Convention rights which would create new positive obligations, and by limiting the instances in which existing obligations can be applied. The Bill will make clear that where public authorities are giving clear effect to primary legislation, they are not acting unlawfully; and it will remove UK courts' duty to interpret legislation in ways that are not in line with the ordinary meaning of the words and overall purpose of the statute (as described for section 3 HRA above).

Give great weight to the views of Parliament in consideration of the public interest

12 The Bill will make clear the weight to be given to the views of Parliament. The provision will not encroach on the principle of Parliamentary privilege as set out in Article 9 of the Bill of Rights 1689.

13 It will require courts, when determining questions relating to Convention rights in contexts where Parliament has legislated, to give the greatest possible weight to Parliament's view of the public interest.

14 The Bill will protect Parliament's ability to exercise its judgement in balancing complex and diverse socio-economic policies, with the wider interests of society.

Implement a permission stage to ensure trivial cases do not undermine public confidence in human rights

15 Currently under the HRA there is no standalone procedure at the start of legal proceedings to ensure that a human rights claim brought by a claimant against a public authority for an alleged breach of their rights is sufficiently serious to merit the expenditure of court time and resources. This has also resulted in a situation whereby public authorities have incurred significant costs, including legal costs, in defending themselves against trivial claims under the HRA which have later been found not to be sufficiently serious and have wasted court time and public resources.

16 The Bill will therefore create a permission stage to ensure trivial claims do not undermine public confidence in human rights more broadly.

17 The introduction of a permission stage will ensure that courts focus on serious human rights-based claims and place responsibility on the claimant to demonstrate that they have suffered a significant disadvantage before a human rights claim can be proceeded to trial. If a claimant cannot demonstrate that they have suffered a significant disadvantage, then a claim could still proceed if the court considers there is a wholly exceptional reason on the grounds of public importance.

Recognise that responsibilities exist alongside rights

18 Under the HRA there is no specific legislative requirement for the courts to consider the conduct of the claimant in the awarding of any damages. However, judges do need to consider all the circumstances of the case, including any other remedy already granted in relation to the breach in question, as well as whether an award is actually necessary to rectify the breach found.

19 The Bill will re-focus when human rights remedies are provided to ensure that the courts will expressly need to consider a claimant's relevant wider conduct when considering whether to make an award of damages, and the amount thereof, affirming in legislation the connection which exists between rights and responsibilities.

20 The Bill will enshrine a set of principles for awarding damages independent of that of the Strasbourg Court, allowing UK courts to consider such awards in a UK context. It will also contain a new provision for courts actively to take account of the public interest when making an award, including expressly considering certain factors such as the impact on a public authority's ability to continue to provide services to society. The Bill will also implement the ECtHR judgment in *SW v United Kingdom*, which became final in September 2021.

Ensure Parliament's role in responding to adverse judgments of the European Court of Human Rights

21 The Bill will ensure Parliament is formally made aware of adverse ECtHR judgments against the UK, including unilateral declarations made by the UK. It is the responsibility of the Government to implement adverse judgments, and Parliament does not currently have a formal or explicit role in that process. The Government believes that Parliament, given its central role in the UK's constitutional arrangements, should be notified when the UK has failed to comply with the Convention. As such, the Bill will introduce a duty on the Government to notify Parliament of adverse Strasbourg rulings against the UK, and where the UK has made a declaration acknowledging a violation of a Convention right. The Minister will be required to lay any such judgment or declaration before Parliament.

Strengthen the right to freedom of speech

22 The Bill will strengthen the right to freedom of speech in clause 4. It will introduce a requirement for courts to give great weight to the importance of protecting freedom of speech whenever they are balancing freedom of speech with competing rights (e.g., the Article 8 right to private and family life) in human rights claims.

23 Freedom of speech is defined as the right to freedom of expression set out in Article 10 of the Convention, insofar as it consists of the right to impart ideas, opinions, or information by means of speech, writing or images (including in electronic form).

24 The Bill will set out exceptions where the provision for strengthened protection for freedom of speech will not apply, and where the requirements set out in Article 10 of the Convention will apply without modification. Where an exception does not apply and the right is strengthened, the strengthened right will continue to be subject to the qualifications set out in Article 10(2) of the Convention.

25 The Bill will set out requirements that a court must assess when considering granting relief which might affect the freedom of expression.

Protect journalistic sources

26 All sources of information in publications are currently protected under section 10 of the Contempt of Court Act 1981, which provides that no court may require a person to disclose, and no person is guilty of contempt of court (i.e., they cannot be found to be disobeying or ignoring a court order) for refusing to disclose their source of information.

27 The Bill will amend the Contempt of Court Act 1981 so that the protection in section 10 no longer applies to journalistic sources, and replace it with a new condition for a court to consider before it can order a journalistic source to be disclosed. The court must be satisfied that there is an exceptional and compelling reason why disclosure is in the public interest and one of the three bases on which disclosure can be ordered (necessary in the interests of justice; national security; or for the prevention of disorder or crime) must be engaged.

Recognise trial by jury as of fundamental importance to the UK criminal justice system

28 Jury trials are an important component of fair trials in criminal proceedings in the UK, subject to provisions within the respective frameworks set out in legislation by the UK Parliament and the devolved legislatures that set out where jury trial is required, or where the defendant may choose whether or not to have a jury trial.

29 The ECtHR recognises that jury trials are a mode of trial capable of being consistent with the right to a fair trial (protected by Article 6), but jury trials are not expressly protected by the Convention.

30 The Bill will recognise trial by jury as one mode of trial capable of providing a fair trial in legislation.

31 The provision will apply only insofar as arrangements for trial by jury are determined in and continued to be determined by each jurisdiction, namely under the control of the UK Parliament for England and Wales, and of the Scottish Parliament and Northern Ireland Assembly, respectively.

Limit the Bill's extraterritorial scope

32 The Bill will apply extraterritorially to the extent of the UK's obligations under the Convention, but with an exclusion for military operations overseas. This means that claims will not be able to be made under the Bill in relation to acts done in the context of military operations overseas. The HRA is silent about its own territorial scope. However, by virtue of a series of significant cases, it has been interpreted as broadly mirroring the scope of the UK's obligations under the Convention. The current position therefore is that claims relating to military operations overseas may be brought under the HRA. The Bill will remove the ability to bring a claim for violation of a Convention right in relation to military operations overseas, and later legislation will bring forward alternative remedies to maintain compatibility with the Convention and ensure there is a route to remedy. The provisions in the Bill relating to military operations overseas will not be commenced unless and until the corresponding alternative remedies are in place.

Ensure the importance of public protection is given due regard in the interpretation of rights

33 The Bill contains a new provision that applies to courts considering whether certain Convention rights have been breached where the claimant was, at the time of the alleged breach, serving a custodial sentence for a criminal offence. In such cases, courts will be obliged to give the greatest possible weight to the importance of reducing the risk to the public from those who have been convicted of criminal offences and are serving custodial sentences. This will strengthen the Government's forthcoming parole reforms, by providing that any court considering a challenge to a release decision on human rights grounds gives the greatest possible weight to the importance of reducing the risk to the public from those serving custodial sentences. It will also strengthen the Government's hand in contesting human rights claims from prisoners opposing their placement in a separation centre and the Government's ability to defend human rights claims brought regarding the deportation of foreign national offenders.

Clarify the interpretation of certain rights

34 The Bill will enable provision to be made to restrict further individuals' ability to rely on Article 8 (right to private and family life) to avoid deportation. The Bill will also set out the circumstances in which deportation appeals by foreign national offenders that raise Article 6 (the right to a fair trial) must be dismissed.

Legal background

35 The relevant legal background is explained in the policy background section of these Notes.

Territorial extent and application

36 Clause 37 sets out the territorial extent of the clauses in the Bill. The extent of a Bill is the legal jurisdiction of which it forms part of the law; application refers to where it has practical effect. The Bill in its entirety both extends and applies to England and Wales, Scotland, and Northern Ireland.

37 The Sewel Convention means that the UK Parliament "will not normally legislate with regard to devolved matters without the consent" of the devolved legislatures, and the UK Government will not normally support such legislation.

38 A further aspect of the Convention, not reflected in the legislation but addressed in the Devolution Guidance Notes, is that the UK Parliament will not normally alter the legislative or executive competence of the devolved legislatures or administrations without seeking equivalent legislative consent (and similarly the UK Government will not normally support such legislation).

39 The table in Annex A summarises the position of the Bill regarding territorial extent and application in the UK. The table also summarises the position regarding legislative consent motions.

Commentary on provisions of Bill

Introductory

Clause 1: Introduction

40 Clause 1 sets out certain key principles underpinning the Bill. Subsection 1 sets out that the Bill will reform the law relating to human rights by repealing and replacing the HRA.

41 Subsection 2 sets out that the Bill will clarify and rebalance the relationship between courts in the UK, the ECtHR and Parliament. It then goes on to set out certain other key principles, referring to relevant sections in the Bill in relation to each: that the UK Supreme Court, rather than the ECtHR, determines what the Convention rights mean, and how they are given effect, for the purposes of the UK's domestic law; that courts are, with the repeal of section 3 of the Human Rights Act, no longer required to read and give effect to legislation, so far as possible, in a way which is compatible with the Convention rights; and that courts must give the greatest possible weight to the principle that in a Parliamentary democracy, it is Parliamentary that properly makes decisions about the balance between different policy aims, different Convention rights, and the Convention rights of different people.

42 Subsection (3) affirms that the judgments, decisions, and interim measures of the ECtHR are not part of domestic law and that these do not affect Parliament's right to legislate.

The Convention rights

Clause 2: The Convention rights

43 This clause sets of out the meaning and application of the term "Convention rights" within the Bill.

44 Subsection (1) provides that the Convention rights are defined as being the rights and fundamental freedoms set out in: Articles 2 to 12 and 14 of the Convention; Articles 1 to 3 of the First Protocol to the Convention; and Article 1 of the Thirteenth Protocol to the Convention, all as read with Articles 16 to 18 of the Convention.

45 Subsection (2) sets out that those Articles are to have effect subject to derogations and reservations, as set out in clauses 26 and 27 of the Bill.

46 Subsection (3) introduces Schedule 1, which sets out the text of the Convention rights.

Clause 3: Interpretation of the Convention rights

47 Clause 3 sets out how domestic courts should approach interpreting the Convention rights. The clause is concerned with setting out material to which courts may have reference when interpreting what these rights mean in domestic law, and the limits of courts' interpretive power.

48 Subsection (1) affirms in legislation the status of the UK Supreme Court with regards to the interpretation of the Convention rights in the UK: it is the Supreme Court (and not the ECtHR) which decides what Convention rights mean in UK law. Subsection (2) sets out considerations for courts that are determining questions which arise in connection with a Convention right. These considerations replace the single explicit reference in the HRA to the Strasbourg jurisprudence as a particular source of law that courts must 'take into account'.

49 Subsection (2)(a) is a mandatory consideration, directing courts to the text of the Convention rights. The preparatory work of the Convention (known as the *travaux préparatoires*) is the official record of the negotiation that preceded the agreement of the Convention. Reference to the preparatory work of the Convention can serve to inform courts' understanding of the original

intention behind the Convention rights, and thus how the rights should be interpreted. Courts are presently able to look at this preparatory work, but explicit reference in the Bill signals the importance of this material. Subsection 2(b) sets out that courts may have regard to common law rights and principles that are similar to the Convention rights.

50 Subsection (3) sets out the approach that courts should take to Strasbourg jurisprudence, a concept defined in clause 35. Subsection (3)(a) sets the interpretations of Convention rights that have been or would be adopted by the ECtHR as a 'ceiling': UK courts may not adopt interpretations of rights that expand the protection afforded by these rights beyond the approach that has been or would be taken by the ECtHR. This means, for example, that courts cannot interpret a Convention right to expand the scope of the right to cover more circumstances, impose additional obligations on public authorities, or restrict the extent to which interferences with and limitations on the right can be justified, unless the court has no reasonable doubt that the ECtHR would adopt the same interpretation. This does not require a court to predict the exact judgment that the ECtHR would make as to the outcome on the facts of the case: the provision is about the interpretations of rights that would be adopted by the ECtHR.

51 Subsection 3(b) clarifies that, beneath the 'ceiling' set out in subsection 3(a), courts may depart from Strasbourg jurisprudence: there is no 'floor' in relation to the Strasbourg jurisprudence. Courts are therefore free to adopt interpretations of rights that do not expand the interpretations of rights, regardless of the approach that would be taken by the ECtHR in the same circumstances. Courts may therefore depart from Strasbourg jurisprudence – informed, for instance, by the considerations in subsection (2) – as long as they do not adopt an interpretations of a right that confers greater protection than would be conferred by the ECtHR.

52 The Bill puts greater weight on freedom of speech in clause 4. Therefore, subsection (4) of clause 3 ensures that the limit in subsection (3)(a) does not apply to clause 4, thus ensuring that UK courts can continue to develop protections of the right to freedom of speech and allow courts to go further in the interpretation of this right than the ECtHR would. This will be necessary in a situation where, for example, the UK court considers that it is necessary to protect freedom of speech in a situation where the ECtHR would not, or in which the ECtHR would find to be something which should be within the UK's discretion to decide domestically (this is what the ECtHR calls the UK's "margin of appreciation").

53 Subsection (5) provides that evidence for the purposes of this section in proceedings before any court is to be given in the manner provided by the rules.

Clause 4: Freedom of speech

54 Clause 4 requires courts to give great weight to the importance of protecting freedom of speech whenever courts are balancing the right with competing factors (e.g., the right to private and family life under Article 8, or the prevention of disorder and crime) in claims and cases involving freedom of speech.

55 Clause 4(1) establishes that courts must give great weight to the importance of protecting the right to freedom of speech whenever they are determining a question which is connected to the right.

56 Clause 4(2) defines "the right to freedom of speech" as the Convention right to freedom of expression (set out in Article 10) to the extent that the right relates to imparting ideas, opinions, or information by speech, writing or images (including in electronic form). The provision will extend beyond oral speech and include any written publications (including academic publications, newspaper articles and posters), social media posts, symbols, and images (e.g., posters or cartoons). The provision does not extend to other physical acts, including those that interfere with the ability of others to do as they wish.

57 Clause 4(3) sets out the exceptions where clause 4 will not apply. Where the circumstances of the case fall within an exception, the strengthened weight will not apply, and the usual weight afforded to freedom of speech in Article 10 will apply. The exceptions apply to:

a. Clause 4(3)(a) – criminal offences. This extends to where courts are determining whether a person has committed an offence, and to legislation which creates a criminal offence, to ensure that individuals cannot challenge their conviction on the grounds of clause 4;

b. Clause 4(3)(b) – where a person holds confidential information as a result of a relationship in which they owe an obligation of confidence which has arisen either under an agreement, or due to a professional relationship, with a person. This may be, for example, through the course of their employment or the exercise of a professional function (e.g., legal professional privilege or medical confidentiality);

c. Clause 4(3)(c) – the determination of questions relating to a person's citizenship or whether a person is entitled to enter or remain in the UK;

d. Clause 4(3)(d) – the determination of questions which affect or may affect national security. This ensures that the strengthened weight provided to freedom of speech does not restrict a public authority's ability to limit freedom of speech where it is in the interests of national security to do so.

58 The great weight given to the importance of freedom of speech does not create an absolute right to freedom of speech. Even with greater weight attached, freedom of speech remains a qualified right and is subject to the qualifications set out in Article 10(2) of the Convention.

Clause 5: Positive obligations

59 Clause 5 prohibits domestic courts from adopting new interpretations of Convention rights that would require a public authority (as defined by clause 34 of the Bill) to comply with a positive obligation, and requires courts applying existing interpretations to consider the need to avoid certain identified consequences.

60 Subsection (1) prohibits courts from adopting new interpretations of Convention rights as containing positive obligations on which public authorities must act. "Post-commencement" interpretations are defined in subsections (3), (4), (5) and (6).

61 Subsection (2) deals with pre-commencement interpretations of a Convention right – i.e., interpretations involving positive obligations that courts find to exist before this Bill comes into force. It sets out five factors to which courts must give great weight to the need to avoid, in applying an interpretation. These are intended to guide courts to consider the wider implications of their decision (rather than just the need to do justice in the particular case). This list is not intended to be exhaustive, and courts may also wish to consider additional factors when determining a case.

62 Subsection (2)(a) requires courts to take into account whether or not applying the obligation would disproportionately constrain resources, thus impacting on public authorities' other areas of work.

63 Subsection (2)(b) requires courts to take into account the public interest in enabling public authorities to exercise discretion over their work and exercise their professional expertise without having to routinely defend such decisions in court.

64 Subsection (2)(c) requires courts to give weight to the principle that an obligation should not be applied if it requires the police to protect individuals who are involved in criminal activity or prevents them from determining operational priorities.

65 Subsection (2)(d) relates to positive obligations that have been found to contain investigative duties. Case law has established a requirement for an independent and effective public investigation in cases where there has been arguable breach of the right, not just by the state but also by third parties. This case found that in order for Article 3 of the Convention (freedom from torture and inhuman or degrading treatment) to have been breached, "egregious and significant" errors in the investigation must have occurred – in other words, the courts should not be required to consider singular errors, but systemic flaws throughout the investigation. The subsection sets out that the interpretation of an investigative obligation cannot be applied if it would require the inquiry or investigation to be concluded to an unreasonably high standard.

66 Subsection (2)(e) requires the courts to take into account the principle that the interpretation should not run contrary to the operation of primary legislation.

67 Subsections (3), (4) and (5) define "pre-commencement" interpretation, in order to clearly distinguish between new interpretations of rights (which, as subsection (1) sets out, cannot be adopted), and those have already been found to exist (whose treatment is outlined in subsection (2)). It sets out two conditions, one of which must be met in order for an interpretation to be treated as "pre-commencement" (in other words, pre-existing).

68 Subsection (4) sets out the first condition, which is that before the section has come into force in law, a domestic court must have already found the obligation to exist, and the interpretation must still have the force of law.

69 Subsection (5) sets out the second condition that must be met, which is that before the section has come into force in law, the ECtHR must have found the positive obligation to exist (subsection (5)(a)), and that same court has not since resiled from that interpretation in subsequent judgments (subsection (5)(b)).

70 This will prevent domestic courts from keeping pace with post-commencement judgments from the ECtHR, after the clause has come into force.

71 Subsection (6) defines a "post-commencement interpretation", as referred to in subsection (2), as being any obligation, which is not a "pre-commencement interpretation", as defined by subsections (3), (4) and (5).

72 Subsection (7) defines "positive obligation" for the purposes of the clause.

Clause 6: Public protection

73 Clause 6 obliges courts, when considering certain Convention rights, to consider the importance of reducing the risk to the public from those who have been convicted of a criminal offence during the period of any sentence of imprisonment or detention they may have been given as a result of that conviction.

74 Subsection (1) of this clause outlines two factors (a) and (b) that must both be satisfied for subsection (2) to apply: first, if the court is determining whether a relevant Convention right of a person has been breached; and second, if the person in question at the time of the alleged breach was subject to a custodial sentence which was imposed on that individual following conviction for a criminal offence.

75 Subsection (2) of the clause sets out that when courts are considering whether a Convention right has been breached, they must give the greatest possible weight to the importance of reducing the risk to the public from those who have been convicted of a criminal offence during the period of any custodial sentence they are serving. Requiring the courts to give the greatest possible weight to this factor means that it will be given appropriate consideration in any balancing exercise.

76 Subsection (3) provides examples of circumstances to which subsection (2) applies, which will include where an alleged breach of a Convention right occurs in connection with a decision about whether a person serving a custodial sentence should be released from custody, and where an alleged breach of a Convention right occurs in connection with a person's placement in a particular part of a prison, such as a separation centre.

77 Subsection (4) provides that the meaning of a 'custodial sentence' is a sentence as specified in the accompanying regulations made by the Secretary of State.

78 Subsection (5) sets out that the regulations as mentioned in subsection (4) will be subject to the negative procedure.

79 Subsection (6) explains that, for the purposes of this clause, a person is subject to a custodial sentence for the duration of the applicable sentence or order, meaning that the clause applies both when a person is in custody, for example, in a prison or young offender institution, and if they have been released on licence, or are serving a period of supervision, or are subject to other release conditions.

80 Subsection (7) defines 'relevant convention right' for the purposes of the clause. The clause will apply to any Convention right other than Article 2 (right to life), Article 3 (prohibition of torture), Article 4 subsection (1) (prohibition of slavery) and Article 7 (no punishment without law), the 'absolute' rights, protection of which cannot be weighed up against anything else.

Clause 7: Decisions that are properly made by Parliament

81 Clause 7 is a clause about respecting the will of Parliament. It applies when courts are determining the compatibility with the Convention rights of an Act of Parliament or an act of a public authority in discharging its statutory duties.

82 Subsection (1) outlines that this clause will apply wherever the court is making such a determination, and in doing so requires consideration of the balance struck between the factors listed in subsection (1)(b)(i)-(iii).

83 The factors in subsection (1)(b)(i)-(iii) relate to:

a. balancing different policy aims against each other, which includes weighing up competing social and economic considerations;

b. balancing different Conventions rights against each other;

c. balancing the Convention rights of different persons against each other; or

d. balancing a combination of the factors listed in subsection (1)(b)(i)-(iii) against each other, such as balancing a person's Convention rights against the interests of society at large.

84 Subsection (2) provides that in coming to their judgment, courts must concentrate on the respect accorded to the will of Parliament. They must:

a. assume that when Parliament passed the legislation in question, it had been satisfied that an appropriate balance had been struck between the factors as set out in subsection (1)(b)(i)-(iii); and

b. place the greatest possible weight on the principle that coming to a decision on the best way to strike that balance in the public interest is properly the democratic function of Parliament.

85 Subsection (3) defines two scenarios where the 'incompatibility question' may arise when considering a provision of primary legislation:

a. subsection (3)(a) refers to whether the provision in question is incompatible with a Convention right; or

b. subsection (3)(b) refers to whether a public authority, when discharging its duties under the provision, acts in a way which is incompatible with a Convention right.

86 Subsection 4 provides a definition for the term used in subsection 3(b) as to when a public authority has acted 'in accordance with' a provision, which means that it has acted in a way that complies with, gives effect to, or enforces the provision in question.

Clause 8: Article 8 of the Convention: deportation

87 The Immigration Act 2014 introduced provision for public interest considerations under Article 8 (the right to private and family life) of the Convention, by inserting Part 5A into the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). It provides that, where a court or tribunal is required to determine whether a decision under relevant immigration legislation breached a person's right to respect for private and family life under Article 8, and as a result would be unlawful under section 6 of the HRA, the court or tribunal must, when considering the public interest question, have regard to certain statutory considerations and, in cases concerning the deportation of foreign criminals, must also have regard to certain additional considerations (those list in Section 117C of that Part).

88 Clause 8 establishes a limit upon the court's power when it is considering whether existing or future deportation provisions (which includes primary and secondary legislation) are compatible with Article 8 (right to respect for private and family life) of the Convention.

89 Subsection (1) establishes the scope of the clause, that it applies to legislative provisions being considered by the court in so far as they relate to decisions by the Secretary of State to deport foreign criminals and whether those are compatible with Article 8. Where the clause refers to foreign criminals, this is defined in clause 35 as persons who are not British citizens, are sentenced to at least twelve months' imprisonment, or are sentenced to imprisonment for an offence specified by order under section 72(4)(a) of the 2002 Act.

90 Subsection (2) sets out the limits on the court's power to find a deportation provision incompatible with Article 8. No deportation provision may be found incompatible with that right unless the court considers that the provision requires a public authority to act in a way that results in a level of harm to a qualifying member of the deportee's family so extreme that it overrides the public interest in the deportation.

91 Subsection (3) defines the level of harm that can be considered as 'extreme'.

92 Subsection (4) (a) establishes that a court must consider a provision compatible where it provides that it is only in the most compelling circumstances that a person's deportation would cause 'extreme' harm to a family member that is not a qualifying child.

93 Subsection (4) (b) establishes that a court must consider a provision compatible where it provides that it is only in the most compelling circumstances that a court could not reasonably conclude that the public interest in deportation outweighs the harm to a family member that is not a qualifying child.

94 Subsection (5) clarifies the interpretation of various terms used in this clause.

Clause 9: Jury trial

95 Clause 9(1) recognises that the ways in which the Convention right to a fair trial is capable of being secured include, in each part of the UK, legislation under which a person is tried by jury.

96 Subsection (2) sets out circumstances in which a trial by jury should or may not be available and subsection (3) provides a definition of "right to a fair trial".

Legislation

Clause 10: Declaration of incompatibility

97 Clause 10 sets out the procedures for declarations of incompatibility for both primary and subordinate legislation. This applies when a court determines that a provision in legislation is not compatible with a Convention right.

98 Subsection (1)(a) sets out the conditions required for a declaration of incompatibility to be available for primary legislation. It states that subsection (2) – the ability to make a declaration – applies where a court is satisfied that a provision of primary legislation is not compatible with a Convention right.

99 Subsection (1)(b) sets out the conditions for a declaration of incompatibility for subordinate legislation. It states that a declaration may be made where the court is satisfied that a provision of subordinate legislation is not compatible with a Convention right and it decides not to quash the provision or declare it invalid due to its incompatibility.

100 The courts are prevented from declaring incompatible a provision if they have also quashed it or found it to be invalid. The courts cannot take both actions but can choose which of the two actions is more appropriate in the given case. Subsection (2) allows the courts to make a declaration of incompatibility if the above conditions in subsection (1) are met.

101 Subsection (3)(a) establishes that the validity, continuing operation, or enforcement of the relevant provision is not affected by a declaration of incompatibility. It is therefore for Parliament and/or the Government to consider whether and how to address the incompatible legislation. This can be through remedial regulations (Clause 26), or amendment of the primary or secondary legislation through other routes.

102 Under subsection (3)(b), a declaration does not bind the parties to the proceedings. Where a Secretary of State, for example, is party to a case, they will not be legally obliged – under this section – to address the incompatibility.

103 Subsection (4) lists the courts that have the power to make declarations of incompatibility. These are the UK Supreme Court, the Judicial Committee of the Privy Council, the Court Martial Appeal Court, and the Court of Protection (in certain circumstances); as well as in Scotland the High Court of Justiciary when not sitting as a trial court and the Court of Session, and in Northern Ireland and England and Wales the High Court and the Court of Appeal.

Clause 11: Right of Crown to intervene

104 Subsection (1) requires that the Crown be given notice whenever a court is considering making a declaration of incompatibility. Subsection (2) allows a relevant UK authority (as defined in subsection (3)) to seek to join the proceedings as a party where a declaration of incompatibility is being considered by giving the appropriate notice. This allows the relevant UK authority to make arguments about whether or not a declaration of incompatibility should be made.

105 Subsection (3) defines the relevant UK authorities. This includes UK Government ministers and ministers from the devolved governments, or a Northern Ireland department.

106 Subsection (4) further explains that notice to be joined as a party under subsection (2) may be given at any time during the proceedings.

107 Subsection (5) provides that any person who has been made party to criminal proceedings under subsection (2), other than in Scotland - where the Supreme Court is not the final court of criminal appeal - may with permission, appeal to the Supreme Court against any declaration of incompatibility. Therefore, in criminal cases (other than in Scotland), where permission is granted, those cases are heard by the Supreme Court.

108 Subsection (6) defines permission as that which is granted by the court making the declaration of incompatibility or by the Supreme Court.

Public authorities

Clause 12: Acts of public authorities

109 Clause 12 sets out the obligation placed on public authorities under the Bill and the exemptions from this.

110 Subsection (1) places an obligation on public authorities to not act in a way which is incompatible with a Convention right, which are set out in the Articles of this Bill. The term ''public authority'' is defined in clause 34.

111 Subsection (2) sets out the two exemptions from this obligation. Together, these exemptions ensure that where a public authority is following the will of Parliament, they will not be acting in breach of the duty in clause 12(1).

a. Subsection (2)(a) sets out the first exemption to this obligation. A public authority is exempt from the obligation to comply with the Convention rights if it has no discretion to act differently within the scope of the law.

b. Subsection (2)(b)(i) and (ii) sets out the second exemption to this obligation. A public authority is exempt from the obligation not to act incompatibly with a Convention right if they had a discretion as to whether and how to act, but no course of action open to them would have been compatible with Convention rights whilst still complying with the provision(s) of legislation. This subsection applies both when the public authority is acting so as to give effect to a provision of primary legislation which is incompatible, and to a provision of subordinate legislation where primary legislation has determined that secondary legislation could not have been made in a compatible way.

112 Subsections (3) and (4) sets out that an ''act'' of a public authority includes a failure to act but does not include a failure to make a proposal for legislation in Parliament or legislate. Together with clause 34, this establishes that neither House of Parliament is a public authority.

113 Subsection (5) sets out that the interpretation of legislation by the courts is not included in the acts of a public authority for which the obligation to act in a way which is compatible with Convention rights applies. This subsection preserves Parliamentary sovereignty, making clear that public authorities (including courts) are not bound by the obligation set out in subsection (1) to interpret legislation in a way which is compatible with Convention rights and should therefore interpret legislation in the usual way.

Clause 13: Proceedings

114 This clause establishes how a person can use Convention rights in legal proceedings. This includes bringing proceedings against a public authority under the Act, including by way of judicial

review; and the use of Convention rights in other ways to assist with establishing a cause of action already recognised in domestic law or to establish a defence to proceedings brought against them.

115 Subsections (1) and (2) set out how a person can bring human rights proceedings and rely on Convention rights, if they consider that a public authority has acted, or proposes to act, in a way which is incompatible with a Convention right (or rights).

116 Subsection (3) is a provision setting out that a human rights claim can be brought using judicial review. It also sets out that if a claim is brought that is not a judicial review, then there is a power to specify in which court those proceedings should be issued.

117 Subsection (4) sets out the time limit for bringing human rights proceedings against a public authority. That time limit is either one year beginning with the date of the act complained of taking place, or a longer period if the court or tribunal has deemed fair having considered the circumstances. This subsection is subject to any rule which imposes a stricter time limit in relation to the procedure in question, for example, judicial review.

118 Subsection (5) sets out that a human rights claim made against a public authority includes a counterclaim or similar proceeding.

119 Subsection (6) defines "victim", by reference to Article 34 of the Convention.

120 Subsection (7) sets out that the Bill will have extraterritorial jurisdiction to the extent there is under the European Convention on Human Rights, but subsection (8) makes this subject to clause 14(1), military operations overseas, meaning that the Bill will not have extraterritorial jurisdiction in the context of military operations overseas.

121 Subsection (9) makes clear that nothing in the Bill creates a criminal offence.

Clause 14: Overseas military operations

122 Clause 14 sets out where extraterritoriality of the Bill is limited to exclude military operations overseas. This means that a claim cannot be brought under the Bill for acts done or proposed to be done in the context of a military operation overseas.

123 Subsection (1) limits the extraterritorial application of the Bill to exclude military operations overseas. This means that section 13 (proceedings) does not allow a person to bring proceedings against a public authority for acts done or proposed to be done outside of the British Islands in the context of military operations overseas. For example, decisions on the battlefield overseas are included within the exclusion, and so a claim cannot be brought under the Bill in relation to such decisions. For this purpose, "overseas" is taken to mean outside the British Islands (meaning the UK, the Channel Islands and the Isle of Man, and the territorial sea adjacent to them).

124 Subsection (2) is a freestanding rule about the domestic application of the Bill in connection with military operations overseas. It specifies that for acts done within the British Islands for the purposes of military operations overseas, the determining factors are (a) that the act is done wholly for the purposes of overseas military operations and (b) that at the time of the act the person affected was outside the British Islands. In effect, it is not possible to bring a claim against a public authority if these conditions are met. For example, decisions made in the UK having effect both at home and abroad, e.g. recruitment of service personnel, would not be included in the rule because the decision would not be specifically targeted at military operations overseas. The rule is not intended to exclude claims in relation to preparatory actions such as training provided in advance of being deployed on a military operation overseas, or the procurement of equipment used or intended for use in a military operation overseas. Instead, the rule is intended to be focused on catching operational impacts occurring on the ground in military operations overseas. Therefore, decisions made in the UK with the operational effect taking place on an

overseas military operation, e.g. a decision made in London to carry out a drone operation in another country or to make a munitions strike in another country (with the overseas operational effect being typically instantaneous), would fall within the rule.

125 Subsection (3) relates to subsection (2) and specifies that where the person directly affected by the act is prevented from bringing proceedings by that subsection, a person who is an indirect victim due to their relationship with the directly affected person also may not bring a claim under the Bill.

126 Subsection (4) specifies that section 13 (proceedings) does not allow a person to bring a claim against a public authority in relation to an inquiry or investigation in response to 14(1) and 14(2). This limits the investigative obligations of Articles 2 and 3 from the Convention so that they don't apply to overseas military operations.

127 Subsection (5) sets out that Convention rights can still be relied on in criminal proceedings, including in proceedings before the service courts, and subsections 14(1) – 14(4) do not prevent this. This subsection is not limited to members of the armed forces, and so would include, for example, other official personnel working in the context of military operations overseas who are able to rely on their Convention rights in any criminal proceedings. Service personnel would also be able to rely on Convention rights in proceedings relating to service offences, such as a court martial for desertion, or in any criminal action taken against them by the Service Prosecuting Authority or equivalent organisation, regardless of whether the act is done, or proposed to be done, during an overseas military operation.

128 Subsection (6) defines "overseas military operations" and "Her Majesty's Forces". "Overseas military operations" are any operations outside the British Islands where Her Majesty's forces are under attack or face the threat of attack or violent resistance. This does not include training exercises overseas. "Her Majesty's forces" is defined in relation to the Armed Forces Act 2006 and does not include any Commonwealth force. For these purposes, it refers only to British armed forces.

129 There is a commencement provision at clause 39(3) which states that the Secretary of State may only exercise may only commence clauses 13(8) and 14 (overseas military operations) if they are satisfied that to do so is consistent with the UK's obligations under the Convention. For the Secretary of State to be satisfied, it may require the introduction of alternative domestic remedies within a subsequent Act, or the revision of extraterritorial jurisdiction under the Convention itself.

Clause 15: Permission required to bring proceedings

130 This clause establishes the permission procedure for a human rights claim brought under section 13(2)(a). It sets out the permission test, exempts certain proceedings from the permission test, and establishes the right of appeal against a decision to refuse permission.

131 Subsection (1) sets out that permission from the court is required before a human rights claim against a public authority can advance to a full hearing for various proceedings. This relates to civil law claims with a human rights element. For judicial review, the permission stage will apply only to judicial review proceedings in England and Wales.

132 Subsection (2) exempts certain proceedings from the permission stage. Subsection (2)(a) explains that this clause does not cover permission for proceedings brought in Scotland or Northern Ireland on a petition or application for judicial review for human rights claims.

133 Subsection (3) contains the permission test that the court must apply before the claim against a public authority can proceed to a full hearing.

134 Subsection (4) allows the court to grant permission if, in the absence of a claimant being able to evidence a significant disadvantage, there is a wholly exceptional reason on the grounds of public interest.

135 Subsection (5) requires the court to record the outcome if a person is unable to demonstrate that they have suffered a significant disadvantage, but the court grants permission on the basis that there is a wholly exceptional public interest.

136 Subsection (6) sets out that there will be a single right of appeal against a decision to refuse permission. This appeal will be to a higher court or tribunal. There will be no second appeal and the procedures covering appeals will be set out in rules.

137 Subsection (7) allows for the procedures for the permission stage and appeals to be set out in rules of court or rules.

138 Subsection (8) defines the term "significant disadvantage" by reference to Article 35 of the Convention.

Clause 16: Judicial review: Sufficient Interest

139 This clause establishes the requirements for a claimant's standing to bring a judicial review claim.

140 Subsection (1) sets out where subsections (2) and (3) apply in relation to judicial review proceedings for human rights claims in Northern Ireland brought under clause 13(3)(a), or other judicial review proceedings in England and Wales, or Northern Ireland, not brought under 13(3)(a) where there is some reliance on a Convention right or rights.

141 Subsection (2) sets out that a person bringing an application for a judicial review claim on the grounds of human rights must be a victim (or would be a victim) of the act (or proposed act) in order for them to be considered a sufficiently interested party.

142 Subsection (3) explains the conditions in subsection (4) required to be met in order to bring judicial review proceedings for human rights claims by clause 13(3)(a) in Scotland, or other judicial review proceedings in Scotland where there is some reliance on a Convention right or rights.

143 Subsection (4) sets out, similarly to subsection (2) for England and Wales, and Northern Ireland, that a person bringing a petition for judicial review for human rights in Scotland, must be (or will be) a victim of the act (or proposed act).

Clause 17: Judicial remedies: general

144 Subsection (1) states that a court may grant such remedy as it considers just and appropriate where it finds that a public authority has breached a Convention right, subject to the powers of the court as set out in subsection (2) and the conditions on the award of damages as set out in clause 18. Subsection (2) sets out that the award of a given remedy must be within the courts' powers, which are explained in the following subsections.

145 Subsection (2)(a) sets out that a court may grant a remedy other than damages in human rights cases if the court has the power to grant that remedy.

146 Subsection (2)(b) sets out that only those courts that have the power to award damages in civil proceedings may do so in human rights cases. This is intended to ensure that human rights damages are only available in the appropriate courts.

147 Subsection (3) provides that the relevant person (for example the Lord Chancellor) may make regulations to ensure that a tribunal can provide an appropriate remedy, where a breach of a Convention right has occurred. This allows flexibility to ensure that changes can be made over

time to provide an appropriate remedy. Subsection (3)(a) provides that the relevant person can add to the relief or remedies the court may grant, for the same reasons as above. Subsection (3)(b) provides that the relevant person can add to the grounds on which the tribunal may grant a remedy, for the same reasons as above.

148 Subsection (4) provides that regulations made under subsection (3) can become effective immediately but must be approved by the relevant legislature (the UK Parliament, the Scottish Parliament, or the Northern Ireland Assembly).

149 Subsection (5) sets out the provisions that enable a public authority held liable for damages under the Bill to claim a contribution from any other person who would be liable in respect of the breach. This maintains the position under the HRA.

150 Subsection (5)(a) applies to proceedings for contribution in Scotland.

151 Subsection (5)(b) applies to proceedings for contribution in England, Wales, and Northern Ireland.

152 Subsection (6) sets out what is meant by the court granting a remedy.

153 Subsection (6)(a) sets out that a court can grant a remedy by awarding a remedy or relief, for example damages.

154 Subsection (6)(b) sets out that a court can grant a remedy by making an order, for example, a mandatory order or a quashing order.

Clause 18: Judicial remedies: damages

155 Subsection (1) states that a court may award damages in a human rights claim to a person only in certain circumstances, subject to the conditions in both paragraphs being satisfied.

156 Subsection (1)(a) sets out that a court may only award damages in a human rights claim to a person if they have suffered loss or damage arising from the breach of their rights.

157 Subsection (1)(b) stipulates that a court may only award damages in a human rights claim if it would not be able to grant a remedy that is just and appropriate without making an award of damages. This reflects the wording of clause (17)(1).

158 Subsection (2) sets out that, when the breach of rights complained of is in relation to Article 5 of the Convention (the right to liberty and security), a court may award damages in a human rights claim notwithstanding subsection (1). This means that it is not a requirement for an award of damages that the person suffered loss or damage arising from the unlawful act or that the court is to be satisfied that is unable to grant a remedy that is just and appropriate without making an award of damages.

159 Subsection (3) sets out that a court must not award a higher sum of damages in a human rights claim than that which it considers that the ECtHR would award.

160 Subsection (4) sets out when the requirements of subsections (5) to (7) must be followed.

161 Subsection (4)(a) applies when the court is considering if an award of human rights damages is necessary to grant a remedy that is just and appropriate.

162 Subsection (4)(b) applies when the court is considering the amount of any award of human rights damages.

163 Subsection (5) provides that a court must take into account all the circumstances of a case, including several factors referred to in the following subsections.

164 Subsection (5)(a) provides that the court must take into account any conduct of the person it considers relevant. The effect of this provision is to allow the courts broad discretion to assess what conduct is relevant, and if relevant, what weight to give it. The discretion provided means that the courts may not consider relevant, or if relevant, give less weight to conduct that has taken place where, for example, the claimant was being coerced or abused.

165 Subsection (5)(b) provides that the court must take into account anything that was done by the public authority to avoid acting incompatibly with the Convention right that has alleged to have been breached. Courts already routinely take this into account, but this provision gives courts a statutory basis on which to take account of the extent of a breach in determining an award of damages.

166 Subsection (5)(c) provides that the court must take into account how serious the effects of the unlawful act were or are, which will depend on the context but may include consideration of the length of time of the breach, the level of the breach or the consequences of the breach.

167 Subsection (5)(d) provides that the court must take into account any other remedy granted in relation to the same act, for instance in a separate tort action. This invites courts to ensure that the same breach is not double counted through an award of damages in separate cases.

168 Subsection (5)(e) provides that the court must take into account the consequences of any other decision, of that court or any other court, in relation to the same act. For example, depending on the nature of the case, if the applicant has already been granted a retrial or pardon, or if there has been a change in the law relevant to the issue, the court may take this into account when determining whether to make an award of damages or the amount of an award.

169 Subsection (6) provides that the court must seriously consider the importance of minimising the impact of the particular award being contemplated on the provision of public services. It ensures that courts consider the extent to which the amount of damages that could potentially be awarded would constrain public authorities' ability to provide services to the wider public.

170 Subsection (7) provides that the court must consider the impact of future awards on the provision of public services. It ensures that courts make a broad assessment of the longer-term impact of any other future awards involving the same or similar issues on the ability of public authorities to provide services to the public.

171 Subsection (8) (a) provides that any reference to an unlawful act by a public authority includes an act that has been proposed but not yet carried out, which would breach someone's Convention rights.

172 Subsection(8)(b) provides that any reference to damages includes compensation.

Clause 19: Judicial acts

173 Judges and magistrates (or those acting in a judicial capacity) are usually immune from damages awards being made against them in proceedings under the Bill of Rights. Clause 19 sets out the way in which a claim may be brought, and the situations in which damages may be awarded.

174 Subsection (1) details how a claim can be made against judges or those acting in a judicial capacity under clause 13(2)(a): by appealing a judgment; applying for judicial review (or, in Scotland, a petition); or in another way that has been set out by procedural rules.

175 Subsection (2) clarifies that subsection (1) does not affect any laws that prevent the court being recognised as a public authority or state body during a judicial review. Judicial review is possible for mistakes of law made by courts or tribunals below the High Court. Mistakes of law of the High Court can be corrected only by appealing to an appellate court.

176 Subsection (3) sets out the exceptional circumstances in which compensation may be awarded in claims against judicial acts done in good faith.

177 Subsection (3)(a) sets out that damages may be awarded to the extent required by Article 5(5) of the Convention, where a judicial act done in good faith breaches Article 5 (right to liberty and security). Article 5 focuses on protecting a person's freedom from unreasonable arrest or detention).

178 Subsection (3)(b) enables damages to be awarded under the Bill in respect of a judicial act done in good faith where the judicial act is incompatible with Article 6 (right to a fair trial), and the breach of Article 6 causes the person to be (i) detained when they would not otherwise have been, or (ii) subjected to a longer period of detention than had the breach not been committed.

179 Subsection (3)(c) enables damages to be awarded in respect of a judicial act done in good faith where a judge follows an unfair procedure, during which an individual's Article 8 rights have been breached.

180 Subsection (4) sets out that the Crown (i.e. the Government) will pay damages for a successful claim as permitted in subsection (3), but the appropriate person (relevant Minister - for example, the Secretary of State for Justice or Secretary of State for Scotland) must be notified and added to proceedings, if they are not already a party to them, in order to allow the court to award damages.

181 Subsection (5) provides definitions of some of the terms used in clause 19.

Limits on powers of court etc.

Clause 20: Limit on court's power to allow appeals against deportation

182 The deportation of a person may be ordered where it is deemed to be conducive to the public good. This can arise in a number of circumstances, including foreign nationals who have committed certain criminal offences. In some situations, foreign national offenders are subject to automatic deportation.

183 Since the introduction of the Immigration Act 2014 there is no automatic right for a person to appeal a deportation order, although there remains a statutory right to appeal against a decision on human rights grounds.

184 Clause 20 establishes limits upon the court's power when they are considering appeals against deportation on human rights grounds by foreign national offenders. Specifically, it applies only to appeals against deportation orders made in relation to Article 6 (right to a fair trial).

185 Subsection (1) establishes that the scope of the clause applies to foreign criminals. Where the clause refers to foreign criminals, this is defined as persons who are not British citizens, are sentenced to at least twelve months' imprisonment or are sentenced to imprisonment for an offence specified by order under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Subsection (1) also establishes that subsections (2) to (4) apply where a tribunal is considering an appeal under the 2002 Act by a foreign criminal against his deportation and he is raising arguments that their removal from the UK in accordance with the order would be unlawful under section 12 of the Bill. It is focused, therefore, on the substance of the appeal and the effect of removal of the offender from the UK.

186 Subsection (2) sets out the limits on the court's power to allow appeals relying upon Article 6 (right to a fair trial) of the Convention where the section applies. It requires that the tribunal hearing the appeal must dismiss it unless it considers that dismissing the appeal would cause a breach of Article 6 that is so fundamental as to amount to a nullification of the right to a fair trial.

187 Subsection (3) provides that the relevant tribunal will need to consider whether the receiving State where the person will be deported to has provided to the UK assurances of compliance with Article 6 on how the person will be treated. In considering these assurances there will be a presumption that the Secretary of State's assessment of them is correct, and the tribunal should treat that assurance as determinative, and dismiss the appeal accordingly, unless it considers that it could not reasonably conclude that the assurances would be sufficient to prevent a breach of Article 6 that is so fundamental as to amount to a nullification of the right to a fair trial.

188 Subsection (4) defines various terms used in this section.

Clause 21: Limit on court's power to require disclosure of journalistic sources

189 Clause 21 makes specific provision for the protection of journalists' sources. The clause applies where a person supplies information to another whilst intending or knowing the information is likely to be used for journalism.

190 In some circumstances, courts can order disclosure of a journalist's source. Clause 21(1) sets out that a court can order disclosure only if it is necessary in the interests of justice; or in the interests of national security or the prevention of crime or disorder. There must also be an exceptional and compelling reason why it is in the public interest to disclose the source.

191 When courts are assessing whether a public interest in disclosure exists, courts will need to give great weight to the public interest in protecting journalists' sources, including the fact that their protection supports the right to freedom of expression. Clause 21(2) links the protection for journalistic sources to protection of the Article 10 right to freedom of expression.

192 Clause 21(3) defines terms used in the clause. 'Journalistic source' includes where a person supplies information to another with the intention that the recipient will use the information for journalism, or where the source knows the information is likely to be used for journalism.

Clause 22: Limit on court's power to grant relief that affects freedom of expression

193 Clause 22(1) applies clause 22 whenever a court is considering whether to grant any relief (i.e. an injunction) which might affect the exercise of the Convention right to freedom of expression (Article 10). For example, this provision will apply where courts are considering granting an injunction to prevent publication of material.

194 Clause 22(2) sets out that if the respondent, i.e. the person against whom an application for relief is made and whose right to freedom of expression would be restricted, is not present nor represented in court, the court cannot grant relief, unless the applicant has taken all practicable steps to notify the respondent, or if there are exceptional and compelling reasons why the respondent should not be notified.

195 Clause 22(3) outlines that courts cannot restrain publication before trial (i.e. where courts are considering granting an interim injunction) unless the court is satisfied that the applicant is likely to establish that publication should not be allowed at full trial.

196 Clause 22(4) defines "relief" as any remedy or order other than in criminal proceedings.

Clause 23: Freedom of thought, conscience, and religion

197 Clause 23 applies when a court is considering whether to grant relief (i.e. a remedy or order) which might affect a religious organisation's ability to exercise the Convention right to freedom of thought, conscience and religion (under Article 9). This provision does not change the fact that the freedom of thought, conscience and religion remains a qualified right and is subject to the qualifications set out in Article 9(2) of the Convention.

198 Clause 23(2) requires that where the court is considering whether to grant relief, they must pay 'particular regard' to the importance of protecting the right.

199 Clause 23(3) extends the definition of "religious organisation"' to its members collectively.

Clause 24: Interim measures of the European Court of Human Rights

200 This clause sets out how interim measures of the ECtHR should be treated in the UK. Interim measures are made under Rule 39 of the ECtHR's Rules of Court, and their purpose is to prevent a State from taking steps which may result in the harm that the applicant is seeking to prevent before the ECtHR. These measures are only made where the applicant faces a real risk of serious, irreversible harm if the measure is not made.

201 Subsection (1) sets out that in determining rights and obligations under domestic law of a public authority, or any other person, interim measures are not to be taken into account.

202 Subsection (2) sets out the circumstances under which subsection (3) applies. Subsection (3) applies where a domestic court is considering whether to grant any relief which might affect the exercise of a Convention right.

203 Subsection (3) provides that under the circumstances set out in subsection (2), the court may not have regard to any interim measures issued by the ECtHR. The purpose of this section is to ensure that the fact that an interim measure has been issued by the ECtHR does not influence domestic courts when deciding whether to grant relief that may affect the exercise of Convention rights.

Remedial action

Clause 25: Duty to notify Parliament of failure to comply with the Convention

204 Clause 25 introduces a duty on the Government to notify Parliament of any judgments of the ECtHR against the UK, as well as instances where the UK has unilaterally declared in proceedings before the ECtHR that it has failed to comply with a Convention right.

205 Subsection (1) sets out what must be notified to Parliament pursuant to subsection 2. There are two scenarios. Firstly, this includes final judgments of the ECtHR finding that the UK has failed to comply with an obligation under the Convention in subsection 1(a). Secondly, cases where the UK has made a unilateral declaration that it has failed to comply with such an obligation under subsection 1(b). In the latter case, there has not been a decision made by the ECtHR, but rather an acknowledgement of the UK that a Convention right has been violated that leads to the ECtHR ending the proceedings.

206 Subsection (2) sets out the obligation itself, requiring that the Secretary of State must lay notice of a judgment or unilateral declaration before Parliament. The obligation does not require any further action to be taken by either Ministers or Parliament once the notification has been made. The clause does not contain any consequences for failure to notify.

Clause 26: Power to take remedial action

207 This clause gives Ministers, and Her Majesty in Council, the power to make remedial regulations. These are a type of secondary legislation which can be used to amend legislation, which has been found to be incompatible with the Convention rights, to remove the incompatibility. This process is intended to enable the incompatibility to be addressed more quickly than might be possible if only primary legislation could be used. The power to make remedial regulations broadly replicates the power to make remedial orders under the HRA, with one exception in subsection (6), explained below.

208 Subsection (1) provides that the power to take remedial action and make remedial regulations applies if:

- a domestic court has made a declaration of incompatibility under clause 10 and if an appeal lies, the appeal is not being pursued/has been abandoned; or
- the ECtHR has made a finding in a case against the UK after this provision comes into force and a Minister, or Her Majesty in Council, concludes as a result that a provision of legislation is incompatible with a UK obligation arising from the Convention.

209 Subsection (2) adds various restrictions in using the remedial power. A Minister of the Crown must consider that there are compelling reasons for using remedial regulations rather than primary legislation, or another form of secondary legislation (as appropriate); and they can only be used to make amendments that the Minister considers necessary to remove the incompatibility.

210 Subsection (3) sets out that in respect of subordinate legislation, remedial regulations can be used to amend primary legislation to remove the incompatibility in certain circumstances, even if the incompatibility is in subordinate legislation. This is to address situations where the underlying primary legislation may compel the subordinate legislation to be drafted in a particular way which gives rise to the incompatibility. The Minister must have compelling reasons to do this and amendments to primary legislation should be made as the Minister considers necessary.

211 Subsection (4) specifies further circumstances in which subordinate legislation can be amended by remedial regulations. This is where a provision in subordinate legislation has been quashed or declared invalid due to incompatibility with a Convention right and the Minister proposes to make remedial regulations using the urgent procedure (as set out in Schedule 2).

212 Subsection (5) provides that Her Majesty in Council can also make remedial regulations if the incompatible provision is in an Order in Council.

213 Subsection (6) lists legislation which is exempt from being amended by remedial regulations: Measures of the Church Assembly or of the General Synod of the Church of England (legislation made by the Church of England), and the Bill itself. To safeguard the constitutional status of the Bill, subsection 6(b) makes it explicit that the Bill itself cannot be amended by remedial regulations.

214 Subsection (7) refers to Schedule 2 which provides further details about the Parliamentary process for making remedial regulations.

Derogations and reservations

Clause 27: Derogations

215 This clause takes a similar approach to the HRA in respect of derogations, but the drafting has been updated to make clarify how the process works.

216 Derogations allow States to suspend temporarily some of their obligations under the Convention in times of war or other public emergency threatening the life of the nation (Article 15 of the Convention). This clause sets out the process for giving UK derogations effect in domestic law, which is described as designating the derogation.

217 Subsection (1) provides that the Secretary of State may designate a UK derogation by regulations. This has replaced the existing order making power with a power to make regulations (a different kind of secondary legislation), as per current practice. It has also introduced the concept of 'UK derogation,' defined in subsection (6).

218 Subsection (2) provides further detail in relation to designating derogations. Regulations made under subsection (1) may be made in anticipation of the making of a UK derogation (clause 27(2)(a)). This means that a designation can be made before the UK formally notifies the Council of Europe of its intention to derogate from part of the Convention. These regulations are subject to

the made affirmative procedure (subsection (2)(b)). The definition of this procedure is set out in clause 33.

219 Clause 27(3) provides for circumstances under which a UK derogation made at the international level ceases to be designated under domestic law. A UK derogation ceases to be designated either if it is amended, replaced, or withdrawn (clause 27(3)(a)), or, unless the derogation has already ceased to be designated because it has been amended, replaced, or withdrawn, five years after the date on which the regulations designating the derogation were made (clause 27(3)(b)). In other words, the designated derogation lasts for five years, unless it has been amended, replaced, or withdrawn before those five years have lapsed. Once the designated derogation ceases to be designated, the derogation no longer has effect in UK law.

220 Clause 27(4) sets out circumstances under which the Secretary of State may by regulations extend the period of designation. At any time before the end of (i) the five years beginning with the date on which the designation regulations are made (unless the derogation has already ceased to be designated because it has been amended, replaced, or withdrawn) (clause 27(4)(a)) or (ii) the period extended by regulations made under this subsection (clause 27(4)(b)), the designated derogation may be extended by a further period of five years. As such, the Secretary of State can extend the period of designation by an additional five years at any time before the end of the initial (or previous) five-year period.

221 Clause 27(5) sets out that regulations made under subsection (4) are subject to the affirmative procedure.

222 Clause 27(6) defines "UK derogation" as a derogation by the UK from an Article of the Convention or of any protocol to the Convention (clause 27(6)(a)), and "designated derogation" as a UK derogation that is designated by regulations made under subsection (1) and is still in force because it has not lapsed or been amended, replaced, or withdrawn (clause 27(6)(b)).

Clause 28: Reservations

223 Under Article 57 of the Convention, any State may, upon signing of the Convention, make a reservation in respect of a provision of the Convention, where any domestic law is not in conformity with the provision of the Convention. Reservations may not be general but must relate to specific provisions of, or protocols to, the Convention. The UK has one partial reservation to the right to education in the First Protocol to the Convention. These clauses set out relevant provisions in respect of reservations.

224 Clause 28(1) sets out the one existing reservation of the UK, namely to Article 2 of the First Protocol to the Convention. This is a designated reservation, meaning it has effect in UK law.

225 Clause 28(2) provides that a UK reservation ceases to be designated (i.e. ceases to have effect) if it is wholly withdrawn.

226 Clause 28(3) provides that if the UK reservation relating to education contained in subsection (1) ceases to be designated if it is withdrawn, the Secretary of State must by regulations amend subsection (1) to reflect that change. This means that this provision may be amended by secondary legislation.

227 Clause 28(4) sets out the procedure to be used for statutory instruments containing regulations made under subsection (3). Such statutory instruments must be laid before Parliament after being made.

228 Clause 28(5) provides relevant definitions. Subsection (6)(a) introduces a concept of "UK reservation" which is a reservation by the UK to an Article of the Convention, or of any protocol

to the Convention. Subsection (6)(b) defines "designated reservation" as a reservation designated under subsection (1) and which has not ceased to be designated by having been withdrawn.

Clause 29: Designated derogations and reservations to be set out in Schedule 3

229 This clause relates to the content of Schedule 3, which contains current reservations and derogations of the UK and contains a duty on the Secretary of State to update Schedule 3 to reflect any designated derogations and reservations or their lapsing or changing.

230 Clause 29(1) sets out that designated derogations and designated reservations are set out in Schedule 3 to this Bill.

231 Clause 29(2) requires the Secretary of State to amend Schedule 3 if it appears to them that it has become out of date, for example to remove or add new derogations. The Secretary of State must do so by regulations.

232 Clause 29(3) provides for the process to be used when making regulations under this section. A statutory instrument containing regulations under this section must be laid before Parliament after it is made.

233 Schedule 3 sets out the existing UK reservation to Article 2 of the First Protocol to the Convention.

Judges of the European Court of Human Rights

Clause 30: Appointment to European Court of Human Rights

234 Under the European Convention on Human Rights, every nine years, the UK is required to provide a list of three candidates to the Parliamentary Assembly of the Council of Europe from which to elect one of the judges to the ECtHR.

235 Clause 30 concerns any judge of the ECtHR who, immediately prior to their appointment, was a judge in a UK court. In particular, the provisions will allow a judge in these circumstances to retain their judicial office in the UK (that is, their "role" as a member of a UK court) without performing any associated function, whilst they serve on the ECtHR. This will effectively ensure that, upon completing their mandate as judge of the ECtHR, the judge can resume their office in the UK court, if they so desire.

236 The clause will apply only to judges holding one of the offices listed in subsection (1). These have been updated to include certain offices not covered in the equivalent provision of the HRA, such as the offices of judge of the Supreme Court and judge of the Upper Tribunal (which did not exist when the HRA was enacted in 1998). This means, for example, that if a judge of the Supreme Court is elected to become judge of the ECtHR, they will be entitled to remain a judge of the Supreme Court (albeit passively) whilst serving at the ECtHR. They will also be allowed to return to the Supreme Court as an active judge at the end of their mandate in Strasbourg.

237 Clause 30(3) will provide that a judge serving at the ECtHR, if they have retained office in a UK court, should not count towards the maximum number of judges allowed for that court. This will ensure that courts do not have to operate with fewer actively serving judges than the maximum number of judges that could, as per legislation, serve at that court. In practice, this means that an additional judge could be appointed during that period, on the same terms as any other judge appointed to that court.

238 Clauses 30(6) and (7) provide that the Lord Chancellor, or Scottish Ministers or the Northern Ireland Department of Justice with regards to relevant offices in Scotland and Northern Ireland respectively, may make regulations necessary to ensure that a judge who has completed their term at the ECtHR can effectively transition back to serving as a judge in a UK court. This could involve

temporarily increasing the maximum number of judges allowed to serve in the court in which the returning judge holds office. This power may only be exercised after consultation with the Lord Chief Justice of England and Wales or with the Lord Chief Justice of Northern Ireland, or any other judicial officeholder they wish to nominate under clause 30(10) and clause 30(12), where it affects a judicial office in England and Wales or in Northern Ireland, respectively. Regulations made under this power are subject to the negative procedure.

Rules and regulations

Clause 31: Rules

239 This clause sets out how and where power is conferred in order to make 'rules' for the Bill - a type of secondary legislation. This is delegated legislation that is made by a person or body under an authority contained in primary legislation (this clause serves as the authority in this Bill). This is in order to ensure legislative flexibility and relevant rules to operate these provisions are kept up to date. There are also general rules of court, separate to statutory instruments, that are relevant in several other areas of the Bill, for example in determining how evidence is introduced to inform the interpretation of rights.

240 Subsection (1) explains the definition of "rules" used in this Bill. Subsection (2) sets out that in making rules, regard must be considerate of clause 19 (judicial acts) of the Act.

241 Subsection (3) sets out that the Lord Chancellor may use statutory instruments to make additional non-court rules relating to the Act.

242 Subsection (4) establishes that a statutory instrument containing rules (other than rules of court) relating to the Bill made by the Lord Chancellor or the Scottish Ministers is subject to the negative procedure. Subsections (5) and (6) set out the procedures to make rules in relation to Northern Ireland.

Clause 32: Regulations

243 Clause 32 sets out the procedures to be used for regulation making provisions in the Bill.

244 Subsection (1)(a) sets out that regulations under the Bill may make consequential, supplementary, incidental, transitional, or saving provision; or with subsection (1)(b), different provision for different purposes. Subsection (1)(a) does not apply to sections 37, 39 or 40.

245 Subsection (2) outlines that powers in the Bill for any Minister of the Crown to make regulations are exercisable by statutory instrument.

246 Subsection (3) states that for a Northern Ireland department, powers to make regulations are exercisable by statutory rule.

247 Subsection (4) sets out the procedure for the "affirmative procedure" and subsection (5) sets out procedures for the "negative procedure".

Clause 33: Regulations subject to made affirmative procedure

248 Clause 33 sets out the procedure for regulations subject to the "made affirmative" procedure. Clause 33(2) sets out that, under the made affirmative procedure, the statutory instrument containing the regulations must be laid before Parliament after being made and, under clause 33(3) the regulations will cease to have effect 40 days after this unless the instrument is approved by a resolution of each House of Parliament during those 40 days.

249 Clause 33(4) sets out that the 40-day period does not include and days during which either (a) Parliament is dissolved or prorogued, or (b) either House of Parliament is adjourned for more than four days.

250 Clause 33(5) clarifies that if the regulations cease to have effect because they were not approved by a resolution within 40 days, this does not affect the validity of anything previously done in reliance on the regulations or prevent the making of new regulations under.

Interpretation

Clause 34: Meaning of "public authority"

251 Clause 34 sets out the scope of the term ''public authority''. Public authorities are the bodies to which the obligation in clause 12 of the Bill applies. It is intended that the Bill applies to the same bodies as the HRA and, as such, the definition of ''public authority'' hinges on the term ''functions of a public nature'', as per subsection (1)(b). This formulation has the benefit of flexibility, which will allow application of the definition to evolve in line with changes to how public functions are delivered and broadly mirrors the bodies for whose actions the UK is responsible before the ECtHR. Subsection 1(a) sets out that courts are public authorities. Subsection (2) outlines that if particular act by a person is private in nature, then that person is not a public authority by virtue of subsection (1)(b).

Clause 35: Meaning of "Strasbourg jurisprudence"

252 Clause 35 defines the meaning of "Strasbourg jurisprudence" throughout this Bill.

Clause 36: Interpretation

253 Clause 36 provides definitions for certain term that are used throughout the Bill, except for in the case of terms used in Schedule 1 or defined in other clauses.

Final provisions

Clause 37: Consequential and minor amendments

254 Clause 37(1) introduces Schedule 5, which sets out the consequential and minor amendments that the Bill makes to other legislation

255 Clause 37(2) provides the Secretary of State with a power to make provision that is consequential on the Bill.

256 Clause 37(3) sets out that regulations made under this power may amend primary legislation made before or in the same session as this Bill.

257 Subsections (4) and (5) set out that regulations made under this power are subject to the affirmative procedure if amending primary legislation, and the negative procedure in all other cases.

Clause 38: Application and extent

258 Subsection (1) provides that this Act, once enacted, binds the crown.

259 Subsection (2) sets out the territorial extent of the Bill. The Bill extends to England and Wales, Scotland, and Northern Ireland.

Clause 39: Commencement

260 Clause 39 sets out how and when the Bill will be commenced. Clause 39(1) sets out that clauses 31 to 41 (except clause 37(1)) will come into force on the day that the Bill is passed.

261 Clause 39(2) confers a commencement power on the Secretary of State in relation to the other clauses of the Bill. Different provisions of this Bill may be commenced at different times.

262 Clause 39(3) states that the Secretary of State may only exercise this commencement power in relation to clauses 13(8) and 14 (overseas military operations) if they are satisfied that to do so is

consistent with the UK's obligations under the European Convention on Human Rights. For the Secretary of State to be satisfied, it may require either the introduction of alternative domestic remedies within subsequent legislation, or the revision of extraterritorial jurisdiction under the Convention.

Clause 40: Power to make transitional or saving provision

263 Clause 40 confers a power on the Secretary of State to make transitional or saving provision in connection with the coming into force of any provision of this Bill by regulation. This provides a mechanism for making amendments which are necessary to ensure a smooth transition between the old and the new law.

264 Subsection (2) provides that this power includes the power for the Secretary of State to amend primary or subordinate legislation to preserve or restore the effect of legislation that has been interpreted or applied using section 3 of the HRA so that this is not lost on repealing the HRA. This power allows Secretary of State to preserve or restore the effect of a "relevant judgment" (as defined in subsection (3)).

265 Subsection (3) defines "relevant judgment". These are judgments where a court or tribunal has interpreted or applied a provision of legislation and it appears to the Secretary of State that this has been done in reliance on section 3 of the HRA. Subsection (4) sets out that the affirmative procedure must be used for any amendments to primary legislation under this clause. Subsection (5) sets out that the negative procedure shall be used for any other amendments under this clause.

266 Subsection (6) provides for a two-year sunset clause. The Secretary of State will have two years following the commencement of the repeal of the HRA to use the power provided in this clause.

267 Subsection (7) defines "the commencement date" (which is when the repeal of the HRA comes into force in relation to section 3 of the HRA) and defines the "HRA 1998" as the Human Rights Act 1998.

Clause 41: Short title

268 Clause 41 sets out that, once enacted, this legislation can be cited as the Bill of Rights 2023.

Schedules

Schedule 1: The Articles

269 Schedule 1 sets out the Convention rights.

Part 1: The Convention

Article 2: Right to life

270 Article 2 is the right to life. Article 2(1) sets out that no one shall be deprived of their life intentionally, save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided in law.

271 Article 2(2) sets out that deprivation of life shall not be regarded as inflicted in contravention of Article 2 if it results from the use of force which is no more than absolutely necessary, either: (a) in defence of any person from unlawful violence, (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, or (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3: Prohibition of torture

272 Article 3 is the prohibition of torture. It sets out that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4: Prohibition of slavery and forced labour

273 Article 4 is the prohibition of slavery and forced labour. It sets out that no one shall be held in slavery or servitude or shall be required to perform forced or compulsory labour.

274 Article 4(3) sets out that "forced or compulsory labour" does not include: (a) any work to b detention imposed according to the provisions of Article 5 (right to liberty and security) or during conditional release from such detention, (b) military service, or service exacted instead of military service in the case of conscientious objectors in countries where they are recognised, (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community or (d) any work or service which forms part of normal civic obligations.

Article 5: Right to liberty and security

275 Article 5 is the right to liberty and security. Article 5(1) sets out that everyone has the right to liberty and security of person, and no one shall be deprived of liberty except for in the designated circumstances in accordance with a procedure prescribed by law. These designated circumstances are:

a. the lawful detention of a person after conviction by a competent court;

b. The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law

c. The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so

d. The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority

e. The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants,

f. The lawful arrest or detention of a person to prevent his effecting an authorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

276 Article 5(2) sets out that everyone who is arrested shall be informed promptly, in a language they understand, f the reasons for their arrest and the charge against them.

277 Article 5(3) sets out that everyone arrested or detained under Article 5(1)(c) (bringing before the competent authority) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to a trial within a reasonable time or a release pending trial. It also sets out that this release may be conditioned by guarantees that the person will appear for trial.

278 Article 5(4) sets out that everyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings whereby a court decides the lawfulness of their detention speedily and orders their release if the detention is not lawful.

279 Article 5(5) sets out that everyone who has been the victim of arrest or detention in contravention of Article 5 has an enforceable right of compensation.

Article 6: Right to a fair trial

280 Article 6 is the right to a fair trial. Article 6(1) sets out that everyone is entitled to a fair and public hearing, within a reasonable time by an independent and impartial tribunal established by law, to determine their civil rights and obligations or of any criminal charge. Judgments shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

281 Article 6(2) sets out that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

282 Article 6(3) sets out the minimum rights that everyone charged with a criminal offence has. These are: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7: No punishment without law

283 Article 7 is the right to no punishment without law. Article 7(1) sets out that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. It also sets out that a heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed.

284 Article 7(2) sets out that this Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8: Right to respect for private and family life

285 Article 8 is the right to respect for private and family life. Article 8(1) sets out that everyone has the right to respect for their private and family life, their home, and their correspondence.

286 Article 8(2) sets out that here shall be no interference by a public authority with the exercise of this right unless this is in accordance with the law and is necessary in a democratic society in the interests of one of the following: national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9: Freedom of thought, conscience, and religion

287 Article 9 deals with freedom of thought, conscience, and religion. Article 9(1) sets out that everyone has the right to freedom of thought, conscience, and religion. It sets out that this right includes the freedom to change their religion or belief and freedom, either alone or in community with others and in public or private and to manifest his religion or belief, in worship, teaching, practice and observance.

288 Article 9(2) sets out that the freedom to manifest one's religion or beliefs shall only be subject to limitations that are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health, or morals, or for the protection of the rights and freedoms of others.

Article 10: Freedom of expression

289 Article 10 deals with freedom of expression. Article 10(1) sets out that everyone has the right to freedom of expression. It sets out that this right includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. However, it also specifies that this Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.

290 Article 10(2) sets out that this is a qualified right: that 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.

Article 11: Freedom of assembly and association

291 Article 11 deals with freedom of assembly and association. Article 11(1) sets out that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

292 Article 11(2) sets out that no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. However, it sets out that this Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12: Right to marry

293 Article 12 sets out the right to marry. It sets out that people of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right. This is a qualified right.

Article 14: Prohibition of discrimination

294 Article 14 contains the prohibition of discrimination. It sets out that the enjoyment of the rights and freedoms set out in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

Article 16: Restrictions on political activity of aliens

295 Article 16 sets out permissible restrictions on the political activity of aliens (meaning foreign nationals). It sets out that nothing in Articles 10 (freedom of expression), 11 (freedom of assembly and association) and 14 (prohibition of discrimination) shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17: Prohibition of abuse of rights

296 Article 17 prohibits the abuse of Convention rights. It sets out that nothing in the Convention may be interpreted as implying for any State, group, or person any right to engage in any activity or

perform any act aimed at the destruction of any of the rights and freedoms set in the Convention or at their limitation to a greater extent than is provided for in the Convention.

Article 18: Limitations on use of restrictions on rights

297 Article 18 limits the use of restrictions on rights under the Convention and sets out that rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Part 2: The First Protocol

Article 1: Protection of property

298 Article 1 of the First Protocol deals with the protection of property. It sets out that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

299 However, the second paragraph of Article 1 specifies that the preceding provisions shall not, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties

Article 2: Right to education

300 Article 2 of the First Protocol deals with the right to education. It specifies that no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3: Right to free elections

301 Article 3 of the First Protocol contains the right to free elections. It specifies that the parties to the Convention undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Part 3: Article 1 of the Thirteenth Protocol

Article 1: Abolition of the death penalty

302 Article 1 of the Thirteenth protocol contains the abolition of the death penalty. It specifies that the death penalty shall be abolished and that no one shall be condemned to such penalty or executed.

Schedule 2: Remedial regulations

303 Schedule 2 provides further details about the Parliamentary procedures for making remedial regulations. These broadly replicate the procedures for making remedial orders under the HRA, except for an additional provision that makes clear that remedial regulations cannot be used to amend the Bill itself.

Regulations

304 Paragraph 1 sets out various effects that remedial regulations may have. Sub-paragraph (1)(a) provides that remedial regulations may have effect from a date earlier that the date they are made; this is useful to address earlier consequences of the incompatibility before the regulations can be made. However, sub-paragraph (4) ensures that no one can be found guilty of an offence solely as a result of the retrospective effect; this ensures compatibility with Article 7 of the Convention, which states that "no one shall be held guilty of any criminal offence on account of any act or

omission which did not constitute a criminal offence under national or international law at the time when it was committed."

305 Sub-paragraph (1)(b) provides that remedial regulations may make provision for the delegation of specific functions. Sub-paragraph (2) provides that they may amend any primary legislation apart from the Bill itself; and they may amend or revoke subordinate legislation. Sub-paragraph (3) provides that they may be made so as to have the same extent as the legislation they affect in order to ensure continuity, for example in relation to territorial extent.

Procedure

306 Paragraph 2 sets out the requirements for remedial regulations to be made. There are two options. In the standard, "non-urgent" procedure, the remedial regulations cannot be made unless a draft of the remedial regulations has been laid before Parliament, and then after a period of 60 days has ended, both Houses of Parliament have approved the draft. In the "urgent" procedure, the person making the remedial regulations can make them without a draft being approved and declare that urgency makes it necessary to do so. Further details on each procedure are set out below.

Regulations laid in draft

307 Paragraph 3 provides details of the standard, "non-urgent" procedure. First, a document containing a draft of the proposed remedial regulations must be laid before Parliament, together with the required information (as defined). This is an explanation of the incompatibility that the regulations are proposing to remove and the reason for using the remedial regulation process. A period of 60 days, beginning on the day on which the document containing the proposal for a draft order was laid, must be allowed for making any representations (defined in paragraph 5). After the period of 60 days has ended, the draft remedial regulations themselves must be laid accompanied by a statement containing a summary of any representations made and details of any drafting changes made to the proposed remedial regulations. After another period of 60 days has ended, the regulations then need the approval of both Houses of Parliament before they can be made. This procedure provides opportunity for scrutiny and redrafting as a result of representations made by Parliamentary Committees and others.

Urgent cases

308 Paragraph 4 provides details of the "urgent" procedure, which can be used when there is an urgent need to remove the incompatibility. For example, the Minister may decide this is necessary in situations where the ongoing incompatibility may have particularly serious consequences. The regulations must declare that it appears necessary to the person making them to use the urgent procedure.

309 Under this procedure, remedial regulations can be made so that they come into force without being approved in draft. They must still be laid for a 60-day period with the required information to give an opportunity for "representations" to be made (defined in paragraph 5). After that period, if any representations have been made, a summary of them must be laid before Parliament, together with details of any changes made as a result; and new remedial regulations can be made to replace the original ones. If the regulations (whether that is the original regulations or the replacement regulations) are not approved by both Houses of Parliament before the end of 120 days from the making of the original regulations, they cease to have effect. This procedure provides opportunity for scrutiny and redrafting as a result of representations made and ensures that the remedial regulations cease to have effect unless they are approved by both Houses of Parliament.

Definitions

310 Paragraph 5 provides definitions of terms used in Schedule 2. "Representations" means representations about the remedial regulations (or proposed remedial regulations), for example reports from Parliamentary committees which have scrutinised them. "Required information" means an explanation of the incompatibility which the remedial regulations are intended to remove, and a statement of the reasons for using remedial regulations.

Calculating periods

311 Schedule 2 specifies certain periods of time for different stages in making remedial regulations. Paragraph 6 states that certain days do not count towards calculating these periods: days that fall during periods where Parliament is dissolved or prorogued, or when either House of Parliament is adjourned for more than four days, are not counted. This is intended to ensure that Parliament has sufficient time to scrutinise draft remedial regulations, and remedial regulations made under the "urgent" procedure.

Schedule 3: Designated reservation

312 Schedule 3 sets out the only existing UK reservation under the Convention, to Article 2 of the First Protocol to the Convention (the right to education).

Schedule 4: Judicial pensions

313 Schedule 4 enables the appropriate Minister to make regulations relating to the domestic judicial pensions of ECtHR judges elected in respect of the UK. This power will allow regulations to set out that the UK judge at the ECtHR remains entitled to active membership of their judicial pension scheme in the UK, if they were an active member of that scheme immediately prior to their appointment to the ECtHR. This power would also allow regulations to determine the terms of any continued entitlement including whether there is a requirement for contributions to be made. Regulations made under this power are subject to the negative procedure, unless made in the same instrument as scheme regulations under section 1 of the Public Service Pensions Act 2013 where those are subject to the affirmative procedure. In this case, regulations made under Schedule 4 would also be subject to the affirmative procedure. The provisions do not affect entitlement to the ECtHR pension scheme.

314 Paragraph 3 of Schedule 4 provides that regulations made under these provisions may amend any of the Acts of Parliament specified in Paragraph 4, referred to as "pensions Acts", though they may only be amended as the Minister deems necessary or expedient for the administration of the pensions scheme concerned in relation to this Act. Paragraph 4 provides definitions of terms used in this Schedule.

Schedule 5: Consequential and minor amendments and transitional provision

Contempt of Court Act 1981

315 Paragraph 1 of Schedule 5 amends the Contempt of Court Act 1981, section 10 on sources of information. It adds after the existing subsection 1 that the subsection does not apply where the source of information is a journalistic source and to see section 20 of this Bill for the details of the provision limiting the court's power to require the disclosure of journalistic sources. Detail can be found on this clause at the relevant section of these Explanatory Notes.

Human Rights Act 1998

316 Paragraph 2 of Schedule 5 repeals the Human Rights Act 1998.

Government of Wales Act 2006

317 Paragraph 14 of Schedule 5 omits the entry for the HRA (which the Bill will repeal) from Schedule 3A of the Government of Wales Act 2006 to reflect that the HRA has been repealed and that Welsh Ministers can seek to be joined as a party to the proceedings in accordance with clause 11(2).

Commencement

318 Clause 38 sets out how and when the Bill will be commenced. Clause 38(1) sets out that clauses 31 to 40 (except clause 36(1)) will come into force on the day that the Bill is passed.

319 Clause 38(2) provides that confers a commencement power on the Secretary of State in relation to the other clauses of the Bill. Different provisions of this Bill may be commenced at different times.

320 Clause 38(3) states that the Secretary of State may only exercise this commencement power in relation to clauses 13(8) and 14 (overseas military operations) if they are satisfied that to do so is consistent with the UK's obligations under the European Convention on Human Rights. For the Secretary of State to be satisfied, it will require either the introduction of alternative domestic remedies within a subsequent Act, or the possibility that extraterritorial jurisdiction is revised at an international level.

Financial implications of the Bill

321 This Bill does not confer any new financial expenditure.

Parliamentary approval for financial costs or for charges imposed

322 As no additional expenditure is expected to arise from this Bill, this Bill is not subject to a money resolution.

Compatibility with the European Convention on Human Rights

323 The Government considers that the Bill of Rights is compatible with the Convention. Accordingly, the Deputy Prime Minister, Lord Chancellor and Secretary of State for Justice has made a statement under section 19(1)(a) of the HRA to this effect.

324 The Government's Convention analysis can be found in the memorandum to the Joint Committee on Human Rights.

Duty under section 20 of the Environment Act 2021

325 The Government's view is that the Bill does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

Related documents

326 The following documents are relevant to the Bill and can be read at the stated locations:

- Human Rights Act Reform: A Modern Bill of Rights. A consultation to reform the Human Rights Act 1998: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf

Annex- Territorial extent and application in the United Kingdom

The Bill in its entirety extends and applies to England, Wales, Scotland, and Northern Ireland.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Legislative consent motion needed?
Clause 1 - Introductory	Yes	Yes	Yes	Yes	No
Clause 2 - The Convention Rights	Yes	Yes	Yes	Yes	No
Clause 3 – Interpretation of Convention Rights	Yes	Yes	Yes	Yes	Yes - for Scotland, Northern Ireland, and Wales
Clause 4 – Freedom of Speech	Yes	Yes	Yes	Yes	Yes - for Scotland, Northern Ireland, and Wales
Clause 5 – Positive obligations	Yes	Yes	Yes	Yes	Yes - for Scotland, Northern Ireland, and Wales
Clause 6 – Public protection	Yes	Yes	Yes	Yes	Yes – for Scotland, Northern Ireland, and Wales
Clause 7 – Decisions that are properly made by Parliament	Yes	Yes	Yes	Yes	No
Clause 8 – Article 8 of the Convention: Deportation	Yes	Yes	Yes	Yes	No
Clause 9 – Jury trial	Yes	Yes	Yes	Yes	Yes - for Scotland

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Legislative consent motion needed?
Clause 10 – Declaration of incompatibility	Yes	Yes	Yes	Yes	Yes - for Scotland and Northern Ireland
Clause 11 – Right of Crown to intervene	Yes	Yes	Yes	Yes	Yes - for Scotland, Northern Ireland, and Wales
Clause 12 – Acts of public authorities	Yes	Yes	Yes	Yes	Yes - for Scotland, Northern Ireland, and Wales
Clause 13 - Proceedings	Yes	Yes	Yes	Yes	No
Clause 14 – Overseas military operations	Yes	Yes	Yes	Yes	No
Clause 15 – Permission required to bring proceedings: general	Yes	Yes	Yes	Yes	Yes - for Scotland and Northern Ireland
Clause 16 – Judicial review: sufficient interest	Yes	Yes	Yes	Yes	No
Clause 17 – Judicial remedies: general	Yes	Yes	Yes	Yes	Yes - for Scotland, Northern Ireland, and Wales
Clause 18 – Judicial remedies: damages	Yes	Yes	Yes	Yes	Yes - for Northern Ireland
Clause 19 – Judicial acts	Yes	Yes	Yes	Yes	Yes - for Northern Ireland
Clause 20 – Limits on court's power to allow appeals against deportation	Yes	Yes	Yes	Yes	No
Clause 21 – Limit on court's power to require disclosure of journalistic sources	Yes	Yes	Yes	Yes	Yes - for Scotland, Northern Ireland, and Wales

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Legislative consent motion needed?
Clause 22 – Limit on court's power to grant relief that affects freedom of expression	Yes	Yes	Yes	Yes	Yes – for Northern Ireland
Clause 23 – Freedom of thought, conscience, and religion	Yes	Yes	Yes	Yes	No
Clause 24 – Interim measures of the European Court of Human Rights	Yes	Yes	Yes	Yes	No
Clause 25 – Duty to notify Parliament of failure to comply with the Convention	Yes	Yes	Yes	Yes	No
Clause 26 – Power to take remedial action	Yes	Yes	Yes	Yes	No
Clause 27 – Derogations	Yes	Yes	Yes	Yes	No
Clause 28 - Reservations	Yes	Yes	Yes	Yes	No
Clause 29 – Designated derogations and reservations to be set out in Schedule 3	Yes	Yes	Yes	Yes	No
Clause 30 – Appointment to European Court of Human Rights	Yes	Yes	Yes	Yes	Yes - for Scotland and Northern Ireland
Clause 31 - Rules	Yes	Yes	Yes	Yes	Yes - for Scotland and Northern Ireland
Clause 32 - Regulations	Yes	Yes	Yes	Yes	Yes - for Scotland, Northern Ireland, and Wales
Clause 33 – Regulations subject to made affirmative	Yes	Yes	Yes	Yes	No
Clause 34 – Meaning of "public authority"	Yes	Yes	Yes	Yes	N/A – see substantive clause
Clause 35 – Meaning of "Strasbourg jurisprudence"	Yes	Yes	Yes	Yes	N/A – see substantive clause
Clause 36 - Interpretation	Yes	Yes	Yes	Yes	N/A – see substantive clauses

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Legislative consent motion needed?
Clause 37 – Consequential and minor amendments	Yes	Yes	Yes	Yes	Yes – for Scotland, Northern Ireland, and Wales
Clause 38 – Application and extent	Yes	Yes	Yes	Yes	N/A
Clause 39 – Commencement	Yes	Yes	Yes	Yes	N/A
Clause 40 – Power to make transitional or saving provision	Yes	Yes	Yes	Yes	Yes – for Scotland, Northern Ireland, and Wales
Clause 41 – Short title	Yes	Yes	Yes	Yes	N/A
Schedule 1 – The Articles	Yes	Yes	Yes	Yes	No
Schedule 2 – Remedial Regulations	Yes	Yes	Yes	Yes	No
Schedule 3 - Reservation	Yes	Yes	Yes	Yes	No
Schedule 4 – Judicial pensions	Yes	Yes	Yes	Yes	No
Schedule 5 – Consequential and minor amendments and transitional provision	Yes	Yes	Yes	Yes	Yes - for Scotland, Northern Ireland, and Wales

BILL OF RIGHTS BILL

EXPLANATORY NOTES

These Explanatory Notes relate to the Bill of Rights Bill as introduced in the House of Commons on 22 June 2022 (Bill 117)

Ordered by the House of Commons to be printed, 22 June 2022

PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS