

The background of the entire page is a photograph of a modern building's exterior. It features a grid of dark grey and light grey rectangular panels. Interspersed within this grid are several balconies or terraces. Each of these features a set of light-colored wooden railings that are arranged in a crisscross pattern. Some of the balconies have small, square windows with bright yellow frames. The overall aesthetic is contemporary and architectural.

Law For Scottish Lawmakers 2026

About JUSTICE.



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

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

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

A key goal is to provide evidence-based analysis to inform the development of new law and policy and to propose practical solutions to legal problems for law-makers, judges and public servants.

An important part of this work is done with decision makers in Parliaments and Governments, where we work to provide practical briefings on the law for officials and parliamentarians, free from party political influence.

This Guide Is Designed To Provide A Basic Introduction

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

Fuller information is provided in end notes.

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

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

Welcome.

The words inscribed on the Mace of the Scottish Parliament – Wisdom, Justice, Compassion and Integrity – offer a useful reminder of the principles that should underpin legislative decision-making.

Lawmakers must exercise wisdom in assessing evidence, scrutinising proposals and considering the long-term effects of legislation. They must pursue justice, ensuring that laws are fair, workable and consistent with the rights and protections expected in a democratic society. Compassion requires attention to the real-world impact of legal change, particularly on those most affected by public policy. And integrity demands a commitment to transparency, accountability and the rule of law.

Making law is one of the central responsibilities of parliamentarians. In the Scottish Parliament, Members are often required to engage with complex legal questions, including the scope of the devolved competence, the interaction between domestic and international obligations and human rights and equality laws. Members are regularly asked to consider legislation with significant consequences for individuals, communities and public institutions. Doing so well requires not only political judgment, but an understanding of the legal and constitutional framework within which our laws are made.

This guide has been developed by JUSTICE with Brodies LLP to support Members of the Scottish Parliament and others involved in the legislative process in navigating these issues with greater confidence. It is intended as a practical resource: explaining key legal concepts, highlighting common challenges, and encouraging more effective engagement in the lawmaking processes.

A better understanding of the law should not limit political debate. But it can improve the quality of that debate, strengthen parliamentary scrutiny, and ensure that laws are both effective in practice and robust in principle. It can help safeguard the values on which this Parliament was founded – Wisdom, Justice, Compassion and Integrity.

At a time when legal and constitutional questions are increasingly prominent in public life, equipping lawmakers with the tools to engage confidently with law is more important than ever. It is hoped that this guide will make a useful contribution to that aim.

JUSTICE was founded in 1957 with a mission to strive for a fairer justice system. JUSTICE advocates for better laws, policies, and practices, and it challenge developments that threaten people's rights or their equality before the law. JUSTICE Scotland is its thriving Scottish chapter. We seek to bring together experts from across the Scottish justice system to influence policy and deliver evidence-based reform. If you have any questions about the guide, or the legal impact of this

Parliament's work, JUSTICE has a dedicated team of lawyers ready to provide further support and assistance where we can.

Usman Tariq KC

JUSTICE Scotland Chair

Seonaid Stevenson-McCabe

JUSTICE Scotland Vice-Chair

Foreword.

As head of the Scottish judiciary, I welcome the publication of this valuable guide and commend it to everyone involved or interested in the making of laws affecting Scotland.

The guide explains the central features of the Scottish legal system with conspicuous clarity. It stresses the fundamental importance of the rule of law to everyone in our society. It sets out the roles and responsibilities of the three pillars of the State: the government, the legislature, and the judiciary. It is for the government to govern, the legislature to make the laws and hold government to account, and the judiciary to uphold the law.

The separation of these pillars and mutual respect between them are the essential principles of our democratic system.

Just as it is the duty of each pillar to remain separate, it is also their duty to support each other's role in upholding the purpose of the State. That purpose is to provide a country which is safe, where commerce can be conducted with confidence and where the basic rights of the individual are respected and upheld. To fulfil that purpose, the State must provide a guarantee to everyone within its jurisdiction. A guarantee of fairness. That the rules are clear. That they apply to everyone, equally. That those who break them will face consequences. That the rules are applied in public view, without delay. And, that nobody – particularly government, Parliament or the judiciary – is above them. That guarantee of fairness is central to the success of our country and to a vibrant democracy. The guarantee of fairness embodies the values inherent in the rule of law.

The guide makes an important contribution to the vitally important task of upholding and strengthening the rule of law by explaining the cardinal features of the system of justice in Scotland.

I warmly congratulate JUSTICE and all who have contributed to the guide.

The Right Honourable Lord Pentland

Lord President of the Court of Session
and Lord Justice General



01. Law For Lawmakers

Introduction.

An MSP has a number of roles. These include making law, acting as a representative and holding the Scottish Government and other public bodies to account. Each of these roles requires MSPs to interact with the law every day. However, whilst the legal profession has always been well-represented in politics, politicians are not elected for their ability as lawyers. This is no bad thing, as a Parliament full of aspiring lawyers would risk focusing on legal technicality rather than policy goals.

Nonetheless, it is important for MSPs to have a clear understanding of our laws and the legal system, its principles and its limitations. To carry out the role of an MSP effectively, MSPs should understand how the UK and Scottish governments, our constitution, and our society are regulated and how the rights of individuals are protected and enforced in practice.

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

The UK Constitutional Context.

The starting point for any conversation about the law is always the constitution. The UK is unusual in having no single codified constitutional document. Instead, our constitution is found in principles, conventions, precedents, and pieces of legislation accumulated over many years. Although you cannot download a copy or borrow the constitution from the library, this does not make the rules and principles that determine how the state works any less significant.

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

In recent years, our political discourse has been dominated by constitutional issues, including the constitutional implications of Brexit and the UK's evolving relationship with the European Union, the scope of devolution, the protection of human rights and, ultimately, the future of the United Kingdom itself. This guide does not seek to provide answers to those questions but may help readers explore the constitutional and legal principles which underlie them.

On any given day, an MSP might engage with the law in a number of ways:

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

Conducting scrutiny: The Scottish Parliament's Committees work to keep the Scottish Government in check. This can include checking whether ministers and agencies are acting lawfully and carefully examining proposed legislation.

In their constituency: MSPs regularly help constituents with their legal problems, including issues such as housing and eviction, access to health and social care services, and challenging local authority decision-making.

The UK's 'Unwritten' Constitution.

The UK is commonly said to have an “**unwritten**” or “**uncodified**” constitution. This shorthand is popular but can be misleading. It might suggest that we have never bothered to think about the rules which govern the relationships between the institutions of state.

In fact, those rules have evolved over centuries of thought and practice, and they continue to do so. This makes the constitution more difficult to grasp, but also means that it can adapt to the needs of our community.

Our constitution is derived from a range of sources, many of which date from well before the creation of the United Kingdom, including ancient English ‘charters’ like Magna Carta (which established limits on royal authority and granted certain individual liberties) and the Bill of Rights 1689 (England) and Claim of Right 1689 (Scotland) (which established limits on the powers of the monarch and the balance of power between monarch and Parliament, including the principles of frequent Parliaments, free elections and ‘parliamentary privilege’).

These sit alongside modern legislation passed by the UK Parliament governing how the country is run. For example, the Constitutional Reform Act 2005 (which established the UK Supreme Court), the European Union (Withdrawal Agreement) Act 2018, and the Acts which govern devolution (including the Scotland Act 1998) all shape our constitution as it stands today.

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

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

Devolution: Scotland's Constitution.

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

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

The Acts of Union 1706 and 1707, which followed, united Scotland and England and created the United Kingdom of Great Britain. Although the Acts created a union, it was not a “perfect union” and instead, preserved each nation's distinct traditions. The Acts of Union further contributed to the particular character of Scotland's constitutional position, preserving Scotland's distinct nationhood within the union.²

The Scottish Parliament and Scottish Government have since been created by the Scotland Act 1998, which is an Act of the UK Parliament, and their powers and limits are defined by that legislation.

“There shall be a Scottish Parliament”

The Scotland Act 1998, Section 1(1)



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

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

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

⁴See s63A Scotland Act 2016.

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

“There shall be a Scottish Government, whose members shall be:

- (a) the First Minister,
- (b) such Ministers as the First Minister may appoint..., and
- (c) the Lord Advocate and the Solicitor General for Scotland”

The Scotland Act 1998, Section 44(1)

As with any Act of Parliament, the Scotland Act can be amended by the UK Parliament,³ as it was by the Scotland Acts 2012 and 2016. One such amendment declares that the Scottish Government and Parliament are permanent features of the UK's constitutional arrangements that can only be abolished by a Scottish referendum.⁴ The final say on interpretation of the Scotland Act lies with the courts, and ultimately the Supreme Court of the United Kingdom. For that reason, the Scotland Act is sometimes described as ‘Scotland's Constitution’.

Equivalent legislation devolved power from the UK Parliament to Wales and Northern Ireland.⁵ The UK's devolution settlement is often described as ‘asymmetric’, as the scope of devolution varies across each of the nations. The Scottish Parliament's powers are limited by the concept of ‘**legislative competence**’ set out primarily in sections 28-30 of the Scotland Act 1998.

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

The Scotland Act 1998, Section 29(1)

There are two main elements to legislative competence. The first is that **'reserved'** matters remain under the sole control of the UK Parliament and are outwith the Scottish Parliament's legislative competence. This means that the Scottish Parliament may not pass legislation on those matters. 'Reserved matters' include areas such as foreign policy, defence and aspects of energy policy (including electricity, and oil and gas licensing). The Scotland Act only lists those areas which are reserved. All other matters are therefore 'devolved' and may, in principle, be legislated on by the Scottish Parliament. Reserved matters are set out in two ways. A list of reserved matters is contained in Schedule 5 to the Scotland Act 1998. A list of specific legislation which is reserved and therefore may not be amended by the Scottish Parliament is also set out in Schedule 4.⁶

The UK Parliament may still make legislation which relates to devolved matters but it will not normally act without the consent of the devolved Parliament or Assembly. This principle is called the **'Sewel Convention'** or the **'Legislative Consent Convention'**. Where the Scottish Parliament is invited to give consent in this manner, it does so by a **'Legislative Consent Motion'** or **'LCM'**.⁷ The list of reserved matters can be amended by primary legislation (i.e. an Act of the UK Parliament) or secondary legislation made by the UK Government. These are known as **'section 30(1) orders'**. Perhaps the most prominent example was the section 30(1) order used to permit the Scottish Parliament to pass the Scottish Independence Referendum Act 2013.

The second main element of the Scotland Act is the incorporation of human rights protections within the Scotland Act itself. Any legislative provision that is incompatible with **'Convention rights'** is outside legislative competence. Convention rights are the rights under the European Convention on Human Rights (**'the Convention'** or **'ECHR'**) which have also been incorporated into UK law by the Human Rights Act 1998 (**'the HRA'**).

While the UK was in the European Union, it was also outwith the Scottish Parliament's legislative competence to legislate in a way that breached EU law. The European Union (Withdrawal) Act 2018 repealed the European Communities Act 1972, by which the UK had acceded as a member state of the European Economic Area and incorporated European Community Law into its domestic law. EU law became no longer directly applicable in the UK following the 2018 Act but, to ensure continuity, some elements of EU law were retained in domestic law. For a fuller discussion of the implications of Brexit, see Chapter 6.

A number of mechanisms are provided within the

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

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

Scotland Act to ensure legislation is within legislative competence, which can be referred to as a "triple lock[AF1.1][JD1.2]" system. Any person introducing a Bill in the Scottish Parliament must state that (in their view) it falls within the Parliament's legislative competence. The Presiding Officer (the Speaker of the Scottish Parliament) must also independently assess legislative competence and provide a statement on whether (in their view) it falls within competence. After a Bill is passed, but before it is sent for Royal Assent (before it becomes law), it may be challenged in the UK Supreme Court by the Advocate General, Attorney General (UK Government Law Officers) or Lord Advocate (a Scottish Law Officer)). Following enactment, the legislative competence of any piece of legislation can also be challenged in the courts by anyone who is directly affected by the law, including members of the public.

Summary

The UK has no written constitution. The constitution is contained in and governed by constitutional principles, conventions, precedents and legislation.

The powers of the Scottish Parliament are constrained by the Scotland Act 1998 which sets out the legislative competence of the Parliament.

Some policy areas are explicitly reserved to the UK Parliament. All other policy areas are devolved.

Human rights protection is built into the Scotland Act and governs both the Scottish Parliament's powers and actions taken by the Scottish Government.



Constitutional Principles.

Parliamentary sovereignty and the rule of law

The UK constitution rests on two core common law principles. The first is that the UK Parliament is sovereign, meaning that it has ultimate legal authority to enact, amend or repeal any law. The second is that we are all – including the government of the day – governed by the rule of law.

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

A V Dicey, Introduction to the Study of the Law of the Constitution⁸

Parliamentary Sovereignty.

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

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

⁹2020 SC 37.

¹⁰In the 1953 case of McCormick v Lord Advocate 1953 SC 396, the then Lord President stated that the principle was not part of Scotland's constitutional history and doubted it could be said to be true for a UK Parliament founded by a treaty between nations. In more recent judgments, the Supreme Court has hinted that the common law may limit parliamentary sovereignty, for example the non-binding opinion of Lord Hope in Jackson v the Attorney General [2005] UKHL 56, which was a case about the Hunting Act 2004.

¹¹See, for instance, the decision of the Supreme Court in Axa General Insurance Limited v HM Advocate 2012 SC (UKSC) 122.

“Under the constitutional system of the United Kingdom Parliament is the sovereign institution. Its sovereignty is exercised through the enactment of Acts of Parliament, which represent law binding on all persons, including the executive and other official institutions [...] Thus it is Parliament, and Parliament alone, that is empowered to effect changes in the law of the United Kingdom, either directly in an Act of Parliament or indirectly by authorizing subordinate legislation through an Act of Parliament”.

Lord Drummond Young, Cherry v Advocate General for Scotland⁹

Although the precise scope of parliamentary sovereignty has been questioned in case law, for practical purposes, it remains the basis on which the constitution is said to operate.¹⁰

As already discussed, the Scottish Parliament does not enjoy parliamentary sovereignty equivalent to that of the UK Parliament, due to the limits set out in the Scotland Act 1998. The courts can declare that the Scottish Parliament's legislation “is not law” (strike it down) if it is not within legislative competence and have done so on a small number of occasions. However, the courts have also made clear that they will recognise the special status of the Scottish Parliament as a directly elected representative body when assessing the lawfulness of its legislation.¹¹

The Rule Of Law.

The **‘rule of law’** lies at the heart of modern democracy.

It is often said that the judiciary is the ultimate guardian of the rule of law, but the rule of law does not mean the rule of judges, and the views of judges will not always trump Parliament’s intention.¹² Instead it means that no government can do anything unless it can point to the law which gives it the power to do so. The government must comply with the law and not exercise power arbitrarily.

The rule of law ensures that government bodies and other agencies cannot interfere with our freedom without parliamentary approval; we are all, including government, equal before the law. The law applies equally to everyone, and no one is above it.

The Magna Carta – which is often cited as preventing unlawful detention and punishment without due process (amongst other fundamental rights and liberties) – provides one of the earliest examples of the rule of law in action.

Similar constitutional concepts developed in Scotland prior to the Union. For instance, the Claim of Right Act 1689, an Act of the pre-union Scottish Parliament, contains provisions rejecting the use of imprisonment without due process.¹³

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

The Separation Of Powers.

The principle of the **‘separation of powers’** requires that all three arms of the state – the legislature (parliament), the executive (ministers) and the judiciary (courts) – perform their different roles under the constitution independently of each other:

- (a) The executive is responsible for formulating and implementing policy;
- (b) The legislature oversees the work of the executive and creates the law to reflect policy; and
- (c) The judiciary interprets, enforces and applies the resulting law.

This allows for a system of mutual checks and balances designed to ensure that power is distributed and that each institution works within the confines of the constitution and its role within it.

At a UK level, the executive comprises the Government, including the Prime Minister, Cabinet Ministers and the Crown. The legislature – Parliament – comprises the House of Commons, the House of Lords and the Crown. The judiciary comprises the judges in the courts and tribunals system.

In Scotland, for devolved matters, the executive is the Scottish Government (being the First Minister and the Scottish Ministers) and the legislature is the Scottish Parliament. Courts and tribunals in Scotland adjudicate on both devolved and non-devolved issues.

Unlike in some countries, the separation of powers between institutions in the UK and Scotland is not absolute. At both a UK and Scottish level, ministers are members of the executive but simultaneously sit and vote in the relevant parliament. This means that members of the government can vote as part of the legislature and also ensures that they are held to account by the legislature.

Nevertheless, the independence of each institution remains critically important.

The relationship between the legislature and the courts is also based on respect for their different constitutional functions. For the UK Parliament, Article 9 of the Bill of Rights 1689 prevents domestic courts from directly calling into question the proceedings of the UK Parliament. This is known as the concept of **‘parliamentary privilege’**. A more limited version of this protects proceedings in the Scottish Parliament from defamation claims and is built into section 41 of the Scotland Act 1998.

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

Summary

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

The Independence And Impartiality Of The Judiciary.

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

Summary

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

The principle of judicial independence is a long-standing principle of the common law which underpins the right to access to justice, the rule of law and the separation of powers. It was put into statute by the Constitutional Reform Act 2005, which places a duty on the Lord Chancellor and other ministers to uphold the independence of the judiciary. Similar provision was made in Scotland by the Judiciary and Courts (Scotland) Act 2008.

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

The Judicial Oath

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

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

Unelected but democratic

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

Lord Bingham, Belmarsh¹⁴



¹²As noted by Lord Hughes (dissenting in part) in R (Evans) v Attorney General [2015] UKSC 21 (the ‘black spider memos’ case) at [154].

¹³Developments were not always equivalent. For instance, torture was made illegal in England by the Bill of Rights of 1688, some time before Scotland where it was prohibited under the Treason Act of 1708.

¹⁴A and others v Secretary of State for the Home Department [2004] UKHL 56 at [42].

Preservation of this impartiality means that:

- (a) The judiciary must be institutionally and functionally separate from the other branches of government.
- (b) Judicial independence also assumes that the other branches of government will refrain from personal attacks on individual judges and undue criticism of judicial decisions. The First Minister, Scottish Ministers, Lord Advocate and MSPs all have an explicit duty to uphold the independence of the judiciary. The Scottish Government is expressly barred from seeking to influence judicial decisions.¹⁵
- (c) Finally, and crucially, both actual bias and the appearance of bias are prohibited. In the famous Pinochet case, a House of Lords decision was overturned because one of the judges was linked to a charity which intervened in the case. There was no suggestion that the judge had not acted independently, but the appearance that he could have done so meant the case had to be heard again.¹⁶

Judicial Appointments

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

In Scotland, the Lord President is head of the judiciary and has responsibility for the Scottish Courts and Tribunals Service, which is operationally independent from the Scottish Government.

Independent bodies are responsible for judicial appointments and remuneration within their jurisdiction. For example, the Judicial Appointments Board for Scotland handles judicial recruitment, overseeing a merit-based selection process consisting of online applications, shortlists and selection days. The Board has a statutory duty to select candidates solely on merit, although diversity must also be taken into account.¹⁷

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

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

¹⁷s12-14 of the Judiciary and Courts (Scotland) Act 2008.

¹⁸ These documents are available online from the respective government websites.

Institutional Competence And Respect.

The relationship that the UK Parliament and Scottish Parliament each have with the courts is built on mutual respect for their respective constitutional roles. Generally, the principles of parliamentary sovereignty and the rule of law reinforce the distinct constitutional responsibilities of Parliament and the judiciary.

Just as the UK and Scottish Parliaments recognise that it would not be proper to comment on live legal disputes, the courts recognise that there are boundaries to their expertise. For example, in judicial review cases, judges will not substitute their own decision for that of a public authority. They pay particular respect to the decisions of specialist tribunals and bodies appointed by the parliaments or ministers.

Courts are also sensitive to the limits of their ability to make decisions about resource allocation or socio-economic policy (see Chapter 4).

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

Other Key Features Of The Constitution.

There are a range of other conventions and principles which form part of the UK constitution which we cannot cover in detail. Most are grounded in the common law and reflected in the Ministerial Code, the Civil Service Code or in the Cabinet Manual.

In Scotland, the Scottish Ministerial Code applies and a separate (but very similar) version of the Civil Service Code exists.¹⁸ These documents are a helpful guide to the work of ministers and officials and they are often used by parliament in its scrutiny work. Examples of well-known constitutional conventions include:

- The King will not withhold Royal Assent for any law passed by the UK or Scottish Parliaments.
- The principle of ‘collective cabinet responsibility’ means that all ministers take responsibility for all of the government’s decisions, even if they disagree with them privately.
- The UK intends to abide by its obligations in international law.

Our Legal System.

The UK does not have a single legal system. Instead, our constitution recognises three distinct legal jurisdictions: in England and Wales; Scotland; and Northern Ireland, each with its own system of courts and laws.¹⁹

Summary

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

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

The Courts and Tribunals.

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

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

¹⁹There has been some debate as to whether Wales may establish its own legal jurisdiction, separate from England (see Distinct, not separate: the future of the Welsh jurisdiction | The Law Society). However, for present purposes, England and Wales continues to exist as a single legal jurisdiction (albeit, as with Scotland and Northern Ireland, there is a body of devolved legislation passed by the Senedd that applies only to Wales).

²⁰The Courts Reform (Scotland) Act 2014 introduced a new Sheriff Appeal Court which began to hear appeals in September 2015.

²¹McInnes v HM Advocate [2010] UKSC 7 at [5] (Lord Hope).

²²Criminal Procedure (Scotland) Act 1995, s124(2), as amended. Once the compatibility issue is resolved, the Supreme Court must remit the case back to the High Court for disposal, meaning that the High Court of Justiciary remains the final court of appeal for all criminal matters in Scotland.

Criminal Courts.

In Scotland, less serious criminal cases are dealt with in justice of the peace courts (by lay magistrates) or in sheriff courts under summary procedure (by a sheriff sitting alone), and more serious ones by sheriff courts under solemn procedure (by a sheriff sitting with a jury). The Sheriff Appeal Court will hear appeals in summary (less serious) criminal cases.²⁰ The most serious cases are prosecuted in the High Court of Justiciary, which also acts as the final court of appeal for all Scots criminal cases.²¹ The Victims, Witnesses and Justice Reform (Scotland) Act 2025, when in force, will also establish a new Sexual Offences Court that will have jurisdiction to hear criminal cases involving serious sexual offences. There is no right to a jury trial as such. Instead, whether or not a trial is conducted with a jury depends on the procedure that it is prosecuted under. However, the most serious criminal cases in the sheriff court, and all criminal cases in the High Court of Justiciary (and Sexual Offences Court) are triable with a jury.

Only when criminal cases raise issues relating to Convention rights can the UK Supreme Court become involved, and then only so far as required to resolve these ‘**compatibility issues**’.²²

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



Civil Courts.

In Scotland, civil cases are heard in the local Sheriff court or in the Court of Session, depending on the type of case and its value. The Court of Session is Scotland’s highest civil court and generally hears high-value (i.e. over £100,000) and complex cases, both at first instance and on appeal, and cases involving judicial review. The Court of Session also has a specialist division called the Commercial Court, which is designed to deal with commercial disputes as efficiently as possible.

In the Court of Session, a case will normally be heard by a single judge sitting in the ‘Outer House’. Very occasionally, civil jury trials will be held in certain types of cases. Appeals can be heard by three senior judges in the ‘Inner House’ of the Court of Session. Where permitted, appeals can go from the Inner House to the Supreme Court.²³

Lower value cases are heard in the Sheriff Court. They may be appealed to the Sheriff Appeal Court and then, if necessary, the Inner House of the Court of Session.

Civil cases in England and Wales are usually dealt with by the county courts. Some complex, sensitive or high-value claims are heard in the High Court.

Where permitted, appeals go to the Civil Division of the Court of Appeal and on to the Supreme Court. The courts in Northern Ireland adopt the same model.

Tribunals.

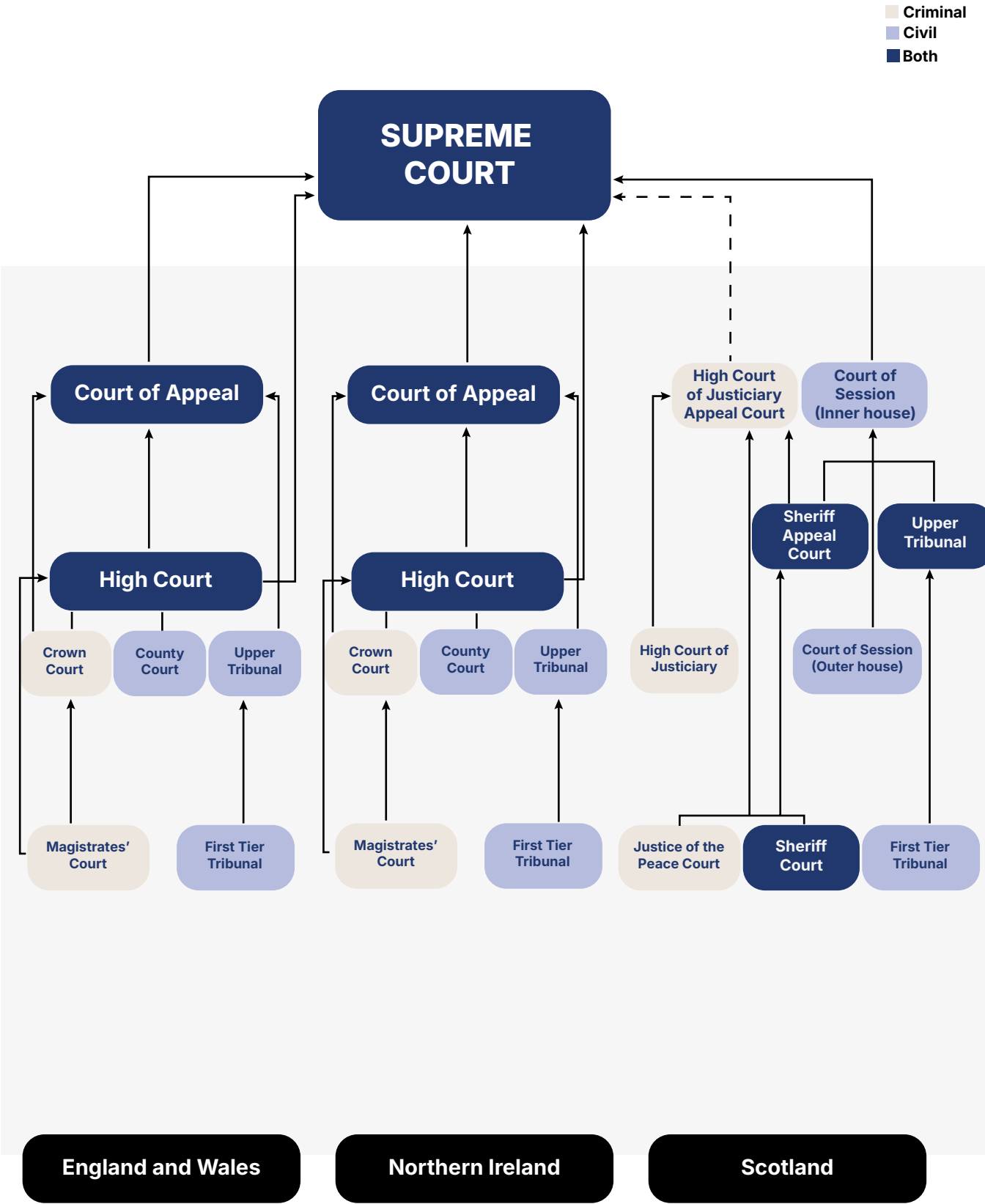
Tribunals are bodies that, just like courts, must decide on legal disputes between individuals. They are designed to adopt more informal procedures and focus on specialist areas of law. For example, specialist tribunals hear cases relating to health and social care entitlements, immigration and asylum claims, competition disputes and employment matters.²⁴

²³The Sheriff Appeal Court introduced by the Court Reform (Scotland) Act 2014 started to hear civil appeals in January 2016. The Act also introduced a new Personal Injury Court, which began operating in September 2015.

²⁴The UK tribunal system is largely arranged on a two-tier basis. The First-tier Tribunal comprises lots of different chambers dealing with disputes in the first instance. Appeals from the First-tier go to the appropriate chamber in the Upper Tribunal. From there, you can appeal to the Courts of Appeal (England and Wales and Northern Ireland), or to the Court of Session (Scotland). Some specialist tribunals, such as the Employment and Employment Appeals Tribunal, and the Competition Appeal Tribunal, make up separate jurisdictions which exist outside the two-tier structure.



The United Kingdom Court System.





02. The Rule Of Law

“Wherever law ends,
tyranny begins.”

John Locke, 1690²⁵

“... the existence of the rule of law impacts everyday life for everybody all the time. It is not just what happens in the courts; that is really important. There is the fact that, if you go into a shop and buy something but it is defective, you can take it back; or, if you enter into an agreement to pay for something, you pay because you know that there is a justice system that will make you pay.”

Baroness Hale of Richmond²⁶

“The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.”

Lord Hope, Deputy President of the Supreme Court, AXA General Insurance, 2011²⁷

It is hard to overstate the importance of the rule of law. It sits alongside parliamentary sovereignty as a pillar of the constitution and is recognised as a “constitutional principle” in the Constitutional Reform Act 2005 and the Regulation of Legal Services (Scotland) Act 2025.²⁸ The House of Lords Constitution Committee has described it as being of “fundamental importance”.²⁹

The 1765 case of *Entick v Carrington* is a model illustration of the rule of law in action. The British Government suspected Mr Entick of sedition and sent agents to look for evidence on the basis of a warrant issued by a minister. The High Court of England and Wales said that public bodies could only act in accordance with the powers granted to them and that the minister did not have the authority to grant a valid warrant as he was not a justice of the peace. The government was not above the law.³⁰

The rule of law is also important in many ordinary matters which do not reach courts. Widespread acceptance that it is necessary to comply with the law is essential to ensuring civil order, facilitating business and trade, and underpinning democracy.³¹

The Scottish Ministerial Code binds Scottish Ministers to “comply with the law, including international law and treaty obligations, and to uphold the administration of justice”.³² The Scottish Civil Service Code requires civil servants to “comply with the law and uphold the administration of justice”.³³

Summary

- The rule of law is the principle that we are all equal before the law, including the government, and that the application of the law should be non-discriminatory, predictable, not arbitrary, and safeguarded against abuse, and accessible through independent and impartial courts.
- Everyone is bound by and entitled to the benefits of the law, meaning there are limits on the exercise of public power.

What Is The Rule Of Law?

There is no single definitive statement of the rule of law and its precise scope is debated. One of the best-regarded and most often used definitions, however, was provided by Lord Bingham, former Senior Law Lord, who said that: “the core of the principle is... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”.³⁴

Lord Bingham outlined a series of features which support this principle. The Venice Commission of the Council of Europe (of which the UK is a member) has also produced an influential checklist of criteria, as has the World Justice Project.³⁵ From these lists, common features include:

- (a) Legality, including a transparent, accountable and democratic process for enacting law;
- (b) Legal certainty and predictability;
- (c) Prevention of arbitrariness and abuse of powers;
- (d) Non-discrimination and equality before the law; and
- (e) Access to justice before independent and impartial courts

Key Features Of The Rule Of Law.

Equality Before The Law

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

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

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

Lord Scarman, *Khawaja*³⁶

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

Baroness Hale, *Belmarsh*³⁷

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

Justice Jackson, *Railway Express Agency*, US Supreme Court³⁸

²⁵Locke, *Second Treatise of Government* (1689), chap. XVII, s.202, p.400.

²⁶Baroness Hale of Richmond, Oral Evidence to the House of Lords Constitution Committee, The rule of law, 2 April 2025, question 26, available online at committees.parliament.uk/oralevidence/15821/html/.

²⁷AXA General Insurance Company Ltd v Lord Advocate [2011] UKSC 46, at [51], citing himself in *R (Jackson and others) v Attorney General* [2005] UKHL 56.

²⁸See s1 Constitutional Reform Act 2005 and s2(1)(a) of the Regulation of Legal Services (Scotland) Act 2025. This provision in the 2025 Act is not yet in force but is mirrored in s1(a)(i) of the Legal Service (Scotland) Act 2010 which it is set to replace.

²⁹Constitution Committee, The rule of law: holding the line against tyranny and anarchy, (13th Report, Session 2024–26, HL Paper 211), paragraph 1.

³⁰*Entick v Carrington* [1765] EWHC KB J98.

³¹Constitution Committee, The rule of law: holding the line against tyranny and anarchy, (13th Report, Session 2024–26, HL Paper 211), paragraphs 28 to 38.

³²The Scottish Ministerial Code at [1.7], available online at <https://www.gov.scot/publications/scottish-ministerial-code-2025-edition/>.

³³The Civil Service Code (Scottish Executive version) at Paragraph 6, available online at <https://www.gov.scot/publications/civil-service-code/>.

³⁴Bingham, *The Rule of Law* (2010), p.8. ³⁵Bingham, *The Rule of Law*, (2010); The Venice Commission of the Council of Europe, *Rule of Law Checklist*, CDL-AD(2016)007, (2016); World Justice Project, ‘What is the Rule of Law’, available at <https://worldjusticeproject.org/about-us/overview/what-rule-law>.

³⁶*R (Secretary of State for The Home Department) ex parte Khawaja* [1983] 2 WLR 321, p.111. ³⁷*A v Secretary of State for the Home Department* [2004] UKHL 56 at [237]. ³⁸*Railway Express Agency Inc v New York* (1949) 336 U.S. 106 at [112].

This does not mean that parliament can never distinguish between different classes or groups. The key is whether there is an objective justification for the difference.³⁹ Distinctions between groups of people must be based on rational, objective evidence. A law preventing people with red hair from being teachers would fail the test.⁴⁰ However, treating children who have committed crimes differently to adults is justified by reference to their limited maturity, experience and capacity.

Access To Justice.

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

Access To Justice In Action

Patients in an NHS Scotland health region who were medically fit to be discharged from hospital but who lacked capacity to make decisions about their personal welfare were being transferred into and held in care homes without consent or lawful authority pending the appointment of a welfare guardian. When this came to light, a legal action was raised against the health board and the care homes, and they agreed to end the practice.⁴¹

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

Steyn LJ, Leech⁴²

Respect for the rule of law requires access to justice for all, irrespective of economic or social status. This means that it should not be too expensive or time-consuming for an individual to access the courts, tribunals or other dispute resolution mechanisms.

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

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

Sir Hartley Shawcross⁴³

More recently, it was also an important factor in the Supreme Court’s decision that the Lord Chancellor had acted unlawfully when imposing fees on parties bringing claims in the Employment Tribunal:

“Courts exist in order to ensure that the laws ... are applied and enforced. ... In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter...”

Lord Reed, UNISON⁴⁴

Open Justice.

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

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

Lord Hope, Bank Mellat⁴⁵

Exceptions to this principle can be justified in the public interest, for example, by providing screens to protect witnesses or hearing some evidence in private to limit publicity and to protect the identities of children. However, these exceptions are carefully considered.

The UK Parliament has, for example, permitted one party to be shut out of court for part, or all, of the hearing of a civil case involving evidence which might be damaging to national security.⁴⁶ However, the Supreme Court has indicated that this kind of exceptional measure must be a matter of last resort.⁴⁷

Scottish courts have introduced livestreaming to strengthen open justice by allowing wider public access to proceedings. Since 2023, hearings in the Court of Session have been broadcast online, and this has recently been extended to the Criminal Appeal Court, where certain appeal cases are now livestreamed to improve transparency and accountability.⁴⁸

Transparency And Legal Certainty.

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

Lord Diplock, Black-Clawson International⁴⁹

The law must be clear and intelligible enough to allow people to regulate their conduct. This does not mean that we must all be lawyers, or the law so simple that we can read it as easily as the newspaper. However, it does mean that there must be a clear answer about what the law is, and that answer must be reasonably accessible.

- In practice, this means that the law must be:
- (a) made public;
 - (b) ‘prospective’ and not ‘retroactive’ (i.e. forward-looking, not making behaviour unlawful after the event); and
 - (c) relatively stable, with fair warning given of any significant change.

⁴¹EHRC, ‘Equality and Human Rights Commission reaches settlement on ending unlawful detention of adults with incapacity by NHS Greater Glasgow and Clyde’, 20 November 2020, News, available at <https://www.equalityhumanrights.com/media-centre/news/equality-and-human-rights-commission-reaches-settlement-ending-unlawful-detention>. The court action was not continued after the practice was ended.

⁴²R v Secretary of State for the Home Department ex p. Leech [1993] 3 WLR 1125, at p.210.

⁴³HC Deb, 15 Dec 1948, Vol 549, Col. 1221.

⁴⁴R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51, at [68].

⁴⁵Bank Mellat v HM Treasury [2013] UKSC 38 at [81]. Although Lord Hope dissented in this case – meaning he disagreed with its outcome – this summary of the principle of open justice is uncontroversial.

⁴⁶See Justice and Security Act 2013.

⁴⁷See also, Bank Mellat v HM Treasury [2013] UKSC 38 at [3] and [74].

⁴⁸Scottish Courts and Tribunals Service, ‘Court of Session livestream’ (introduced 2023) and ‘Criminal Appeal Court Live’ (launched 2025), available at <https://www.scotcourts.gov.uk/livestream/> (last accessed 25 February 2026).

⁴⁹Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, at p.638.

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

For example, where an Act of the Scottish Parliament gives a minister or other public official the power to make a decision, the scope of the power cannot generally be completely unrestricted or undefined. If it were, it would be extremely difficult for individuals to know how the potential uses of that power might affect them in practice.

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

Protection Of Individual Rights.

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

Lord Toulson, Kennedy⁵⁰

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

Preamble, Declaration of Human Rights 1948

“... the historical roots [of Scotland’s human rights journey] do need to be acknowledged. These include the Claim of Right [of 1689], the Scottish Constitutional Convention [formed in 1989], and the civic and cross-party support at that time for a Bill of Rights for Scotland which was superseded by the Human Rights Act of 1998.”

First Minister’s Advisory Group of Human Rights Leadership⁵¹

Most modern definitions of the rule of law incorporate respect for fundamental human rights, though not all. Without including respect for human rights within a definition of the rule of law, states could pass legislation that oppressed minorities, deprived individuals of freedoms or property, or prevented certain groups from equal participation in society, all while legitimately claiming to be complying with the rule of law.

The UK courts have a history of protecting individual rights through the common law, as a fundamental part of the rule of law (see Chapter 5).

The incorporation of human rights and (until Brexit) European law in the Scotland Act 1998 has also given the courts greater powers in respect of legislation passed by the Scottish Parliament than legislation passed by the UK Parliament. In 2016, for example, the UK Supreme Court found the data-sharing provisions within the ‘named persons scheme’ in the Children and Young People (Scotland) Act 2014 breached the right to respect for private and family life under Article 8 of the ECHR. Whereas legislation passed by the UK Parliament in breach of the ECHR could only have been declared incompatible (and still be legally binding), the provisions within the 2014 Act which were outwith the competence of the Scottish Parliament were unlawful and could not be brought into force.⁵²

The Rule Of Law In The Scottish Parliament

“Although a number of Acts of the Scottish Parliament have been challenged before the courts, successful challenges have been relatively rare. In most cases, including the Protection of Wild Mammals (Scotland) Act 2002 (to ban hunting of foxes with hounds), the Damages (Asbestos-related Conditions) (Scotland) Act 2009 and the Alcohol (Minimum Pricing) (Scotland) Act 2012, the legislation has been upheld by the courts.

⁵² Christian Institute and others v Lord Advocate [2016] UKSC 51, 2017 SC (UKSC) 29.



⁵⁰Kennedy v The Charity Commission [2014] UKSC 20 at [133].

⁵¹The First Minister’s Advisory Group on Human Rights Leadership, ‘Recommendations for a new human rights framework to improve people’s lives’, 10 December 2018, p.14.



03. Introduction To The Law

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

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

Following Brexit, EU law no longer has direct effect in the UK. Instead, “retained EU law” was created under the European Union (Withdrawal) Act 2018, and has evolved into “assimilated law” under the Retained EU Law (Revocation and Reform) Act 2023. Courts now interpret this body of law as domestic, without the supremacy or interpretive guidance previously afforded by the Court of Justice of the European Union (the “CJEU”).

International law does not generally have direct effect in the UK unless explicitly incorporated. This is discussed further in Chapter 6.

Summary

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

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

Law can be found in statute (also known as legislation) and in the common law. Statute law is made by, or under the authority of, the UK Parliament and Scottish Parliament and the common law is developed by the judiciary.

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

Primary And Subordinate Legislation.

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

Statutes sit at the core of our legal system. Acts of the Scottish Parliament and Acts of the UK Parliament are also known as ‘**primary legislation**.’ Primary legislation is made by the parliaments and generally cannot be amended except by the parliaments.⁵³ Acts of the UK Parliament cannot be struck down by the courts (in line with the doctrine of parliamentary sovereignty). Where a court finds that an Act of the UK Parliament breaches a Convention right, the Court may issue a declaration of incompatibility, but the legislation remains in force unless and until the UK Parliament chooses to amend it.⁵⁴ By contrast, Acts of the Scottish Parliament may be struck down by the courts if they are outwith the Scottish Parliament’s ‘**legislative competence**’, which includes where Convention rights have been breached.

Many Acts create a basic legal framework but do not deal with the detail needed to make the law work in practice. Instead they give ministers and other bodies the power to create ‘**subordinate legislation**’: detailed and often technical rules which govern the actual operation of the law within the legal framework set by the enabling Act.

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

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

Laws Passed By Parliament: A Quick Guide

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

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

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

It becomes (or remains) law unless MSPs pass a motion to annul it within 40 days.

- (b) Under ‘**Affirmative procedure**’, subordinate legislation can become law only after the Scottish Parliament has voted to approve it.
- (c) ‘**Laid-only**’ or ‘**no-procedure**’ subordinate legislation is subject to technical scrutiny by Scottish Parliament. It does not require approval and cannot be annulled.⁵⁶

Making Legislation Work

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

Making Legislation.

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

All Acts of the Scottish Parliament start life as Bills. In order to become law, they must be approved by the Scottish Parliament and receive Royal Assent. Bills progress through a number of stages: **Stage 1** (a consideration of the Bill’s general principles and a vote on whether they are agreed with), **Stage 2** (consideration and report by the appropriate committee(s) of Scottish Parliament) and **Stage 3** (debate on the whole Bill and decision on whether to pass it or reject it). Stages 2 and 3 provide an opportunity for detailed consideration and amendment of a Bill’s provisions.⁵⁵

Secondary legislation is afforded less parliamentary time and is subject to less scrutiny as a result. In general, there are three ways in which subordinate legislation receives parliamentary approval:

- (a) Under ‘**negative procedure**’ subordinate legislation cannot come into force until 28 days after being placed before the Scottish Parliament.



⁵³In an exception to this rule, both the UK Parliament and the Scottish Parliament may confer powers on ministers to amend primary legislation in a later statutory instrument (‘secondary legislation’). This practice is commonly known as a ‘Henry VIII Clause’ and is generally subject to close scrutiny by the legislature (Locke, Second Treatise of Government (1689), chap. XVII, s.202, p.400). The secondary legislation making such amendments, whether to Acts of the UK Parliament or to Acts of the Scottish Parliament, is also subject to scrutiny by the courts in a way that primary legislation is not.

⁵⁴A recent example is *Hirst v Chief Constable, Police Service of Scotland & Others* [2026] CSOH 8, in which the court issued a declaration of incompatibility in respect of section 170 of the Criminal Procedure (Scotland) Act 1995, finding that the statutory immunity from civil action for malicious prosecution enjoyed by the Lord Advocate and procurators fiscal is incompatible with Article 6 ECHR (which concerns fair trials).

⁵⁵For a description of the equivalent process in the UK Parliament, see the JUSTICE publication for MPs and Peers, Law for Lawmakers.

⁵⁶In addition to the affirmative, negative and laid no-procedures, two further procedures exist for certain Scottish Statutory Instruments (SSIs). Provisional affirmative SSIs are instruments that are made and brought into force immediately but lapse unless they are subsequently approved by the Scottish Parliament within the required period. They are usually used for emergency situations because they can make changes immediately before Scottish Parliament has considered the SSI. Super-affirmative SSIs are used where a particularly high degree of parliamentary scrutiny is required. A draft SSI is sent to the Delegated Powers and Law Reform Committee or other interested parties to consider before the SSI is formally laid under normal affirmative procedure. This procedure is usually for specialised categories of SSIs, such as order-making powers under the Public Services Reform (Scotland) Act 2010, which are subject to super-affirmative scrutiny.

Stages In The Passage Of A Public Bill.

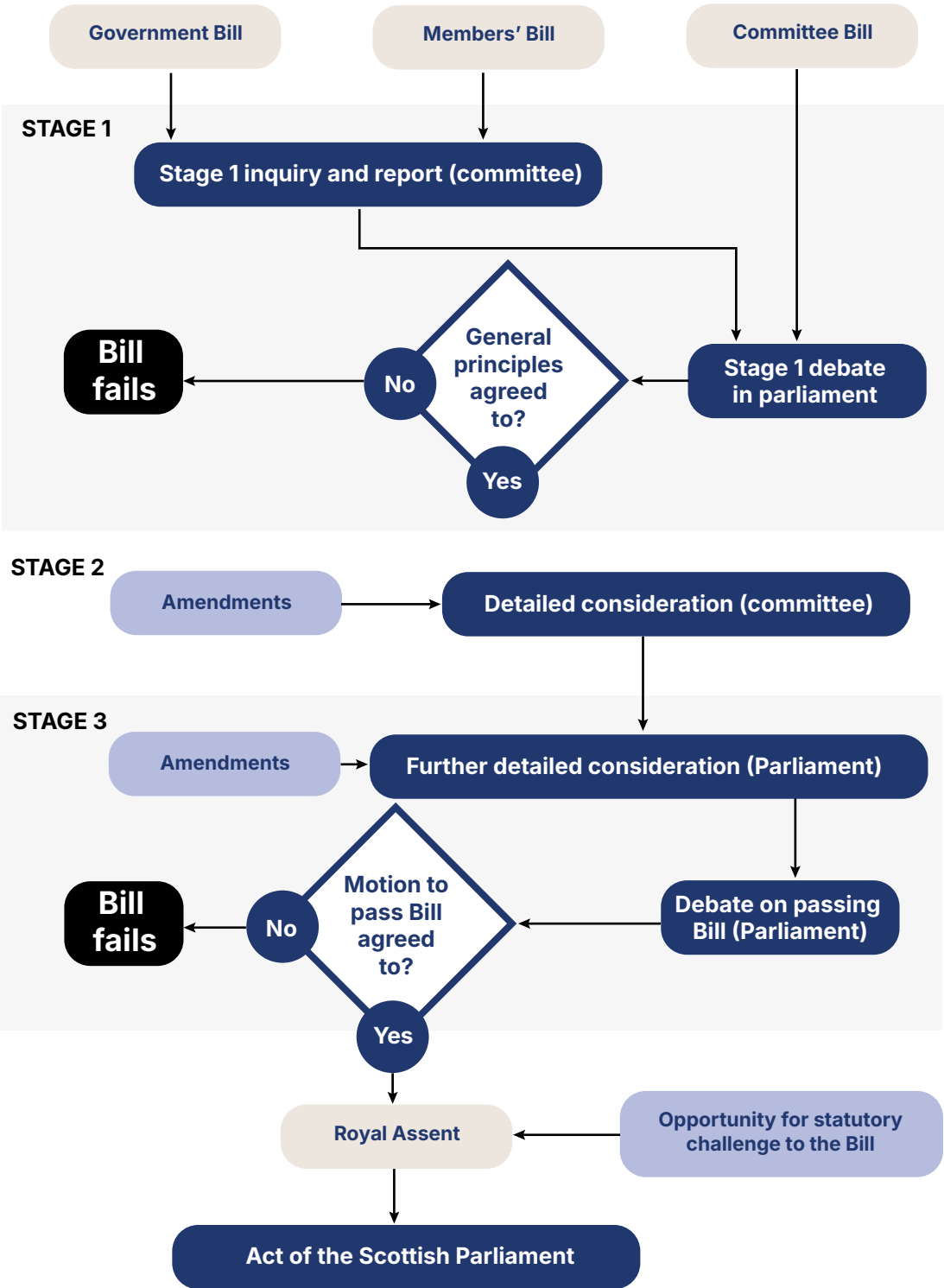


Diagram © Scottish Parliament (www.parliament.scot)

Scrutinising Delegated Powers

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

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

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

The Common Law.

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

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

In both the UK Parliament and the Scottish Parliament, if there is any direct conflict between statute and the common law, the statute will prevail. If the courts develop a rule that MPs or MSPs do not like, they can legislate to alter or override it.⁵⁷ On the other hand, where legislation is vague or unclear in its application, the common law can help fill gaps, either unplanned or unanticipated. Acts of the UK and Scottish Parliaments are recognised by the courts as taking precedence over the common law. We cover these rules of statutory interpretation in some more detail opposite.

⁵⁷AXA General Insurance v Lord Advocate 2011 SC (UKSC) 122. For instance, the Damages (Asbestos-related Conditions) Scotland Act 2009 was introduced specifically to reverse the decision of the courts that pleural plaques, being in themselves harmless, could not form the basis for a compensation claim. The subsequent legal challenge to the legislation was rejected by the UK Supreme Court when determining an appeal arising from Scotland (see Chapter 1).

The Role Of Judges.

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

Statutory interpretation

When courts interpret and apply statutes, they are trying to reach the legal outcome which the legislature wanted to create. This is not always straightforward.

For example, some statutes use deliberately broad language, giving judges the flexibility to interpret and apply the law, depending on the facts of any individual case. At other times legislation is simply unclear or gives a widely framed degree of discretion to individuals who hold public power.

Then again, even where the meaning of the law appears obvious, its application to an unforeseen set of facts may be far from clear.

To help them, judges use a number of common law rules of '**statutory interpretation**'. Modern statutory interpretation increasingly adopts a purposive approach that focuses on the text (the ordinary meaning of words used), context (structure of the statute and surrounding provisions) and purpose (the aim or mischief being addressed) of a statute. This approach brings together a number of common law rules that have been developed by the courts to aid with statutory interpretation, including:

- (a) **The 'literal rule':** Judges must start with the 'ordinary meaning' of legislation. Judges are seeking to enforce the will of the legislature, and the first insight into the will of the legislature is the ordinary meaning of the words which the legislature has approved.
- (b) **The 'golden rule':** In some circumstances, a phrase might legitimately have more than one literal and valid interpretation. In others, adopting its literal meaning might lead to an absurd result. The golden rule allows judges to adopt the interpretation that is reasonable in light of the statute read as a whole. It is sometimes referred to as the presumption that the legislature does not intend to create absurdities.
- (c) **The 'mischief rule':** In some cases, the intended practical effect of a measure is far from clear from the actual text of an Act. Judges may use the mischief rule to identify the problem that the statute was trying to remedy and interpret it in a way that meets the intention of the legislature.

(d) **Implied repeal:** Where two Acts clash, the later Act stands and the conflicting provisions of the earlier one fall away (are deemed to have been replaced). Some statutes have been considered to be so constitutionally significant by the courts that the doctrine of implied repeal may not apply to them. For example, it has been suggested that the Bill of Rights 1689, the HRA and the various devolution statutes, including the Scotland Act 1998, can only be repealed expressly.⁵⁸

(e) **Fundamental rights:** Special considerations arise when there is a direct conflict between a statute and fundamental principles of the common law. Examples of these principles include the presumption in favour of open justice, the right to equal protection by the law and the right to freedom of expression. The courts will try to interpret any ambiguous statute, as far as is possible, in a way that is consistent with the common law principle in question. It is presumed that the legislature intends to respect fundamental rights. Any legislation by the UK Parliament to restrict these core principles must be explicit about that intention (see also Chapter 5). Legislation by the Scottish Parliament to do so may, in exceptional circumstances, be unlawful.

(f) **Parliamentary directions:** Judges will also follow clear instructions on statutory interpretation given by the legislature. Examples of such instructions are included in the HRA. The courts have a statutory duty to interpret legislation in a way that "so far as is possible" respects the individual rights guaranteed by the HRA (see also Chapters 5 and 6).

In addition to these traditional interpretive tools, courts increasingly rely on Explanatory Notes, Impact Assessments, and other legislative background materials to discern the purpose and context of statutes. Explanatory Notes, published alongside Bills and Acts, offer insight into the intended meaning of provisions. While not legally binding, they are routinely cited in judgments to support purposive interpretation. Similarly, Delegated Powers Memoranda, consultation papers, and policy documents can assist in understanding the broader legislative scheme. However, recent authority emphasises that external aids, Explanatory Notes included, play only a secondary role and that statutory interpretation must remain anchored primarily in the words actually enacted by the legislature.⁵⁹

⁵⁸Thoburn v Sunderland City Council [2002] EWHC 195 Admin at [62]; AXA General Insurance v Lord Advocate 2011 SC (UKSC) 122.

⁵⁹R (O) v Secretary of State for the Home Department [2022] UKSC 3.

⁶⁰Adler v George [1964] 2 QB 7.

⁶¹Pepper v Hart [1993] AC 593.

⁶²MacMillan v T Leith Developments Ltd [2017] CSIH 23.

⁶³Pepper v Hart [1993] AC 593.

Statutory Interpretation In Action

The UK Parliament criminalised the act of causing an obstruction "in the vicinity of" an air force station. One defendant argued that because he had caused a disruption inside an air force station he had not committed an offence. The court interpreted "in the vicinity of" to mean "in or in the vicinity of". A literal interpretation would have had the absurd outcome of frustrating the purpose of the statute – which was to prevent interference with the armed forces in their work.⁶⁰

Pepper V Hart

If primary legislation is ambiguous or obscure, the courts may refer to Hansard and the Official Report when interpreting the meaning of a particular provision; this applies to provisions in Acts of the UK Parliament⁶¹ and Acts of the Scottish Parliament.⁶² Clear statements of purpose by the Minister responsible for steering the Bill through the legislature may help the court to give effect to parliament's intention in passing it. For this reason, Ministers often take care to make clear statements about a Bill's intended effect as it passes through parliament. These statements are usually called '**Pepper v Hart**' statements after the case which established the rule. However, the courts will not treat such statements as conclusive.⁶³

Developing The Common Law.

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

Common Law In Action

- When Mrs Donoghue ordered a bottle of ginger beer in a Scottish café, she did not expect to find a dead snail inside. When she fell ill after drinking the ginger beer, she sued Mr Stevenson, the manufacturer. The House of Lords found that the manufacturer should have taken reasonable care to ensure that the beer was safe to drink – and the common law of negligence was born.⁶⁴
- Prior to the enactment of the Sexual Offences (Scotland) Act 2009, rape and other sexual offences were defined by the common law. In 2001, the High Court of Justiciary overturned the common law rule, said to originate with the institutional writer Hume, which meant that force was a necessary element in rape. This reflected changing social attitudes to non consensual sex and the different forms it may take, which meant the old common law rule was unsustainable.⁶⁵ More recently, the Victims, Witnesses and Justice Reform (Scotland) Act 2025 introduced further reforms aimed at improving the experiences of victims and witnesses, particularly in cases involving sexual offences.

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

Precedent only operates within jurisdictions. Scottish courts are not bound by the decisions of English courts. But the legal systems and many laws are so similar that it is very unusual for any significant difference to emerge, and the Scottish courts frequently refer to decisions of the English courts.⁶⁶ The Supreme Court determines cases from across the entire United Kingdom. In practice, it is rare for the Supreme Court to set precedent for Scottish criminal cases, save where Convention rights are engaged or (other) legislative competence issues arise.

⁶⁴Donoghue v Stevenson [1932] AC 562. The ‘Paisley Snail’ has become known as the origin of the law of negligence, not just in Scotland and England but in common law jurisdictions across the world – although it may never have existed (once the legal point had been settled, the manufacturer settled the case and Mrs Donoghue’s claims were never examined by the court).

⁶⁵Lord Advocate’s Reference 1 of 2001, 2002 SLT 466. Such judicial activism is sometimes controversial on the basis that it is really a matter for the Scottish Parliament to amend Scots Criminal Law. Common law sexual offences have now been superseded by the Sexual Offences (Scotland) Act 2009. Further procedural reforms relating to sexual offence cases have been introduced by the Victims, Witnesses and Justice Reform (Scotland) Act 2025.

⁶⁶The opposite occurs too but less frequently, as the size of the jurisdictions mean it is relatively unusual for cases in Scotland to consider points before similar points have been taken in England. An exception has been in the human rights area where the enforceability of human rights in the Scotland Act 1998 meant many of the leading early human rights cases considered by the Supreme Court were Scottish cases.

Latin In The Law

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

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



What About International Law?

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

Some international treaties may create dispute resolution processes which may be binding on signatory states. For instance, the European Convention on Human Rights created the European Court of Human Rights; and some trade agreements provide a trans-national process of arbitration to create a single, simplified route to resolving disputes.⁶⁷

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

In some countries, international law is automatically treated as part of the domestic legal system (these

are called **‘monist’** systems). The UK is not such a system – it is a **‘dualist’** legal system – which treats international and domestic law as two separate legal orders. That means that before international treaties have any effect they must be made part of domestic law by legislation. This requires an Act of the UK Parliament, or within Scotland the Scottish Parliament may also legislate to implement international obligations where this falls within its legislative competence.

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

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

UK courts sometimes engage in a form of **‘judicial dialogue’** with international courts, particularly the European Court of Human Rights. While not binding, such decisions are treated as persuasive and contribute to the evolving interpretation of Convention rights under the HRA.

More detail on international law is provided in Chapter 6.



⁶⁷For example, the Energy Charter Treaty provides one of the most widely used trans-national investor-state arbitration systems. Foreign investors can bring arbitration claims directly against host states, creating a unified international route for dispute resolution.



**04. Public Law And
Judicial Review**

Every day, public bodies, including ministers in both the UK and Scottish Governments, local authorities, and other bodies exercising public functions, make a variety of decisions and perform a range of functions which impact on citizens’ lives.

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

Public law helps determine the scope of statutory powers and duties. It provides a starting point for the scrutiny of the work of public agencies, civil servants and ministers. It can also help with the oversight of private parties who exercise delegated functions. Key public law principles include lawfulness, rationality and procedural fairness, as explained in more detail below.

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

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

Summary

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

A decision of a public body, or a private body on which public functions have been delegated, may be challenged by raising an action (a petition) in the Court of Session to have the decision judicially reviewed.

Judicial review is not concerned with the substance of a decision or whether a decision was right, but only whether it was lawful.

A decision may only be judicially reviewed if there is no other mode of appeal or remedy to the decision/action, and a judicial review must generally be brought within three months of the decision which is being challenged.

What Is Judicial Review?

If public bodies act out with their powers or take decisions that are incompatible with public law principles, their decisions can be challenged in court by judicial review.

Judicial review is concerned with the legality of the decision-making rather than the substance of the decision itself. Therefore, the court’s concern is with the legality of the decision-making, rather than whether the court would have reached the same view.

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

All remedies arrived at through judicial review are discretionary. However, if a judicial review is successful, the court can:

- (a) Quash the decision (strike it down).
- (b) Make an order requiring the decision-maker to do or not do something.
- (c) Make an authoritative declaration about the meaning of a particular law.
- (d) Award damages (in limited circumstances).

Which Decisions Can Be Challenged?

Many different kinds of public decisions can be subject to judicial review, including failures or refusals to act. The key test for whether a decision can be challenged is generally to ask if the relevant decision maker was exercising a discretion that has been delegated to that decision-maker (for example through an Act of the UK or Scottish Parliament or the constitution of a private organisation).

Delegated or secondary legislation – rules, regulations or other statutory instruments made by public bodies acting under the delegated authority of the UK Parliament or Scottish Parliament – can be struck down by the courts if they breach the principles of public law. The courts presume that Parliament intends these important delegated powers to be exercised lawfully.

The activities of the UK Parliament itself are not subject to judicial review and Acts of the UK Parliament cannot be ruled invalid by judges exercising judicial review. At most, the courts can make a ‘declaration of incompatibility’ in some human rights cases (see Chapter 5).

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

What Kind Of Review?

Judicial review does not give a judge the power to step in and retake a disputed decision themselves. A judicial review claim is not an appeal on the merits of a decision, and the judge will not substitute their own view for that of the decision maker.

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

However, the court retains the authority to assess whether the outcome for the applicant would have been substantially different if the decision-maker’s conduct under challenge had not occurred.

Statutory Appeals And Judicial Reviews.

When Parliament confers a decision-making power, it can make decisions taken using that power subject to a process known as statutory appeal. Examples of decisions from which there is a statutory right of appeal include certain immigration and asylum decisions; certain decisions regarding benefits entitlements; certain planning decisions; and decisions in relation to tax.

Under this framework, an appeal court or tribunal may have the power to re-take a decision from the beginning. They can examine both the legal aspects and the evidence afresh. They can then substitute their own judgment for that of the initial decision-maker. It is only competent to bring a judicial review if any statutory appeal route has been exhausted.

Restricting Judicial Oversight.

Both the UK and Scottish Parliaments sometimes legislate to limit the courts’ ability to review certain public decisions through ‘ouster clauses’. These clauses can be contentious because in the case of the UK Parliament they can be seen to challenge the balance between parliamentary sovereignty and the constitutional need for judicial scrutiny. In the case of the Scottish Parliament, ouster clauses raise similar concerns.

Consequently, courts have tended to interpret ouster clauses narrowly due to the principle of legality, assuming that the legislature did not intend to entirely exclude judicial review unless the language of the ouster clause explicitly states otherwise.⁷⁰

Judicial Review Or ‘Appeal’

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

“The Court of Session ha[s] power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions were taken by any person or body to whom a jurisdiction, power or authority had been delegated or entrusted by statute, agreement or other instrument”⁶⁸

Lord Hope, West⁶⁹

⁶⁸West v Secretary of State for Scotland 1992 S.C. 385.

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

⁷⁰Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147.

What Are The ‘Grounds’ For Judicial Review?

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

- (a) **‘Illegality’**: Where a decision-maker has made a mistake in law, tried to do something which it has no power to do, or exercise its power unlawfully. This includes a failure to comply with the requirements of the HRA.
- (b) **‘Irrationality’**: Where the decision-maker has made an unreasonable decision, has failed to take relevant matters into account, or has taken account of irrelevant matters.
- (c) **‘Procedural unfairness’**: Where the decision-maker has failed to follow relevant procedures or has shown bias.

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

Illegality.

If a public body misinterprets the law when making a decision, uses a power for a purpose it was not designed for, or does something it does not have the power to do (acts **‘ultra vires’**), then it has acted unlawfully, and its decision may be set aside for **‘illegality’**.

A decision may also be unlawful if it is so unfair that it amounts to an abuse of power.

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

In the 1980s Strathclyde Regional Council was required by statute to provide a supply of “wholesome water”. It had been co-operating with the health board in the progressive fluoridation of the water supply. However, the Court of Session held that “wholesome” meant “free from contamination and pleasant to drink.” The local authority therefore did not have the power to add fluoride to water to improve the general dental health of the population.⁷¹

In another case, applying prison rules to prevent a prisoner meeting with a journalist was inconsistent with the common law protection offered to free expression and the principle of legality.⁷²

A judicial review can also consider whether a public body has complied with its duty under the HRA to respect individual rights (see Chapter 5).

Irrationality.

A decision can be successfully challenged if it is **‘irrational’**. A decision is irrational if no reasonable decision maker could justify it (often called **‘Wednesbury unreasonableness’**, after the case that established the principle).⁷³

Irrationality is a high threshold and it is relatively rare for the courts to find that it has been met. One senior judge has said that it should generally apply only “to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”⁷⁴



Wednesbury Unreasonableness

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

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

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

Procedural Unfairness.

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

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

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

Greenpeace successfully challenged a decision to proceed with the building of new nuclear power plants. The Secretary of State had set his own rules for public engagement. The court considered the quality of the consultation process and decided it was inadequate. The decision had to be taken again, with the benefit of fuller engagement by the public.⁷⁵

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

Lord Fraser, Ng Yuen Shiu⁷⁶

A Fair Hearing.

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

This can include a right to be heard and a right to receive reasons for a decision. A decision can be challenged if a public authority has exhibited **‘real or apparent bias’**.

It is very rare for a public body to be proved to be biased, but a decision may be unlawful if “the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [decision maker] was biased.”⁷⁷ Decision-makers should be above reproach and a real appearance of bias is enough to undermine their authority.⁷⁸ In other words, this will be considered from an objective standpoint by a court, which will generally ask how an informed neutral observer would view the particular conduct.

⁷¹McColl v Strathclyde Regional Council 1983 SLT 179.

⁷²R v Secretary of State for the Home Department ex p Simms [2000] 2 AC 115.

⁷³Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.

⁷⁴Council of Civil Service Unions and Others v Minister for the Civil Service Respondent [1985] AC 374 (Lord Diplock).

⁷⁵R(Greenpeace Ltd) v Secretary of State for Trade and Industry (No 2) [2007] EWHC 311 (Admin). In another example, the court found that the public consultation process regarding the proposed third runway at Heathrow was invalid as it was based on out-of-date figures, see R (Hillingdon and others) v Secretary of State for Transport [2010] EWHC 626 (Admin).

⁷⁶AG of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629 at p.638.

⁷⁷Porter v Magill [2001] UKHL 67

⁷⁸A good example of the need to avoid apparent as well as actual bias is the Pinochet case, considered in Chapter 2.

In some circumstances there will be a 'legitimate expectation' that a public authority will act in a certain way. For example, the public might legitimately expect to be consulted before a long-standing practice is changed. A breach of this kind of expectation can be grounds for review.

Usually, a legitimate expectation will only give rise to a procedural right, such as the right to be consulted, but in some limited circumstances a legitimate expectation may lead to substantive rights, such as the right to insist that the status quo is not changed.

Legitimate Expectations In Action

Mr McHattie successfully challenged the decision of a local authority to close the adult care centre which his son, who experiences a number of significant learning and mobility issues, had attended for a number of years. The court found that Mr McHattie and his family had a legitimate expectation that they would be consulted on any proposal that affected the future of the centre.

The failure to consult “went to the heart” of the council's decision-making process and rendered it “fundamentally flawed” (para 42).

The court also found that in failing to carry out an impact assessment, the council had failed in its duty under the Equality Act and had acted unlawfully. The decision to close the centre was reduced and the effect was that the council required to keep the centre open.⁷⁹

Proportionality.

In some claims involving the HRA, the court will look at whether a particular decision is 'proportionate'. This involves the judge asking whether the impact of a decision is proportionate to its aim. The court can check whether the public authority has gone further than is necessary to serve the public interest (see Chapter 5).

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

⁷⁹McHattie v South Ayrshire Council [2020] CSOH 4.

⁸⁰Pham v Secretary of State for the Home Department [2015] UKSC 19.

⁸¹Court of Session Act 1988, s 27B(2)(a).

⁸²Walton v Scottish Ministers [2012] UKSC 44; Greenpeace Ltd v Advocate General for Scotland [2025] CSOH 10.

⁸³R v Somerset County Council and ARC Southern Ltd, ex p Dixon [1998] Env LR 11.

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

Proportionality And The Common Law

The Supreme Court considered a challenge to the Home Secretary's attempt to strip a suspected terrorist of his British citizenship. The court noted that – when looking at an interference with fundamental rights, such as citizenship – anxious scrutiny and proportionality tests may produce very similar results.⁸⁰

Who Can Bring A Judicial Review?

To bring a claim for judicial review a person or body must have 'sufficient interest' in a decision.⁸¹ Sometimes this interest will be obvious, for example if they have been refused asylum. However, the person bringing the challenge (in judicial review the 'petitioner') does not have to have a financial or legal interest in the decision, nor do they need to be the most obvious challenger.

Community groups and non-governmental organisations have brought judicial review claims on the basis that they represent the public interest.⁸² However, a body representing a group of individuals may not have standing to bring a claim for judicial review if none of the individuals comprising the group would have sufficient interest.

A judicial review cannot be brought by someone who simply does not like a decision or who disagrees with the policies of the decision maker.⁸³

In considering whether the petitioner has sufficient standing, the court will also consider the underlying merits of the challenge and whether there are others who are obviously better placed to challenge the decision. Typically, the weaker the merits, the stricter the approach to standing.

Who Has Sufficient Interest?

The Christian Institute and three other interest groups were found to have sufficient interest in public policy relating to family issues to challenge the 'named person' provisions of the Children and Young People (Scotland) Act 2014.⁸⁴

However, the Good Law Project (GLP) was not found to have sufficient interest to challenge an alleged UK Government policy of appointing individuals to Covid-19 taskforces without open competition. GLP's broad remit to promote high standards in public administration did not grant it a commercial or public law interest in the taskforce procurement process. GLP's co-claimant, the Runnymede Trust, was found to be a better-placed challenger given its interest in tackling racial discrimination.⁸⁵

A person or organisation, not otherwise involved in a court action, may apply for permission to submit evidence and make submissions to assist the court, known as an intervention. The intervention must be relevant to the questions already raised by the case but an intervener can provide evidence that the petitioner does not otherwise have access to. In some cases, the intervener's evidence can play a key role in the court's decision.

How Does Judicial Review Work?

- (a) There can be no judicial review without the court's permission. In order for a petition to progress the petitioner must have both '**sufficient interest**' (considered above) and a '**real prospect of success**'.
- (b) Judges can make a decision on permission 'on the papers' without hearing arguments or may wish to hear from parties at an oral hearing. If permission is refused on the papers, the petitioner can ask that an oral hearing take place.⁸⁶

- (c) If the court considers the test for permission has been met, the petition proceeds to a full judicial review hearing.

Watch The Clock

Applications for judicial review must be made within three months of the act or decision which is being challenged.⁸⁷

The court may extend the time limit if it considers it is equitable to do so in the circumstances,⁸⁸ this includes where the petitioner was only notified of the decision at a later date.⁸⁹

Who Pays For A Judicial Review?

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

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

A petitioner in an environmental matter may apply for a protective expenses order (a 'PEO') to limit their liability in expenses, typically to £5,000.⁹⁰ The purpose of a PEO is to redress the potential imbalance of financial resources between parties in relation to funding litigation. PEOs are relatively rare, however a court may grant a PEO where the court proceedings are considered "prohibitively expensive" with regard to whether the costs and expenses likely to be incurred by the applicant for a PEO: (a) exceed their financial means; or (b) are objectively unreasonable.

⁸⁴Christian Institute and others v Scottish Ministers 2016 SC 47, at paragraphs 41-43. (The case was appealed to the UK Supreme Court, but not on this issue. See chapter 2).

⁸⁵R (Good Law Project) v Prime Minister [2022] EWHC 209 (Admin).

⁸⁶Court of Session Act 1988 s27C and Court of Session Rules, rule 58.8.

⁸⁷Court of Session Act 1988 s27A.

⁸⁸Court of Session Act 1988 s27A.

⁸⁹Odujajo v Secretary of State for the Home Department [2020] CSIH 57.

⁹⁰Rules of the Court of Session 1994 Chapter 58A.

What Can The Court Do?

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

- (a) Reduction of a decision:** The court can tell the decision-maker to re-take the decision lawfully (commonly called ‘**quashing**’ the decision). The public body can lawfully arrive at the same conclusion or result a second time, but it must follow the proper process and consider all evidence reasonably in doing so. The court might give guidance on the law which the decision-maker needs to follow.
- (b) A declaration:** The court can make a ‘**declarator**’ that the decision-maker got it wrong and acted unlawfully, explaining why. This remedy might mean that its decision stays in place because quashing it would not be appropriate. If a public body has changed its decision while the case was going on, the judge might use a declaration to give clearer guidance for future cases and other public bodies.
- (c) Compensation:** The award of compensation or ‘**damages**’ in a judicial review is possible in Scotland but is relatively rare. There are limited circumstances where the court will award payment of money for losses suffered by a party as the result of an unlawful decision.
- (d) Interdict / specific implement:** The Court can either prohibit a public body from acting beyond its powers in the future or require it to perform a particular act or take specific steps to carry out its legal duties. It cannot order a public body to reach a particular decision.

In some cases, the court may make temporary interim orders during a case to avoid a detriment to one of the parties pending its final judgment.

England, Wales And Northern Ireland.

The law on judicial review in England and Wales and Northern Ireland is very similar. The grounds of review are broadly the same and the three

jurisdictions share the UK Supreme Court as their final court of appeal for judicial review proceedings.⁹¹ The location of the public body normally determines where a challenge should start.

England.

In England, the High Court deals with most judicial review cases, though the Upper Tribunal also has jurisdiction in, for example, immigration cases. Prior to bringing a judicial review in England (with the exception of some urgent cases), the claimant must write a pre-action letter (a ‘letter before claim’) to the decision maker setting out their case and allowing the decision maker to explain their actions or overturn their decision. Thereafter, as in Scotland, they must obtain permission from the court before proceeding, and in order to get permission, must have an **arguable case** and show **sufficient interest**. The application must be brought promptly and at the latest, as in Scotland, within three months. As discussed above, once permission is granted, the principles which the courts apply in determining applications for judicial review are virtually identical in Scotland and England.

Northern Ireland.

Claimants wishing to bring a judicial review in Northern Ireland also require to comply with a pre-action protocol requiring a formal letter to be sent before “leave” is sought (similar to permission) to bring the judicial review.⁹² Although many familiar public law questions are routinely raised in Northern Ireland, the distinct political and constitutional context has created some unique elements to judicial review.⁹³ The (amended) Northern Ireland Act 1998 has been described as a ‘constitution’⁹⁴ for Northern Ireland, and in subsequent judicial review proceedings the importance of paying “particular attention” to it has been noted.⁹⁵

Wales.

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

Devolution Issues.

Both the Scottish Parliament and the Scottish Government are subject to limits on their powers to legislate or to carry out administrative acts. Those limits are found in the Scotland Act 1998, sections

29 and 57(2). ‘Devolution issues’ are challenges which require the court to consider whether the devolved legislatures or executive administrations have acted within the boundaries of their devolved powers or ‘competences’. This can also include checking human rights compatibility (see Chapter 5). Such challenges may be made in Scotland, Wales or Northern Ireland.



⁹¹Ivan Hare, Catherine Donnelly, and Joanna Bell (eds), De Smith’s Judicial Review (9th edn, Sweet & Maxwell 2023, 1st Supplement 2024) paragraph 1-010.
⁹²Rules of the Court of Judicature (Northern Ireland) 1980 Order 53; and Judiciary of Northern Ireland revised Practice Note 1/2008.
⁹³See Ivan Hare, Catherine Donnelly, and Joanna Bell (eds), De Smith’s Judicial Review (9th edn, Sweet & Maxwell 2023, 1st Supplement 2024) chapters 1 and 14.
⁹⁴Robinson v Secretary of State for Northern Ireland [2002] UKHL 32.
⁹⁵Re McComb’s Application for Judicial Review [2003] NIQB 47.



05. Rights And The Individual

Summary

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

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

Introduction.

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

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

Since the UK became the first country to ratify the Convention in 1951, the UK Government has also agreed treaties which protect the rights of women; children; and disabled people; help stamp out racism; protect the rights of refugees fleeing persecution; and recognise the international prohibition on torture (see Chapter 6).

The UK Government signs treaties on behalf of the whole of the UK. However, where those treaties address devolved matters, it is the responsibility of the devolved institutions to ensure protection of the rights they enshrine.⁹⁶ While the UK Government ratified, for example, the UN Convention on the Rights of the Child (‘UNCRC’), matters such as education and children’s health are devolved to Scotland. The Scottish Parliament has since directly incorporated the UNCRC into devolved domestic law in Scotland within the limits of devolved competence.⁹⁷

There is also a wide network of statutes of both the UK and Scottish Parliaments that work to protect human rights. For example, the Equality Act 2010 prevents discrimination on the ground of protected

characteristics, such as gender and race, and the Forced Marriage (Protection and Jurisdiction) (Scotland) Act 2011, which protects people from being forced into marriage.

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

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

This Chapter will look at:

- (a) rights at common law,
- (b) what rights are protected and reinforced by the Convention,
- (c) how the Convention is applied, principally in Scotland, but also in the UK as a whole, and
- (d) the role and purpose of the European Court of Human Rights (‘ECtHR’ or ‘the Strasbourg Court’).

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

Common Law Rights.

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

Indeed, in 1949, Lord President Cooper’s view⁹⁸ was that **“it is still the common law of Scotland that ... defines all the main rights and duties of the Scottish citizen.”**⁹⁹ For example, the long-recognised rule that a warrant to search a property must be specific in terms of the object of the search protects individuals against arbitrary intrusions in the home by police.¹⁰⁰

More recently, the UK Supreme Court held that the common law should be “the natural starting point in any dispute” involving civil liberties or human rights.¹⁰¹ Thus the common law might protect human rights in new ways not required by the Convention or it may already protect rights so that courts do not have to directly apply the Convention.¹⁰²

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

- (a) Acts of public bodies or officials can be challenged on the basis that the act was founded on an error of law. For example, a decision of the Scottish Ministers to refuse compensation for a miscarriage of justice was successfully challenged on the basis that the Scottish Ministers had made an error of law by concluding that the particular case was not exceptional for the purposes of the Ministers’ policy on such payments,¹⁰³ and a decision of the Secretary of State to detain two individuals after their release from prison, while awaiting deportation, was successfully challenged, on the grounds that the Secretary of State had relied on an unlawful policy when exercising their powers of detention.¹⁰⁴
- (b) The acts of public authorities remain subject to judicial review, tested against a standard of legality, rationality¹⁰⁵ or procedural propriety, where those acts interfere with fundamental rights protected by the common law.¹⁰⁶
- (c) Theoretically, in an extreme case where an Act of the Scottish Parliament contradicted “fundamental rights or the rule of law”, it could be struck down at common law.¹⁰⁷

However, the protection of the common law has limits. For example, it has been established that the right to vote is not one that exists at common law,¹⁰⁸ though it is protected in legislation.

But what happens when neither statute nor the common law is able to protect a human right? A good example is the case of Campbell and Cosans. Two mothers from Bishopbriggs and Cowdenbeath did not want their children to be punished by the belt at school. They, like many others, were unable to secure a remedy in domestic courts but won their case in the ECtHR,¹⁰⁹ which said that parents had a right under Article 2 of Protocol 1 to exempt their children from this punishment. In due course, this decision led to the abolition of physical punishment in Scottish state schools.

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

As late as 2010, there was no right in Scots law to receive legal advice when being questioned by police. When Peter Cadder took this issue to the UK Supreme Court, it identified “clear and consistent” case law by the ECtHR that this was a violation of the Convention.¹¹⁰ Therefore, thanks to the right to fair trial in Article 6 ECHR, you have the right of access to a lawyer prior to being interviewed. This allows every person detained by the police the opportunity to fully understand the legal implications of their arrest and being questioned by police, and what their rights are in that context.

The European Convention On Human Rights.

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

The Convention is an instrument of the Council of Europe, which is a body distinct from the European Union, and is unaffected by the UK leaving the EU. The Council of Europe is an older institution established in the aftermath of the Second World War. Made up of 46 Member States, it is larger than the EU and includes many non-EU States (for example Switzerland), but EU countries are required to comply with the minimum standards of the Convention.

⁹⁶ There is no strict legal obligation on the Scottish Government or Parliament to implement the UK’s international obligations: *Whaley v HM Advocate* [2007] UKHL 53, at [8] and [9], Lord Hope.

⁹⁷ United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

⁹⁸ In response to a perceived and apparently undesirable proliferation of statute law.

⁹⁹ The Scottish Legal Tradition, Lord Cooper of Culross (published for the Saltire Society by Oliver and Boyd, 1949. (Saltire Pamphlets: no. 7)).

¹⁰⁰ *Webster v Behune* (1857) 2 Irv. 596; *Bell v Black and Morrison* (1865) 5 Irv. 57.

¹⁰¹ *Kennedy v The Charity Commission* [2014] UKSC 20 at [46] (Lord Mance).

¹⁰² *A v BBC* [2014] UKSC 23 at [56] and [57] (Lord Reed).

¹⁰³ *Dinnell*, Petitioner [2013] CSOH 204.

¹⁰⁴ *R. (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12.

¹⁰⁵ *West v Secretary of State for Scotland* 1992 SC 385, at [413] (Lord Hope).

¹⁰⁶ See *Eba v Advocate General for Scotland* [2011] UKSC 29, at [46] and [47], and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at [410] (Lord Diplock).

¹⁰⁷ *AXA General Insurance v Lord Advocate* [2011] UKSC 46, at [51] (Lord Hope) and [149] (Lord Reed).

¹⁰⁸ *Moohan and another v The Lord Advocate* [2014] UKSC 67, at [34] (Lord Hodge); [2014] CSIH 56, at [17] (Lady Paton).

¹⁰⁹ *Campbell and Cosans v UK* (1991) 13 E.H.R.R. 441.

¹¹⁰ *Cadder v Her Majesty’s Advocate* [2010] UKSC 43.

What Are The Convention Rights?

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

These rights require to be implemented in different ways. Public bodies may be required to refrain from doing something (called a '**negative obligation**').

Sometimes, however, to protect a right properly, public authorities might have to take steps to make sure that a right actually works in practice (a '**positive obligation**').

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

Are Convention Rights Absolute?

The rights within the Convention can be divided into three groups:

- (a) **Absolute rights** – these cannot be interfered with by the state or derogated from even in a state of emergency e.g., Prohibition of torture and inhuman or degrading treatment or punishment (Article 3).
- (b) **Limited rights** – these may be interfered with in certain defined circumstances e.g., Right to liberty and security (Article 5).
- (c) **Qualified rights** – these can be restricted in some circumstances and within limits e.g., Right to respect for private and family life (Article 8).

The rights in Articles 8 to 11 ECHR are 'qualified rights'. This means that they can lawfully be limited where it is necessary to consider the competing rights of other people or the wider community. For instance, freedom of expression is sometimes limited in order to prevent incitement to violence. These limits are only lawful if they are 'proportionate' to a 'legitimate aim'. This means that the seriousness of the impact on individual rights must be weighed against the public interest goal which any limitation seeks to serve.

¹¹¹Human Rights Act 1998, Schedule 1, Parts 1 and 2.

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

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

Convention Rights¹¹¹

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





Example Of A Qualified Right.

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

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

Article 10(2) explains its limits:

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

Balancing Rights?

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

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

For example, Ms Eweida complained that a ban on her wearing a small cross to work was a violation of her right to religion. She won. There was no evidence of a risk to the public or of any significant impact on anyone else. It was disproportionate for her employer to prevent her from wearing it.¹¹²

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

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

Derogation.

States are able to 'derogate' from (meaning, temporarily suspend or restrict) some Convention rights in times of war or other public emergencies "threatening the life of the nation".¹¹³ For Scotland's purposes, it would be the UK Government that would do this as the signatory State to the Convention, by notifying the Council of Europe.

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

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

Lord MacFadyen, Calder, 2006¹¹⁴

Some Convention rights are '**non-derogable**'. These include the right to life (except in respect of deaths resulting from lawful acts of war) and the prohibitions on torture and slavery.¹¹⁵

How is the Convention applied in Scotland?

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

The two important international obligations on the UK are:

- (a) **Article 1 ECHR**, which requires the UK to make sure that everyone within its "jurisdiction" enjoys each of the rights it guarantees. This generally applies to people in the UK but can include rare circumstances where the UK exercises control over an area or an individual overseas (for example, to some conduct by UK troops).¹¹⁶
- (b) **Article 13 ECHR**, which requires that effective remedies are available when things go wrong. For instance, the effective criminal prosecution of murder is considered one necessary effective remedy for the protection of the right to life (Article 2 ECHR).

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

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

¹¹²Eweida v British Airways plc [2010] EWCA Civ 80. Ms Eweida lost her case before the Court of Appeal. She did however win at the European Court of Human Rights, after the Equality and Human Rights Commission, Liberty and others intervened in the case (Eweida and others v the UK (2013) 57 EHRR 8).

¹¹³Article 15(1) ECHR. See also s14 Human Rights Act 1998.

¹¹⁴Calder v Frame 2007 JC 4 at [32].

¹¹⁵Article 15(2) ECHR.

¹¹⁶Al-Skeini v the UK [2011] ECHR 1093.

The Scotland Act 1998: Devolution And Convention Rights.

The Convention has a particular constitutional significance for Scotland.¹¹⁷ Convention rights apply more forcefully to the devolved institutions than they do to the UK Parliament. The Scottish Parliament cannot make any law which is outside of its legislative competence. A law will be outside of the Parliament's competence if it is incompatible with the Convention rights.

The Convention In Action

A Scottish prisoner who was in a two- person cell challenged his lack of integral sanitation, which had required him to “slop out”. This was deemed to be “degrading treatment” under Article 3 ECHR. The Court of Session therefore ordered the Scottish Prison Service to prevent the practice of slopping out and awarded the prisoner damages.¹¹⁸

Two long term prisoners convicted of serious crimes challenged the Scottish Independence Referendum Act 2013 because it did not allow them to vote in Scotland's Independence Referendum in 2014. Article 3, Protocol 1 ECHR requires States to “hold free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” The Court of Session at first instance and on appeal¹¹⁹ and the UK Supreme Court¹²⁰ found that as the ECtHR had decided that this rule did not apply to referendums – only parliamentary general elections – the disenfranchisement of the prisoners in the referendum was lawful.

A police policy of ‘containing’ or ‘kettling’ protesters was challenged as a violation of the Article 5 right to liberty, after a number of G20 demonstrators were detained for several hours without food or access to toilets. After challenges in the UK and Strasbourg, judges clarified that the policy was proportionate and lawful, if certain safeguards were in place, including a time-limit, provision for release in some circumstances and access to water and toilet facilities.¹²¹

The Scotland Act 1998

Any Act of the Scottish Parliament is not law – that is, it would be struck down by the courts – if it is deemed to be incompatible with a Convention right (Section 29(2) (d)).¹²² This is different from Acts of the UK Parliament (see below).

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

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

The Scotland Act In Action

The first case in which a provision of an Act of the Scottish Parliament was ‘struck down’ under section 29(2)(d) of the Scotland Act was *Salvesen v Riddell*.¹²³ The Agricultural Holdings (Scotland) Act 2003 was outside the legislative competence of the Scottish Parliament. This was because it violated the rights of some landlords of agricultural tenancies to the peaceful enjoyment of their possessions (Article 1, Protocol 1 ECHR). However, the court made an order suspending the effect of its decision to allow the incompatibility to be resolved by the Scottish Parliament.

The latest ‘striking down’ was in *Christian Institute and others v Lord Advocate*.¹²⁴ In this case, the UK Supreme Court decided that certain provisions of the ‘Named Person’ scheme were a violation of the right to private and family life. The Scheme provided for information about ‘relevant changes in a child or young person's life’ to be shared between healthcare, education and other personnel of public authorities. The provisions could not be justified under the Article 8(2) ECHR balancing requirements as they were deemed not to be “in accordance with the law” – they lacked clarity and safeguards to protect children's data. Ultimately, in September 2019, the Scottish Government announced that it would repeal parts 4 and 5 of the Children and Young People (Scotland) Act 2014, bringing a formal end to the Scheme.

The Role Of The Scottish Parliament.

The Scottish Parliament has an important function in protecting Convention rights. All Bills presented to the Scottish Parliament by anyone entitled to do so must state that the Bill is within the Parliament's legislative competence.¹²⁵ As we know, this means, among other things, that the Bill should be compatible with the Convention. The Presiding Officer must also give his or her opinion on whether the Bill is compatible.¹²⁶

Scottish Parliamentary Committees

Various committees scrutinise legislation and consider wider societal issues against human rights standards. Such committees include the Equalities, Human Rights and Civil Justice Committee, the Criminal Justice Committee and the Social Justice and Social Security Committee. Like all of the Scottish Parliament's Committees, they can call government ministers and public bodies to give evidence and can make recommendations.

The Human Rights Act 1998.¹²⁷

After a number of high-profile cases highlighted the limits of the common law, Parliament passed the HRA. One of these cases was *Smith and Grady v UK*,¹²⁸ where the ECtHR unanimously found that the investigation into and subsequent discharge of personnel from HM Forces because they were homosexual was a breach of their Article 8 rights. This was after the case had previously been dismissed in both the High Court and Court of Appeal. The HRA makes Convention rights directly effective in the UK – that is, individuals can directly challenge interference with their Convention rights in UK courts.

The impact of Convention rights on legislation passed by the UK Parliament under the HRA is different to their interaction with Scottish legislation. Acts of the UK Parliament cannot be struck down by the courts, which must only interpret them, ‘so far as it is possible to do so’, in a way which is compatible with the Convention.¹²⁹ However, secondary legislation which cannot be read in a way that respects Convention rights can be struck down by the courts.

As a result, courts have a duty to try to interpret even unambiguous legislation in a way that respects Convention rights. However, there are limits to this power. The courts cannot give express statutory words a meaning inconsistent with their plain language or one which would ‘go against the grain’ of the statute.¹³⁰

The Human Rights Act

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

¹¹⁷As it does to Wales and Northern Ireland too. ¹¹⁸*Doherty, Philbin and Logan v Scottish Ministers* [2011] CSIH 58. ¹¹⁹*Moohan, Gillon v Lord Advocate* [2013] CSOH 199; [2014] CSIH 56. ¹²⁰*Moohan and another v Lord Advocate* [2014] UKSC 67, at [10] (Lord Hodge). ¹²¹*Austin v the UK* (2012) 55 EHRR 14; *Austin and Another v The Commissioner of Police of the Metropolis* [2007] EWCA Civ 989. ¹²²Similar restrictions exist in relation to the powers of Ministerial office holders in the Northern Irish and Welsh Assemblies (s24(1) Northern Ireland Act 1998 and s81 Government of Wales Act 2006). ¹²³*Salvesen v Riddell* [2013] UKSC 22. ¹²⁴*Christian Institute and others v Lord Advocate* [2016] UKSC 51, see also chapter 2 of this Guide.

¹²⁵s31(1), Scotland Act 1998. It used to be that only Bills introduced by the Scottish Government required a statement in respect of legislative competence, but this was amended to include all other Bills – MSPs' Members' Bills, Committee Bills and Private Bills – by section 6 of the Scotland Act 2012.

¹²⁶s31(2), Scotland Act 1998.

¹²⁷For further reading, see Blackstone's Guide to the Human Rights Act 1998, 7th Edn, (2015).

¹²⁸(1999) 29 EHRR 493. In the domestic courts this case was decided at English and Welsh common law, but nothing indicates the decision would have been different in Scotland.

¹²⁹s3, Human Rights Act 1998.

¹³⁰*Ghaidan v Godin-Mendoza* [2004] UKHL 30, at [33] (Lord Nicholls).

The Public Duty To Respect Rights.

The Act creates a duty on all public authorities, including the devolved institutions of Scotland, Wales and Northern Ireland, to act compatibly with Convention rights.¹³¹ This is designed to make sure individuals’ rights are respected without any need for the courts to get involved. If a public body falls short, a claim can be considered by the courts and a judge can overturn a decision or direct a public body to stop acting unlawfully. Damages are available under the HRA, but compensation is generally fairly limited.

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

The duty also applies to private bodies when they perform ‘public functions’. For example, legislation has been enacted to ensure the protections provided by the HRA apply to people receiving publicly arranged care in an independent sector care home as the provision of this care is considered a “public function”.¹³² The public duty can, in some circumstances, also apply to some private health facilities.¹³³

Declarations Of Incompatibility.

Where an Act of the UK Parliament cannot be read in a way that is compatible with Convention rights, the courts may make a ‘**declaration of incompatibility**’.¹³⁴

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

Declarations of incompatibility are uncommon (a little over 30 final declarations have been made since the HRA was brought into force).¹³⁵

¹³¹s6, Human Rights Act 1998. ¹³²s73, Care Act 2014. ¹³³R (A) v Partnerships in Care Ltd [2002] 1 WLR 2610 (publicly funded mental health care in a private facility). ¹³⁴Section 4, Human Rights Act 1998. ¹³⁵Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2023–2024, Ministry of Justice, November 2024 (CP 1192). ¹³⁶s10, Human Rights Act 1998. ¹³⁷The Scottish Human Rights Commission website provides helpful information on its duties and history, at <http://www.scottishhumanrights.com/> Scotland’s Second National Action Plan for human rights can be found here: <https://www.snaprights.info/wp-content/uploads/2023/03/SNAP-2-March-2023-FINAL-PDF.pdf>.

Fast-Track ‘Remedial Orders’.

The UK Government may respond to a declaration of incompatibility through a fast-track ‘remedial order’.

This is a procedure whereby a violation of Convention rights can be fixed quickly by the UK Parliament.¹³⁶ It allows the Government to use secondary legislation to change the law within a maximum of 60 days.

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

The National Human Rights Institutions.

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

The Scottish Human Rights Commission (‘SHRC’) was created by the Scottish Parliament and reports to it. The SHRC has general functions and duties concerning human rights issues that relate to devolved matters, including promoting human rights in Scotland. In particular it encourages best practice; monitors law, policies and practice; conducts inquiries into the policies and practices of Scottish public authorities; intervenes in civil court proceedings; and provides guidance, information and education. Its current work includes monitoring the implementation of Scotland’s National Action Plan for human rights.¹³⁷

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

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

The Future Of The Human Rights Act.

The HRA has been subject to criticism, including by UK Governments, and a number of parties have proposed repealing the HRA as part of their election manifestos.

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

The European Court of Human Rights.

The ECtHR, based in Strasbourg, interprets and applies the provisions of the Convention. The UK – together with each of the other States of the Council of Europe – has agreed to “abide by the final judgment of the court”.¹³⁸

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

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

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

- (a) pay compensation to affected individuals,
- (b) stop doing whatever is causing the problem, and/ or
- (c) adopt ‘general measures’ to prevent the violation from happening again – often this means changing the law.

¹³⁸Article 46 ECHR. ¹³⁹Manchester City Council v Pinnock [2010] UKSC 45, at [48] (Lord Neuberger). ¹⁴⁰R v Horncastle [2009] UKSC 14. ¹⁴¹Hutchinson v UK, App No. 57592/08, 17 January 2017.

Taking Into Account Judgments From The ECtHR.

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

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

“...inconsistent with some fundamental substantive or procedural aspect of [UK] law and whose reasoning does not appear to overlook or misunderstand some argument or point of principle”.¹³⁹

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

For example, the ECHR backtracked from finding that the UK rules on hearsay evidence in criminal trials were in breach of Convention rights after the UK Supreme Court forcefully disagreed in a carefully reasoned judgment.¹⁴⁰

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

A Conversation About Rights?

The Strasbourg Court decided that prisoners serving a ‘whole-life tariff’ – serious offenders with a life sentence, where a judge has confirmed that they should spend their whole life in jail – should have an opportunity for their sentence to be reviewed. Without one, a whole-life term would constitute inhuman and degrading punishment (Article 3 ECHR). The Court of Appeal in England and Wales considered this judgment and said that the existing law – interpreted under the HRA to comply with Article 3 – provides for sufficient opportunity to ask for early release to be considered. Thinking about its position again, with the benefit of the Court of Appeal’s explanation of the way in which UK law works, the Grand Chamber of the Strasbourg court then agreed.¹⁴¹

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

- **The ‘living instrument’**
The ECtHR treats the Convention as a ‘living instrument’. This means it is interpreted with reference to present day conditions, and in the light of changing moral standards or scientific developments. For example, over the past 50 years, the protection offered to the rights of gay and transgender people has changed significantly.¹⁴²
The right of people with disabilities not to be discriminated against has also been recognised by the ECtHR, despite the fact that it is not mentioned in the original text of the Convention.¹⁴³
- **The ‘margin of appreciation’**
States have a ‘margin of appreciation’ in the application of some rights. This means that, in some cases which involve striking a balance between a legitimate public interest and the impact on an individual right (discussed earlier in this Chapter), the ECtHR may allow the government room – or a “margin” – to take a decision which is best suited to domestic law, policy and practice. This is because the primary responsibility for protecting individual rights lies with states. The role of the Strasbourg Court is a ‘supervisory’ one. There may be a range of acceptable ways of responding to a problem, each of which might adopt a different strategy, while all meeting the requirements of the Convention. The ECtHR recognises that national institutions are better placed to make local decisions than an international court. A wider margin of appreciation is allowed in cases raising issues of social and moral controversy where there is a lack of consensus among the signatory states, such as assisted dying.¹⁴³ The countries of the Council of Europe have decided that the Convention should be amended to reflect this principle in its preamble.¹⁴⁵



¹⁴²Shalk and Kopf v Austria, App No. 30141/04, 24 Jun. 2010.
¹⁴³Burnip v Birmingham City Council and another [2012] EWCA Civ 629.
¹⁴⁴Pretty v UK (2002) 35 EHRR 1.
¹⁴⁵Protocol No. 15 amending the Convention (available online at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213>).

Protecting Convention Rights In Parliament

Pre-Charge Detention In Terrorism Cases

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

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

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

Protecting Convention rights in Parliament

DNA And Privacy

Until 2008, the UK National DNA Database retained the fingerprints and DNA of people never convicted of any offence, including children. In *S and Marper*, the ECtHR held that this blanket policy of indefinite retention was disproportionate and incompatible with the right to privacy. The ECtHR rejected the UK Government’s argument that this retention was necessary to prevent crime or disorder or to protect the rights of others as the blanket retention of information did not strike “a fair balance between the competing public and private interests”.¹⁴⁶

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



¹⁴⁶*S and Marper v UK* [2008] ECHR 1581.
¹⁴⁷*Hirst v the UK (No 2)* [2005] 42 EHRR 849.
¹⁴⁸*R (on the application of Chester) v Secretary of State for Justice; McGeoch (AP) v The Lord President of the Council and another* [2013] UKSC 63.
¹⁴⁹*McHugh and Others v UK App. No 51987/08*, 10 February 2015.
¹⁵⁰Representation of the People Act 1983 Remedial (Scotland) Order 2025. This Order is time limited and is due to expire on 28 February 2030.
¹⁵¹s5, Scottish Elections (Franchise and Representation) Act 2020.
¹⁵²*Hora v the UK*, App No. 1048/20, 23 September 2025. This case is currently being considered for referral to the Grand Chamber of the European Court of Human Rights. A limited number of cases can be reconsidered by the Grand Chamber (17 judges of the Court sitting together).

Protecting Convention rights in Parliament

Prisoner Voting

In *Hirst v UK*¹⁴⁷, the Strasbourg Court held that the UK’s blanket ban on prisoners voting in general elections was inconsistent with the obligation to hold free elections (Article 3, Protocol 1, which includes a right to vote). The Strasbourg Court held that conditions curtailing the right to vote must maintain the integrity and effectiveness of the right and must be imposed in pursuit of a legitimate aim in a way that is proportionate. The blanket ban on prisoner voting did not fulfil these requirements. This decision has since been upheld by the Supreme Court.¹⁴⁸ It has also been confirmed by the ECtHR, although that Court has refused to offer prisoners any compensation.¹⁴⁹

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

In December 2013, a Select Committee of both Houses of the UK Parliament recommended that all prisoners serving sentences of less than 12 months should be entitled to vote. While, the ban remains in force in respect of UK elections, the Scottish Parliament has since taken steps to extend the voting rights of some individuals detained on mental health grounds,¹⁵⁰ and of prisoners sentenced to 12 months or less in prison.¹⁵¹

The UK Government undertook non-legislative changes allowing prisoners released on temporary licence to vote, and in 2025 the ECtHR held that the disenfranchisement of a prisoner serving a life sentence was compatible with the Convention.¹⁵²

The Equality Act 2010.

Although the common law enshrines the right of us all to the equal protection of the law, Article 14 of the Convention and the HRA protect only against discrimination in the enjoyment of other Convention rights.¹⁵³

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

The Equality Act replaced a patchwork of anti-discrimination laws and is for the first time a holistic legal framework for equal treatment in the law.¹⁵⁴ The Act applies in England, Scotland and Wales. It has limited effect in Northern Ireland, which has its own equality legislation.

Introduction.

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

- (a) disability;
- (b) gender reassignment;
- (c) pregnancy and maternity;
- (d) race (including ethnic or national origins, colour and nationality);
- (e) religion or belief;
- (f) age;
- (g) marriage and civil partnership;
- (h) sex; and
- (i) sexual orientation

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

(a) Direct discrimination: When a person is treated less favourably than another in a similar situation because they have, or are wrongly believed to have, a protected characteristic;

(b) Indirect discrimination: When a rule generally applies to everyone but affects a particular group unfairly. If there is not fair reason – known as objective justification – for the treatment, this will be unlawful;

(c) Failure to make reasonable adjustments to practices or premises to avoid disadvantaging disabled people;

(d) Harassment: Unwanted conduct related to a protected characteristic that has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment; and

(e) Victimisation: When a person takes legal action (including but not limited to court action) against discrimination or harassment and is subsequently victimised because of doing so.

The Act also protects someone from discrimination which happens because they are believed to be in a particular group or because they are associated with someone with protected characteristics. The protection offered to those associated with someone with protected characteristics includes carers, and ensures they are not unfairly discriminated against when fulfilling their role as a carer.¹⁵⁵

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

When Does The Equality Act 2010 Apply?

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

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

Disability And Reasonable Adjustments.

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

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

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

Equality Law In Action

A school excluded a Sikh boy – who was required to wear a turban as part of his religious observance – for non-observance of its uniform policy. The policy banned all headgear and made no exception for religious dress. By applying the rule without exception, the school was unlawfully discriminating against him.¹⁵⁶



¹⁵⁶Mandla v Lee [1983] 2 WLR 620.
¹⁵⁷Howe v JD Wetherspoon, 18 May 2015.
¹⁵⁸Hall v Bull [2013] UKSC 73.
¹⁵⁹RBS v Allen [2009] EWCA Civ 1213.
¹⁶⁰Lambert v Lewisham and Southwark College (unreported), 21 May 2015. For case summary see the University College Union website at <https://www.ucu.org.uk/article/7540/Lewishamand-Southwark-College-discriminated-againstblind-disability-officer-tribunal-rules>.
¹⁶¹s15, Equality Act 2010.

Come One, Come All

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

If a pub refuses entry to a group because they are Irish Travellers, then they have discriminated against them because of their race.¹⁵⁷

A B&B owner who refuses to let a room to a gay couple discriminates on grounds of their sexual orientation.¹⁵⁸

A bank could only be accessed by steps, with no working lift or ramp and with an ATM that could not be reached by wheelchair users. It was in violation of the equality duty to make reasonable adjustments to make its branch accessible to people with disabilities.¹⁵⁹

A college disability officer who is blind asks for reasonable adjustments to be made to allow him to continue to do his job. The college invests in software to help him do his job, but five years later it still does not work. He can bring a successful claim under the Equality Act 2010.¹⁶⁰

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

In addition to the duty to make reasonable adjustments, it is unlawful to discriminate against someone for a reason “arising as a consequence” of their disability, without a proportionate justification.¹⁶¹ One example where this may apply is where someone takes prolonged time away from work for reasons connected with their disability.

¹⁵³The UK has not yet ratified Protocol 12 to the European Convention on Human Rights which would provide a freestanding equality guarantee within the Convention.
¹⁵⁴Including the Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Age) Regulations 2006, Equality Act 2006 and Equality Act (Sexual Orientation) Regulations 2007.
¹⁵⁵Coleman v Attridge Law [2008] All ER (D) 245.

Equal Pay.

The Equality Act 2010 continues to protect the presumption in law that men and women should earn equal pay for equal work. It enables individuals to challenge unequal pay and terms.¹⁶²

Equal Pay For Equal Work

In 2013 251 women working for a local council won their Supreme Court claim for equal pay. Working as classroom assistants, support for learning assistants or nursery nurses, they were paid less than a group of mostly male groundskeepers and refuse workers who were entitled to substantial bonuses. The Supreme Court rejected the Council's case that because they worked in different places there could be no claim.

The decision benefited thousands of women working across different local authorities. The Court emphasised the purpose of the law, in addressing historical undervaluing of work traditionally done by women.¹⁶³

The Inner House of the Court of Session applied the general principles set out by the Supreme Court in a case against Glasgow City Council.¹⁶⁴ It gave a broad interpretation to the meaning of "associated employer" in section 1(6) (c) of the Equal Pay Act 1970. The Court found that Glasgow City Council was an associated employer of two LLPs, City Parking (Glasgow) and Cordia (Services), to which the Council had transferred

its staff for services it would no longer provide. This meant that female claimants working for the LLPs would be allowed to compare their pay with male employees working for the Council.

¹⁶²Equality Act 2010, Part 5.

¹⁶³Dumfries and Galloway v North [2013] UKSC 45.

¹⁶⁴Glasgow City Council and Others v Unison and Fox Cross [2014] CSIH 27

¹⁶⁵s149, Equality Act 2010.

The Public Sector Equality Duty.

The Equality Act also contains a public sector equality duty. This requires public bodies, in the performance of their functions, to give 'due regard' to three statutory equality needs:¹⁶⁵

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

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

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

What Is A Public Body?

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

Scotland.

The Equality Act 2010 applies to Scotland and the power to legislate for equality is broadly reserved to the UK Parliament. The Scotland Act 2016 conferred additional powers on the Scottish Parliament to supplement the protections in that Act, including in respect of socio-economic inequality.

Northern Ireland.

Although the Equality Act 2010 does not apply in Northern Ireland (with a few limited exceptions), many of the same protected characteristics are protected from discrimination by a patchwork of earlier legislation.¹⁶⁶ Many features are similar. For example, Section 75 and Schedule 9 of the Northern Ireland Act 1998 provide for a single public sector equality duty. There are, however, a number of important differences.

These include:

- (a) the prohibition on age discrimination only applies to employment issues;
- (b) some new protections against disability – related discrimination do not apply in Northern Ireland; and
- (c) protection against discrimination in private clubs is more limited in Northern Ireland.

The Equality Commission for Northern Ireland has recommended wholesale reform of equality law in Northern Ireland.¹⁶⁷



¹⁶⁶See Employment Equality (Age) Regulations (NI) 2006; Disability Discrimination Act 1995; Disability Discrimination (Northern Ireland) Order 2006; Equal Pay Act (NI) 1970; Sex Discrimination (NI) Order 1976; Race Relations (NI) Order 1997; Fair Employment and Treatment (NI) Order 1998; Equality Act (Sexual Orientation) Regulations (NI) 2006.

¹⁶⁷Submission to the Committee for the Executive Office Inquiry into Gaps in Equality Legislation, Equality Commission for Northern Ireland, 6 September 2024.

¹⁶⁸See Scottish Parliament data available at <https://www.parliament.scot/about/how-parliament-works/equal-representation-and-participation/gender-balance-of-msps-in-the-scottish-parliament-2025>; Scottish Government analysis on Diversity in political representation in Scotland: data improvement project proposal, available at <https://www.gov.scot/publications/diversity-political-representation-scotland-data-improvement-project-proposal/pages/2/>.

¹⁶⁹Equal Opportunities Committee, Removing Barriers: race, ethnicity and employment, SP Paper 890, 1st Report, 2016 (Session 4), p. 1 available at <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/96080.aspx>.

¹⁷⁰See <http://www.parliament.scot/msps/disability.aspx>.

Equality In Parliament

- Although significantly improved, the Scottish Parliament has continued to have a gender and ethnic imbalance. In 2025, there were 58 women MSPs (out of 129 (45%)), and six (4.5%) MSPs from ethnic minority backgrounds, compared to around 7.1% of the Scottish population.¹⁶⁸
- Parliamentary Committees often examine how government departments and public bodies meet their duties towards people with protected characteristics. For example, the Equal Opportunities Committee January 2016 report Removing Barriers made recommendations to the Scottish Government on how to tackle the under representation of ethnic minorities in the public sector.¹⁶⁹
- The Cross Party Disability Group was convened to, amongst other things, increase awareness and raise the profile of rights for disabled people in the Scottish Parliament.¹⁷⁰



06. EU And International Law

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

The European Union.

In 1957, representatives from six states signed the Treaty of Rome, establishing the European Economic Community (the “EEC”). The EEC was intended to secure peaceful co-operation, security and economic integration amongst European states following the Second World War. The UK joined the EEC in 1973.

The European Union (‘EU’) was formally created in 1993 and there are currently 27 member states. The EU promotes a common, pan- European approach to many political and economic issues. EU law covers a broad range of areas including agriculture, fishing, business, energy, health, justice, the environment and transport.

Following the EU Referendum vote in June 2016, the UK left the EU on 31 January 2020 (with a transition period in place until 31 December 2020).

EU Law In The Uk.

When the UK joined the EEC in 1973, the European Communities Act 1972 (the “ECA”) provided a mechanism for EU law to have direct effect in domestic UK law. In the decades that followed, a significant amount of EU law became part of UK law. This included:

- (a) **EU Directives:** the most common form of EU legislation. EU directives set out what must be achieved by member states but leave the method of implementation to the member states. The UK passed national legislation, through the UK Parliament or the devolved legislatures (where the subject area was within devolved powers), to bring EU Directives into effect in the UK.
- (b) **EU Regulations:** apply directly in each member state without the need for any national legislation. The ECA provided that EU Regulations had direct effect in the UK and took precedence over any other rule of UK law, including Acts of Parliament.
- (c) **Decisions of the CJEU on matters of EU law:** these were binding on UK courts.

EU Law In The UK After Brexit.

The post-Brexit landscape is complex and the legal framework governing the status of EU law in the UK is subject to numerous exceptions and continuing points of interaction (for example in relation to Northern Ireland). This section provides a high-level overview of the current status of EU law in the UK, the key statutory provisions and the powers available to Ministers to amend any retained law.

Key UK statutes to be aware of include:

- (a) the European Union (Withdrawal) Act 2018 (**the ‘Withdrawal Act’**), the European Union (Withdrawal Agreement) Act 2020; and
- (b) the Retained EU Law (Revocation and Reform) Act 2023 (**the ‘REUL Act’**).

The position in Scotland is also governed by the Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (the ‘Continuity Act’).

The Withdrawal Act.

Following the UK’s decision to leave the EU, the ECA was repealed by the Withdrawal Act. The Withdrawal Act took a ‘snapshot’ of EU law that was in force and applicable in the UK at the end of the Brexit transition period (11 pm on 31 December 2020). The Withdrawal Act provided that most of that law would continue to be part of UK law, subject to minor amendments to ensure the law operated effectively outwith the EU framework.

This included ensuring that most EU-derived UK legislation (such as legislation to implement an EU Directive) and most EU Regulations, together with certain other instruments, directly applicable EU treaty articles, and certain general principles of EU law continued to be part of UK law and that the UK courts should continue to have regard to judgments of the CJEU in certain circumstances.

The Withdrawal Act ensured that most EU law remained or was transposed onto the UK statute book, largely “as is”. The aim was to prevent any “gaps” in UK law, given the number of areas of law that had been governed by EU law prior to the UK leaving the EU.

The Withdrawal Act also:

- (a) ended the jurisdiction of the CJEU in the UK (although UK courts may still have regard to or follow judgments of the CJEU in certain circumstances – for example, CJEU decisions in respect of EU law that is still applicable to Northern Ireland); and
- (b) created temporary powers for Ministers and devolved governments to make the minor amendments necessary to ensure that the relevant EU law operates effectively as part of domestic UK law (using statutory instruments to correct ‘deficiencies’ in the relevant retained EU law).

The UK Government has used these powers, some of which are known as Henry VIII powers, to correct these ‘deficiencies’ in the relevant retained EU law.

Typical amendments include:

- (a) replacing references to the European Commission with references to UK Ministers or UK regulators; and
- (b) removing reciprocity, e.g. obligations that require EU or EEA persons to be treated in the same way as UK persons.

The REUL Act.

Following on from the Withdrawal Act, the REUL Act:

- (a) revoked some of the EU law that had continued to apply under the Withdrawal Act;
- (b) provided the UK and devolved governments with more extensive powers to restate, revoke and replace any EU law that was retained post-Brexit (other than primary legislation). We note these powers can be exercised until 23 June 2026;
- (c) further regulated, from 1 October 2024, the interpretation by the UK courts of EU law that was retained post-Brexit, and set out the factors that UK courts should take into account when deciding whether to have regard to or depart from CJEU case law;

- (d) confirmed that, where there is a conflict, UK legislation takes precedence over any EU Regulation; and
- (e) provided that EU law that had been retained post-Brexit should be known as ‘assimilated law’ after the end of 2023 (it was previously known as ‘retained EU law’).

The Continuity Act.

The Continuity Act provides for EU law to be incorporated into the law of Scotland in devolved areas by regulations made by Scottish Ministers – so without the need for primary legislation to be made by the Scottish Parliament. The aim of this ‘keeping pace’ power was to allow the Scottish Government to ensure continuity of alignment with EU law in devolved matters. However it does not itself give effect to any kind of EU law in Scotland and specific regulations must be made in order to change Scots law to reflect changes made to EU law.

The Brexit Legislation

The European Union (Withdrawal) Act 2018 repealed the European Communities Act 1972 and provided for EU law to cease generally to have effect in or bind the UK.

The European Union (Withdrawal Agreement) Act 2020 made provision for ratifying the Brexit withdrawal agreement agreed with the EU and provides rights to EU citizens remaining in the UK.

The European Union (Future Relationship) Act 2020 makes provision for implementing the EU-UK Trade and Cooperation Agreement into UK law.

The Retained EU Law (Revocation and Reform) Act 2023 gives the UK Government and courts additional powers to replace or depart from EU law without the need for specific Parliamentary intervention.

In Scotland the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 provides for Scots law in devolved areas to stay aligned to future EU law and gives the Scottish Ministers powers to make provision in secondary legislation for this purpose.

EU-UK International Relations.

At the international level, the UK’s former membership of the EU has been replaced by two principal agreements:

- (a) The **Withdrawal Agreement**: governs the relationship between the UK and the EU in several areas, including separation issues, citizens’ rights and specific arrangements relating to Northern Ireland. Article 4 of the Withdrawal Agreement requires the Withdrawal Agreement to have direct effect in UK domestic law and provides for individual enforcement rights in UK courts. The European Union (Withdrawal Agreement) Act 2020 implemented the Withdrawal Agreement in UK law; and
- (b) The **UK-EU Trade and Cooperation Agreement (the “TCA”)**: governs significant aspects of the trade relationship between the UK and the EU and regulates a number of key areas previously regulated by the EU Single Market. The TCA was implemented by the European Union (Future Relationship) Act 2020. It establishes arrangements for future cooperation across a range of areas including trade, aviation, road haulage, fisheries, police and security, health insurance and continued UK participation in some EU programmes. The TCA is subject to review every five years. The first review is due to start in May 2026.

EU law generally ceased to apply in the UK on 31 December 2020. However, EU law may continue to apply in limited circumstances, for example where rights were acquired or events took place before Brexit or, for certain rights retained under the Withdrawal Act, before the end of 2023. Additionally, as part of the Withdrawal Agreement, the **‘Northern Ireland Protocol’** provided that certain aspects of EU law continue to apply “to and in the United Kingdom in respect of Northern Ireland”. The purpose of the Northern Ireland Protocol included the protection of the Good Friday Agreement and avoiding a hard border on the island of Ireland by ensuring Northern Ireland remained aligned with EU law in some areas and maintaining frictionless access to the EU.

Examples of EU law that continue to apply in Northern Ireland include:

- (a) EU state aid rules;
- (b) certain EU legislation relevant to goods (notably product standards), customs and VAT; and
- (c) certain EU legislation relating to wholesale electricity markets.

¹⁷¹See <https://www.gov.uk/government/publications/retained-eu-law-dashboard>.

Following concerns around the implementation of the Northern Ireland Protocol it was revised by the **‘Windsor Framework’** in 2023 with changes made in two key areas:

- (a) changing rules governing trade between Great Britain and Northern Ireland to reduce administrative costs and other potential trade barriers; and
- (b) allowing members of the Northern Ireland Assembly to seek to prevent certain changes to EU laws from applying in Northern Ireland under the Protocol (the ‘Stormont Brake’).

UK courts have the power to disapply UK primary legislation where a provision is deemed to be incompatible with the Withdrawal Agreement, including any EU law that remains applicable in Northern Ireland in accordance with the Windsor Framework.

Understanding the status of a particular aspect of assimilated EU law (including whether or not it has been fully retained, modified or removed), can be challenging in practice. The UK Government has set up a searchable database of assimilated EU law.¹⁷¹ However, that database does not claim to be fully comprehensive and does not link directly to the full text of the relevant law, as modified by UK legislation (where applicable).

International Law.

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

How Does International Law Affect Our Law?

In the UK, international law is treated as separate from domestic law. This **‘dualist’** approach means that international law is not automatically part of domestic law. Treaty obligations and **‘customary international law’** which bind the UK do not automatically create rights and obligations that individuals can enforce in UK courts.

Treaties.

Treaty-making is the responsibility of the Crown, exercised typically by the Foreign Secretary. Parliament plays an important role in ‘ratification’, the process which determines whether a treaty will bind the UK internationally. No international treaty will bind the UK unless it has been laid before the UK Parliament and neither House objects.¹⁷² The UK Parliament always has the opportunity to debate the implications of a treaty and could vote against the UK being bound by the treaty. Within their devolved competences, Scotland, Wales and Northern Ireland have particular responsibilities for the UK’s international obligations.

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

- (a) the **UN Convention against Torture 1984** requires states to make acts of torture a criminal offence. The UK ratified the Convention in 1988. The Criminal Justice Act 1988 then created a framework for the prosecution of acts of torture;
- (b) the Scottish Parliament enacted the **International Criminal Court (Scotland) Act 2001** which expressly seeks to give effect to the obligations under the Rome Statute 1998 which established the International Criminal Court and defined the offences including genocide and crimes against humanity; and
- (c) the Scottish Parliament also passed the **United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024** to give effect within devolved areas of law to the UN Convention on the Rights of the Child.

Unincorporated Treaties.

A treaty can be ratified (and therefore internationally binding) but not formally incorporated into domestic law. The ‘unincorporated’ treaty obligations remain binding on the UK in international law and will also remain relevant to the UK and Scottish Parliaments’ consideration of law, policy and practice. The rule of

law assumes that the UK intends to comply with its obligations in international law.¹⁷³

The UK Ministerial Code imposes an overarching duty on Ministers to comply with the law, which is interpreted as including international law and treaty obligations.¹⁷⁴ This duty is also expressly set out in the Scottish Ministerial Code.¹⁷⁵ As a result, international law is relevant to the interpretation of domestic legislation and to the development of the common law.

The way in which judges interpret the law – both statutory law and common law – can be informed and influenced by the interpretation of treaties.¹⁷⁶ Where an international law obligation is relevant to an issue before a Scottish court, the judges may look at that obligation to help them reach an interpretation which meets our international obligations in practice. For example, in an appeal relating to the abduction of a child, the Court of Session considered the UK’s obligations under the UN Convention on the Rights of the Child when deciding whether to consider the child’s objections.¹⁷⁷

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

Customary International Law.

It is generally accepted that customary international law is a source of the common law of Scotland. Scottish courts have been clear that “a rule of customary international law is a rule of Scots law”.¹⁷⁸ However, there is no absolute right to bring a claim before the Scottish courts solely on the basis of customary international law.

Whether an individual can bring a challenge on the basis of a rule of customary international law will depend on the specific facts and circumstances of the particular case. Even if a rule of customary international law cannot be directly enforced in the domestic courts, it can nonetheless influence

¹⁷²s20(1) Constitutional Reform and Governance Act 2010. See also, Part 2 Constitutional Reform and Governance Act 2010.

¹⁷³See Chapter 2 of this Guide (The Rule of Law).

¹⁷⁴The Code was amended in 2015 to remove the express reference to international obligations but the current version (October 2025) states it should be “read against the background of the overarching duty on ministers to comply with the law, including international law and treaty obligations, and to protect the integrity of public life”: https://assets.publishing.service.gov.uk/media/68ecd9eaf159f887526bbd3c/The_Ministerial_Code.pdf, para 1.6.

¹⁷⁵For latest version, October 2025, see <https://www.gov.scot/publications/scottish-ministerial-code-2025-edition/>.

¹⁷⁶Although they tend to follow international consensus when doing so, see Lord Hope in R v Asfaw [2008] UKHL 31, at [53].

¹⁷⁷FPS v SM [2024] CSIH 20.

¹⁷⁸Lord Advocate’s Reference (No.1 2000) [2001] SCCR 296 at [23].

the development of the common law and the interpretation of domestic law.

International Human Rights Law.

The UN Declaration of Human Rights, agreed in 1948, has been complemented by a number of more detailed international treaties designed to protect the most vulnerable communities in every society.

The UK ratified the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR') in 1976. In respect of both of these treaties, the UK submits a 'periodic report' on its performance to the bodies set up to monitor compliance with those treaties in practice.

The UK has also ratified several other international human rights treaties including:

- (a) The Convention relating to the Status of Refugees ('the Refugee Convention');
- (b) The Convention on the Elimination of Racial Discrimination ('CERD');
- (c) The Convention on the Elimination of all Forms of Discrimination against Women ('CEDAW');
- (d) The UN Convention against Torture ('UNCAT');
- (e) The Convention on the Rights of the Child ('CRC'); and
- (f) The Convention on the Rights of Persons with Disabilities ('CRPD').

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

The UK accepts the 'right of individual petition' in relation to both CEDAW and CRPD. This means that people in the UK who think that UK law, policy or practice is unlawful can take their complaint directly to the relevant UN Committee.¹⁷⁹

Human rights is not, as such, an area of policy reserved to the UK Parliament under the Scotland Act 1998 and the Scottish Parliament has competence to make laws to observe and implement international human rights treaties within devolved

areas. For example, the UN Convention on the Rights of the Child has been incorporated into Scots law and the Scottish Government aims to develop further protections for particular human rights where they fall within the scope of devolved matters. For example, the Scottish Government is currently developing a draft Human Rights Bill. The proposed Bill, if ultimately passed by the Scottish Parliament, would make four international treaties part of Scots law:

- (a) the International Covenant on Economic, Social and Cultural Rights;
- (b) the International Convention on the Elimination of All Forms of Racial Discrimination;
- (c) the Convention on the Rights of People with Disabilities; and
- (d) the Convention on the Elimination of All Forms of Discrimination against Women.

Ratifying The Convention On The Rights Of Persons With Disabilities

The CRPD (and its Optional Protocol) was ratified by the UK in June 2009. This obliges the UK to take concrete action to comply with its obligations under the CRPD.¹⁸⁰

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

Since ratification, the Supreme Court has confirmed that it will consider the CRPD in disability cases brought under the HRA, where it can assist the court in its interpretation of Convention rights.¹⁸¹

Torture And Practice At Home

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

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

The UK National Preventive Mechanism ('NPM') established under the OPCAT is currently made up of 20 visiting or inspecting bodies who visit places of detention such as prisons, police custody and immigration detention centres. The NPM is coordinated by HM Inspectorate of Prisons ('HMIP'). The Joint Committee on Human Rights has recommended a number of reforms to UK law in the light of our UNCAT obligations.¹⁸²

Children's Rights And The UNCRC

The UN Convention on the Rights of the Child is an international treaty ratified by the UK. The UK Government has committed to ensuring that children have the rights guaranteed to them under the UNCRC. The UNCRC influences the way in which Convention rights protected by the HRA are applied by the domestic courts of Scotland, as well as England and Wales.¹⁸³

The Scottish Parliament incorporated the United Nations Convention on the Rights of the Child (UNCRC) into domestic law with the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, which came into force on July 16, 2024. The UNCRC is now directly enforceable in Scottish courts and it is unlawful for devolved public authorities to act in a way that is incompatible with the Convention's requirements.¹⁸⁴



¹⁷⁹A number of other treaties – including the International Covenant on Civil and Political Rights – have a similar mechanism to let individuals take their cases to an international body for review. The UK does not accept this route of complaint more generally.

¹⁸⁰Equality and Human Rights Commission, The Commission's work on UNCRPD. See <https://www.equalityhumanrights.com/en/ourhuman-rights-work/monitoring-and-promotingun-treaties/un-convention-rights-personsdisabilities>.

¹⁸¹P v Cheshire West and Chester Council and Another [2014] UKSC 19 at [36].

¹⁸²See, for example, Joint Committee on Human Rights, Nineteenth Report of Session 2005-06, The UN Convention against Torture, HL 185/HC 701, available online at <https://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>.

¹⁸³HH v Deputy Prosecutor of the Italian Republic; F-K (FC) v Polish Judicial Authority [2012] UKSC 25 at [98].

¹⁸⁴s6(1).



07. Where To Find Out More

Where Next For Legal Help?

This guide is intended to be a basic introduction to laws which most affect the work of MSPs and their staff as well as MPs and Peers and their staff at Westminster.

Parliamentarians will likely face constituents with complex legal problems on a weekly basis. They also deal with difficult legal questions in their Parliamentary work This chapter is intended to assist in providing some signposts to where further help and support is available.

Can My Constituent Get Legal Aid?

Legal Aid in Scotland is administered by the Scottish Legal Aid Board ("SLAB").¹⁸⁵ All individuals are entitled to free legal assistance in certain circumstances, including if they are arrested, detained or questioned at a police station, or if they are arrested and appear from custody in the sheriff or Justice of the Peace Court.¹⁸⁶ Legal aid may be available for a wide range of other legal advice and representation, but means tests may apply. Legal aid will only be provided by SLAB in relation to matters that can be considered by courts or tribunals in Scotland.

Whether a person is able to get legal aid will depend on the type of case and means testing. In order to get legal aid an individual must contact a solicitor who is registered with the SLAB, using SLAB's 'find a solicitor' tool on its website.¹⁸⁷

SLAB's website also provides eligibility estimators that indicate whether a person is likely to be eligible for legal aid. This takes into account a person's income level and whether they are seeking advice and assistance, advice in relation to a criminal or civil matter, or if the matter relates to the Children's Hearing System.¹⁸⁸

¹⁸⁵www.slab.org.uk/public/.

¹⁸⁶<https://www.mygov.scot/legal-aid>

¹⁸⁷www.slab.org.uk/public/solicitor-finder/index.html.

¹⁸⁸www.slab.org.uk/public/criminal/eligibility/.

¹⁸⁹www.scra.gov.uk/.

¹⁹⁰www.slab.org.uk/public/criminal/eligibility/.

Children's Hearings.

The Scottish Children's Reporter Administration runs the system of **Children's Hearings** in Scotland.¹⁸⁹ Generally children are referred to a Children's Hearing because the Children's Reporter has concerns about them.

Legal aid is available for children or an adult, such as a parent, involved in the upbringing of a child who is going to or has been to a children's hearing. This form of legal aid also covers court hearings that are connected to Children's Hearings. These can for example include court proceedings before a sheriff in relation to an application to vary or terminate a child protection order. Children and relevant adults can also receive legal aid for 'assistance by way of representation', which provides for legal representation by a solicitor at a children's hearing or pre-hearing panel.

In this context a 'child' means someone under 16 or up to 18 if that child had been placed on a compulsory supervision order by a Children's Hearing. A means test is generally applied and in some cases a contribution will be required from an individual with an income above a certain level.¹⁹⁰

How Can An Individual Access Legal Aid?

The way for an individual to access legal aid is to contact a legal aid solicitor, who will apply for legal aid on their behalf.

Evidence Is Key

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

England, Wales And Northern Ireland.

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

More detailed information on the legal aid schemes in England and Wales and Northern Ireland can be found online.¹⁹¹

When Legal Aid Is Not Available.

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

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

Where Next For Advice?

Citizens Advice Scotland gives generalist free advice and information from its local bureaux on a range of different issues, including debt and welfare rights, housing rights and access to justice and human rights. Information and contact details can be found online at their website.

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

The Scottish Association of Law Centres can also provide assistance to individuals in their local areas. SALC acts as the national body for the not-for-profit legal sector and is comprised of Scottish community-based law centres.

¹⁹¹ At www.gov.uk/legal-aid/overview and www.nidirect.gov.uk/legal-aid respectively.

Many **Scottish Local Authorities** operate advice services for residents with housing, benefits and money and debt issues and **Money Advice Scotland** and **Turn2Us** can provide support to constituents with financial and debt concerns.

LawWorks provides details of free legal advice services provided by law students at universities across Scotland. In particular, the following universities have law clinics: Glasgow Caledonian University Law Clinic; University of Strathclyde Law Clinic; Aberdeen Law Project; The University of Edinburgh Free Legal Advice Centre.; Edinburgh Napier Law Clinic; The Law Clinic at Robert Gordon University.

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

The Law Society of Scotland 'Find a Solicitor' facility on its website can help source an appropriate solicitor The Equality Advisory and Support Service may be able to provide advice in some equality cases.

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

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

ACAS gives advice on employment matters and provides mediation for employment disputes. Constituents who are seeking employment advice and are **trade union** members can also receive additional support from their unions.

In Northern Ireland

Citizens Advice Northern Ireland.

AdviceNI for free advice on tax, benefits and debt problems.

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

In England And Wales

Citizens Advice in England and Wales.

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

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

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

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

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

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

- The Criminal Justice Committee (for criminal justice issues)
- The Equalities, Human Rights and Civil Justice Committee (for civil justice issues)
- The Delegated Powers and Law Reform Committee (for secondary legislation and most bills from the Scottish Law Commission).

Details on how to contact individual committees can be found on the Parliament’s webpage and most committees have their own account on X which can be followed.

The Non-Governmental Bills Unit can provide advice and sometimes support for any MSPs who are considering lodging a proposal for a Members’ Bill. The Legislation Team can provide advice and support on the bill scrutiny process, including help with drafting amendments.

which may already have produced a report on a matter of legal interest. These Committees have access to their own dedicated legal advisers and specialist clerks.

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

Legal Help And Support From Others.

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

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

Professional bodies

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

Academic Bodies.

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

- The Centre on Constitutional Change at the University of Edinburgh
- The University College London Constitution Unit
- The Bingham Centre for the Rule of Law

Equality And Human Rights

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

Liberty is a campaign organisation working on human rights and civil liberties in the UK.

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

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

- Age UK
- Together (Scottish Alliance For Children’s Rights)
- The Equality and Diversity Forum
- Inclusion Scotland
- Fair Trials
- Scottish Child Law Centre
- Howard League Scotland
- Scottish Association for Mental Health
- REDRESS
- Reprieve
- The Prison Reform Trust
- The Public Law Project
- Scottish Women’s Rights Centre
- Rape Crisis
- Rape Crisis Scotland
- Ethnic Minorities Law Centre

Further Help And Support At The Scottish Parliament.

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

The Scottish Parliament’s Information Centre (SPICe) is a key resource for MSPs to find information on bills passing through parliament and the parliamentary process. SPICe also provides support with answering constituents’ enquiries. Research briefings and fact sheets are available across all areas of the Parliament’s competence. In particular, on justice matters, there are regular briefings on the operation of the justice system and, on parliament and government, broader constitutional and electoral matters are considered.

More generally, the Parliament’s webpage is a good source of information on the progress of bills, secondary legislation, legislative consent memorandums etc.

The Parliament’s Legal Services Office provides legal advice and support to the SPCB, Presiding Officer and Clerk/Chief Executive and all the departments of the Parliamentary Service as an institution. This includes support to committees on specific matters as appropriate. The Legal Services Office is not able to advise individual MSPs and their staff on legal issues arising in Parliament or constituency work.

Legal Help And Support At The UK Parliament.

The House of Commons

There are also number of sources of legal support available at the UK Parliament:

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

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

- (b) **The Office of Speaker’s Counsel** (the “OSC”) provides legal advice and support to the Speaker and Clerk of the House of Commons and all the departments of the House of Commons as an institution.

The OSC does not advise MPs and their staff, however it is happy to assist MPs to find an alternative source of advice or to indicate where an answer may be found.

- (c) **Specialist Select Committees:** there are a number of Select Committees in both Houses

Immigration

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

- Scottish Refugee Council
- The Immigration Lawyers Practitioners Association
- The Joint Council for the Welfare of Immigrants

Housing

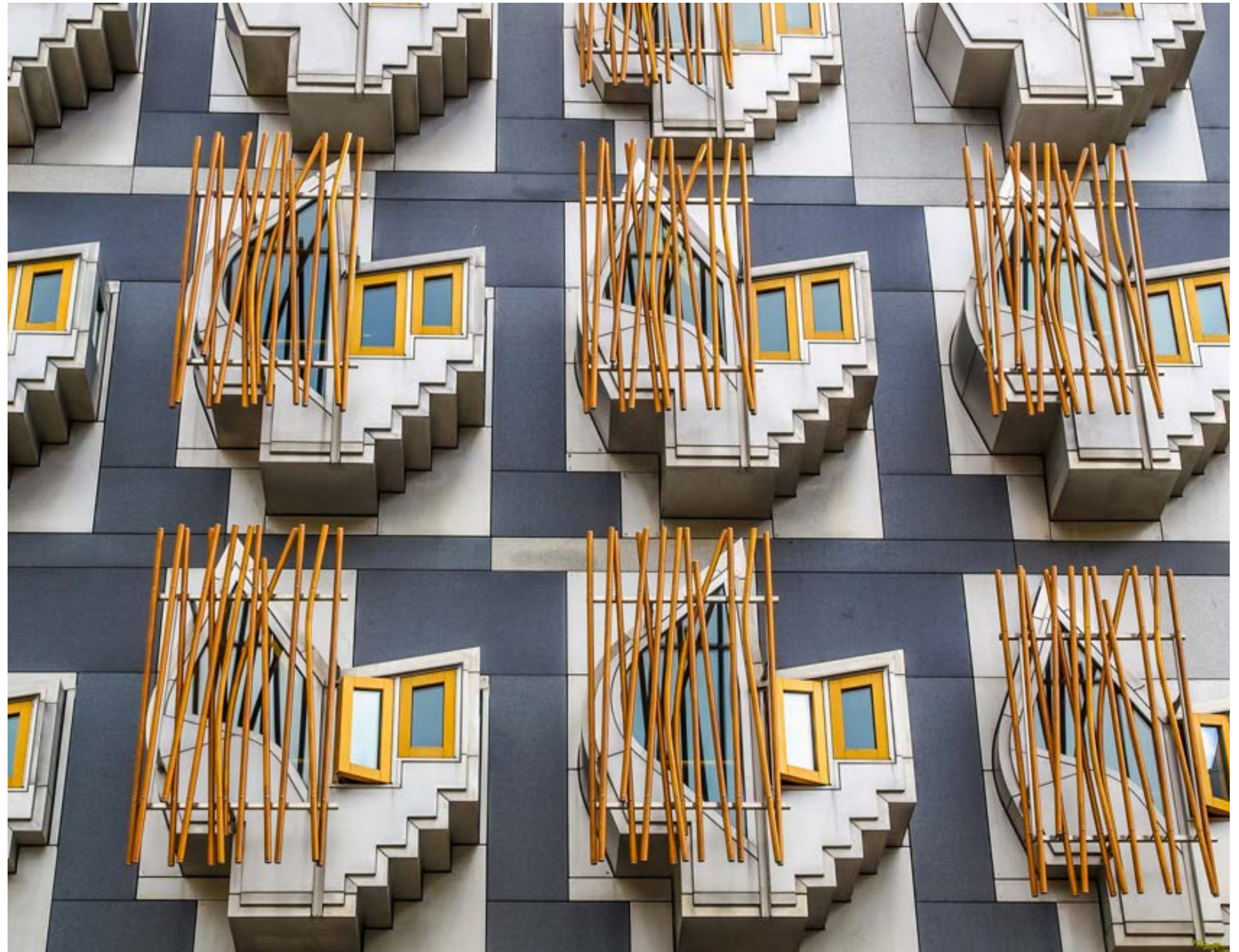
MSPs, MPs and their caseworkers may regularly handle questions about housing law. The following contacts may be helpful:

- The Housing Law Practitioners Association
- Shelter Scotland

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Checklist For Committees

When Making Legislation.

- ☐ **Legislative Competence** – Has legislative competence been clearly evidenced? Are there foreseeable grounds for legal challenge?
 - ☐ **Reserved Matters:** Does any provision stray into areas reserved to the UK Parliament under the Scotland Act 1998?
 - ☐ **Human Rights Compatibility:** Is the bill compatible with the European Convention on Human Rights and other rights obligations?
 - ☐ **Equality Law:** Could provisions conflict with UK-wide equality legislation?
 - ☐ **International Obligations:** Does the bill create tension with treaty or international commitments?
- ☐ **Policy Problem And Necessity** – Is the underlying problem clearly defined? Is legislation genuinely needed, or could policy guidance, funding changes, or secondary legislation suffice? What evidence supports intervention?
- ☐ **Clarity And Drafting Quality** – Are key terms defined? Are duties, powers, prohibitions, and entitlements clearly distinguished? Is there ambiguity that invites litigation or inconsistent interpretation? Are the commencement provisions clear?
- ☐ **Delegated Powers / Henry VIII Concerns** – What is being left to ministers rather than Parliament? Does the bill rely excessively on secondary legislation? Are powers to amend primary legislation by regulation justified? What parliamentary procedure applies (affirmative, negative, super-affirmative)?
- ☐ **Financial Implications** – Who pays? Are cost assumptions evidence-based?
- ☐ **Deliverability And Implementation** – Are responsible bodies identified? Is implementation phased realistically? Are guidance, regulations, or codes of practice required? Are enforcement mechanisms workable?
- ☐ **Enforcement And Accountability** – Who monitors compliance? What sanctions or remedies exist? Are appeals/review mechanisms included? Is there adequate oversight?
- ☐ **Interaction With Existing Law** – Does the bill amend or repeal existing statutes coherently? Are consequential amendments complete? Could conflicting duties arise?
- ☐ **Equalities And Human Impact** – Has an Equality Impact Assessment been completed? Are impacts on protected groups assessed? Are there differential regional, socioeconomic, rural, or island impacts?
- ☐ **Stakeholder Evidence** – Have affected sectors been properly consulted? Is consultation reflected in drafting changes? Are dissenting views addressed?
- ☐ **Unintended Consequences** – How might a clever or hostile actor exploit this? Could the bill create administrative overload or legal uncertainty?
- ☐ **Review And Sunset Mechanisms** – Is post-legislative review required? Are reporting duties built in? Should any powers sunset automatically?



1 Paternoster Lane,
St. Paul's, London,
EC4M 7BQ

scotland@justice.org.uk

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