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The Rt Hon Dominic Raab MP
Lord Chancellor and Secretary of State for Justice

Copy to:

The Rt Hon Alister Jack MP, Secretary of State for Scotland
The Rt Hon Mark Drakeford MS, First Minister of Wales
Paul Givan MLA, First Minister of Northern Ireland
Michelle O'Neill, Deputy First Minister of Northern Ireland

20 December 2021

Dear Dominic,

Thank you for your letter of 14 December 2021 in which you confirmed that the UK Government intends to replace the Human Rights Act 1998 with a “Bill of Rights”.

I recognise that repealing or replacing the Human Rights Act has been a long-standing ambition on the part of the Conservative Party, with similar proposals having been a feature of manifestos and subsequent policy initiatives since at least 2006. I know too that you have had a particular and long-standing personal commitment to weakening or removing fundamental human rights safeguards of the kind which are enshrined in the Act.

I thought it might therefore be helpful to put on record the Scottish Government’s principled objection to the proposition that the Human Rights Act requires to be “reformed” or replaced by a “modern Bill of Rights”. I also want to make very clear from the outset that much of what is proposed in the consultation intrudes, whether directly or indirectly, into matters which lie firmly within the devolved competence of the Scottish Parliament. These matters are not confined to proposals such as those relating to trial by jury which are self-evidently for the Scottish Parliament, and for it alone, to determine.

As you know, human rights as a subject matter are not reserved to the UK Parliament by the Scotland Act 1998. Responsibility for the observation and implementation of human rights obligations in Scotland rests with Scotland’s devolved institutions, including in particular our democratically-elected national parliament.

I do therefore welcome the recognition in the consultation paper that, whilst the Human Rights Act itself is a “protected statute” which cannot be modified by an Act of the Scottish Parliament, our Parliament is nonetheless entitled to legislate for itself in the field of human rights. Indeed, the Scottish Government has an explicit manifesto commitment to bring

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forward legislation during the current parliamentary session which will incorporate further human rights treaty obligations into Scots law, so that they become justiciable in the Scottish courts.

The Human Rights Act is, in its current form, woven directly into the fabric of the current constitutional settlement. Any change to the existing statute would therefore itself be a constitutional matter with specific and direct implications for the exercise of both legislative and executive competence by devolved institutions. As such, I am very clear that proposals of this nature would require the legislative consent of the Parliament under the Sewel Convention.

I should of course take this opportunity also to put on record that the Scottish Government welcomes your clarification that UK ministers remain committed, at least for now, to the UK remaining a full State Party to the European Convention on Human Rights (“ECHR”). Any move by the UK Government to denounce its obligations under the ECHR would, quite apart from the domestic consequences, be disastrous in terms of its international impact. One of the most regrettable and alarming features of the anti-human-rights rhetoric which has all too often been associated with proposals for a “British Bill of Rights” is the encouragement that it gives to repressive regimes around the world. Such regimes need little excuse to commit human rights violations, but messaging that suggests the UK somehow regards core human rights protections as an unwelcome or unnecessary burden is ill-judged and irresponsible.

The Scottish Government will of course respond in detail to your consultation paper, and I note that the deadline for receipt of comments is 8 March 2022. I do, however, want to comment briefly on the approach taken by the UK Government in publishing its consultation paper simultaneously with the report and recommendations of the Independent Human Rights Act Review.

The Scottish Government was one of the almost 170 organisations and individuals which submitted detailed evidence in response to the Review’s call for evidence. It is therefore extremely disappointing that the UK Government has effectively ignored the wealth of expert evidence submitted to the Review by some of the UK’s most eminent legal and human rights experts. The overwhelming weight of that evidence demonstrated beyond argument that the Human Rights Act has been highly successful and effective. “Reform”, as you characterise it, is not just unnecessary, but undesirable.

In fact, as the consultation response from Amnesty International made clear: *“The HRA is a remarkably finely crafted statute [which] has been highly successful in its purpose: the protection of people’s human rights ... the HRA is in fact very well designed for its particular place in the UK’s constitutional arrangements”*.

That assessment was shared by the Faculty of Advocates, which responded that *“we do not consider that a case is made out for any significant change”*.

Such views were not confined to Scotland, with the Law Society of England and Wales (for example) making clear that *“While there is significant evidence to demonstrate the value of the HRA in its current form, we have not seen convincing evidence pointing to the need for*

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its amendment. Significant amendment risks ... undermining access to justice and the rule of law". There were many, many more responses in similar vein.

Moreover, for its part, the Review panel found no convincing case for a radical overhaul of the Human Rights Act of the kind that is now being proposed.

I therefore find it difficult to view the proposals which have now been published by the UK Government other than as a pre-planned and politically-motivated attack on human rights, constitutional certainties and the rule of law. Both the consultation and recent statements to the effect that "overhauling" the Human Rights Act is "a good way of ... ironing out our constitution" suggest an agenda which seeks to radically alter and undermine the principal legal and constitutional protections which have so successfully safeguarded and advanced human rights throughout the UK over the last two decades.

I know that that is a widely-shared perception across the political spectrum and amongst civil society partners in Scotland. I certainly agree with the statement issued on Tuesday by leading human rights organisations in Scotland that *"instead of looking to expand and build on how human rights are protected in law, the UK Government has instead set out plans to weaken them. This is unnecessary, uncalled for and deeply divisive"*¹.

The concern felt in Scotland and elsewhere has been further exacerbated by the UK Government's claims that free speech and democratic debate have been "whittled away" by "wokery or political correctness". The truth, of course, is that the real threat to free speech and democratic debate in this country comes from those who believe themselves entitled to unlawfully prorogue the UK Parliament in order to prevent democratic scrutiny of their actions. A blasé willingness to break international law, ride roughshod over the Sewel Convention, or the serial attempts which have been made to restrict everything from access to the courts to the right to protest are not indicative of a government which has a deep or genuine commitment to fundamental freedoms or the principles on which modern democracies are based.

Not surprisingly, therefore, I find myself very much in agreement with the stark assessment offered by Liberty in its response to Tuesday's announcement. There are very good grounds for believing that this is indeed *"a blatant, unashamed power grab"* by a government that *"is systematically shutting down all avenues of accountability through a succession of rushed and oppressive bills"*.

The threat is one which Professor Mark Elliot, Professor of Public Law at the University of Cambridge, has helpfully described as illustrating *"the fragile state of respect for the rule of law on the part of the UK Government"*. In fact, the underlying mindset is one that *"assumes the UK can legislate its way out of its international law obligations [and] is based on a legally illiterate form of British exceptionalism ... Drill down, and we find that judicial interference essentially means 'courts interpreting the law in a way the Government doesn't like"*.

¹ <https://www.scottishhumanrights.com/news/scottish-human-rights-organisations-unite-to-reject-unnecessary-regressive-and-divisive-plans-to-replace-human-rights-act/>

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In that connection I was further concerned by your remarks in the UK Parliament on Wednesday that *“he who comes to equity must come to the court with clean hands”*. Justice, on that analysis, would appear to be something that should be contingent on the moral standing of an individual – presumably with the government of the day determining the “social credit score” of each litigant.

I have to say that such ideas represent not just a fundamental misunderstanding of the universal and inalienable nature of human rights; they suggest a dangerous and authoritarian direction of travel which is entirely out of step with the established Scottish and UK conceptions of justice and fairness. Establishing facts, determining questions of criminal or civil liability, and dispensing justice, including imposing appropriate punishment where it is merited, are very much the proper functions of our courts. Assessing the subjective moral worth of an individual is not. History provides adequate warning of where such a path may lead.

The reality of course is that the UK does not need a new “Bill of Rights”. That role is already very successfully performed by the Human Rights Act. For our part, the Scottish Government has consistently made clear that there must be no changes to the Human Rights Act that would undermine or weaken existing human rights safeguards in Scotland or indeed elsewhere in the UK.

The Human Rights Act remains one of the most important and successful pieces of legislation ever passed by the UK Parliament. It has a 20 year track record of delivering justice, including for some of the most vulnerable people in our society, and it is a central pillar of Scotland’s constitutional settlement.

As you know, our own clear direction of travel in Scotland is to extend and enhance human rights protections, not to restrict fundamental freedoms or access to justice.

My strong preference would of course be to find ourselves in a position where the Scottish Government can work constructively with you and with the other devolved governments and parliaments of these islands in order to respect, protect and fulfil human rights in ways that not only meet the needs of all members of our society but which demonstrate firm and principled international leadership on human rights.

That is an ambition which applies not just in the context of the current constitutional settlement, but should characterise a strong future partnership between an independent Scotland and the remaining nations within the UK. I would argue that it is self-evidently in our common interest to ensure that the values of democracy, human rights and the rule of law prevail not just within our own states and nations but continue to provide the foundation of a stable, rules-based international order.

As I have made clear in this letter, I have serious and deep-rooted concerns in relation to the UK Government’s current direction of travel, including in respect of the proposals set out in your consultation paper. I therefore welcome the offer of further dialogue with both yourself and Lord Wolfson which you made in your letter, and would propose that our respective officials liaise further in order to arrange a meeting in the New Year.

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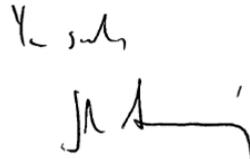


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I am copying this letter to the First Minister as well as to Keith Brown and Shona Robison in their respective capacities as Cabinet Secretary for Justice and Cabinet Secretary for Social Justice, Housing and Local Government. I am also copying it for information to Alister Jack, Secretary of State for Scotland, and to the First Minister of Wales and the First Minister and Deputy First Minister of Northern Ireland.


JOHN SWINNEY

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