

## Section 17 - Contents

### The European Convention of Human Rights and the Human Rights Act 1998

Introduction	17000
What the Human Rights Act 1998 does	17020
UK law	17030

### The European Convention on Human Rights

Introduction	17040
Rights and Freedoms	17100
Article 2 - The right to life	17102
Article 3 - The right to freedom from torture and inhuman or degrading treatment or punishment	17103
Article 4 - The right to freedom from slavery, servitude and forced or compulsory labour	17104
Article 5 - The right to liberty and security of person (subject to UK derogation)	17105
Article 6 - The right to a fair and public trial within a reasonable time	17120
Article 7 - The right to freedom from retrospective criminal law and no punishment without law	17121
Article 8 - The right to respect for private and family life, home and correspondence	17130
Article 9 - The right to freedom of thought, conscience and religion	17140
Article 10 - The right to freedom of expression	17141
Article 11 - The right to freedom of assembly and association	17150
Article 12 - The right to marry and found a family	17151
Article 14 - The prohibition of discrimination in the enjoyment of the convention rights	17159
Article 1 of Protocol 1 - The right to peaceful enjoyment of possessions and protection of property	17160
Article 2 of Protocol 1 - The right of access to education (subject to a UK reservation]	17161
Article 3 of Protocol 1 - The right to free elections	17170

<b>Article 1 and 2 of Protocol 6 - The right not to be subjected to the death penalty</b>	17171
<b>Interpreting the Convention</b>	17172

## **Key concepts**

<b>Introduction</b>	17200
<b>Public Authorities</b>	17201
<b>The formulation of rights</b>	17210
Absolute	17211
Limited	17212
Qualified	17213
<b>Proportionality</b>	17220
<b>Victim</b>	17223
<b>Margin of Appreciation</b>	17240
<b>Factors which might influence the court</b>	17250
The nature of the Convention right and the activity involved	17251
The nature of the restriction on the right	17252
Certain types of cases	17253

## **What the Human Rights Act means in practice**

<b>Introduction</b>	17300
<b>Compatibility of legislation</b>	17310
<b>Compatibility by public authorities</b>	17320
<b>Article 6</b>	17321
The right of access to a court or tribunal	17340
The right to a fair hearing	17350
The right to a public hearing	17351
The right to a hearing within a reasonable time	17352
The right to an independent and impartial tribunal	17353
<b>The Scotland Act 1998</b>	17360
Specialist reporting agencies	17370
The Procurators Fiscal – Article 6	17380
Procurator Fiscal needs a detailed explanation for any period of apparent delay	17390
Delay in case reported to Procurator Fiscal	17391
<b>Article 8</b>	17400
<b>Article 14</b>	17410
Other status	17411

**Race Relations (Amendment) Act 2000**

17415

## **Appendices**

**Outline of the Human Rights Act**

Appendix A

**The Convention rights**

Appendix B

## SECTION 17

# The European Convention of Human Rights and the Human Rights Act 1998

### Introduction

- 17000 The Human Rights Act 1998 is one of the most significant pieces, of constitutional legislation enacted in the United Kingdom.
- 17001 It is a key part of the Government's programme to encourage a modern civic society where the rights and responsibilities of our citizens are clearly recognised and properly balanced.
- 17002 It allows people to claim their rights under the European Convention on Human Rights (ECHR) in UK courts and tribunals, instead of having to go to the European Court in Strasbourg. The Act underpins this by requiring all public authorities in the UK to act compatibly with the Convention rights.
- 17004 It places responsibilities on all of us who work in public authorities, which includes CFS, central government, the courts, the police, local government and many bodies who carry out functions which the Government would otherwise have to undertake. **Appendix A** gives a brief outline of the Human Rights Act itself.
- 17005 This section of the CFS Manual explains in basic terms how The European Convention of Human Rights interacts with the Human Rights Act 1998.
- 17006-17019

## What the Human Rights Act 1998 does

- 17020 The Human Rights Act was introduced to help create a society in which people's rights and responsibilities are properly balanced and where an awareness of the Convention rights permeates our government and legal systems at all levels.
- 17021 The Human Rights Act incorporates provisions from the European Convention on Human Rights into UK law. When the Human Rights Act 1998 came into effect on 2 October 2000, the Convention rights became enforceable in the UK courts.
- 17022 The Human Rights Act makes it unlawful for a public authority to act incompatibly with the Convention rights and allows for a case to be brought in a UK court or tribunal against the authority if it does so. However, a public authority will not have acted unlawfully under the Act if as the result of a provision of primary legislation it could not have acted differently
- 17023 It also requires all legislation to be interpreted and given effect as far as possible compatibly with the Convention rights. Where it is not possible to do so, a court:
- ❑ May quash or disapply subordinate legislation, or
  - ❑ If it is a higher court, make a declaration of incompatibility for primary legislation. This triggers a new power that allows a Minister to make a remedial order to amend the legislation to bring it into line with the Convention rights
  - ❑ Requires UK courts and tribunals to take account of Strasbourg case-law (i.e. the case-law of the Court and the Commission in Strasbourg, and the Committee of Ministers). They will also be bound to develop the common law compatibly with the Convention rights

17024-17029

### ***UK law***

- 17030 Due to the importance the Government attaches to respect for the Convention rights, and the need to ensure that their incorporation into UK law meshed properly with another important aspect of constitutional reform - devolution - provisions were included in the Scotland Act, the Northern Ireland Act and the Government of Wales Act to ensure that the devolved institutions would have to act in a way that was compatible with the Convention rights.

17031-17039

# The European Convention on Human Rights

## Introduction

- 17040 The European Convention on Human Rights is a treaty of the Council of Europe, which was adopted in 1950 and ratified by the United Kingdom in 1951. It was designed to give binding effect to the guarantee of various rights and freedom in the United Nations Declaration on Human Rights, adopted in December 1948.
- 17041 An immediate aim of the Convention was to protect Europe against totalitarianism and a repeat of the atrocities of the Second World War. However, its general purpose has been described as being to protect human rights and fundamental freedoms and to maintain and promote the ideals and values of a democratic society. It therefore has a strong, continuing relevance. The Convention rights are given a broad interpretation rather than a strict, legalistic one, so as to ensure that they are practical and effective within a changing society.
- 17042 Since the 1950's, the UK has undertaken to secure to everyone within its jurisdiction a number of civil and political rights and freedoms as set out in the Convention. However, in contrast with most other signatory countries, the UK did not incorporate the Convention into domestic law, believing instead that the rights and freedoms it guaranteed could be protected by the common law.
- 17043 However, due to the increasing number of successful challenges by citizens against the UK in the European Court, the government pledged to incorporate the Convention rights into the domestic law through a Human Rights Act 1998.
- 17044 This section offers a brief outline of the Convention rights, which have been incorporated into UK law. The Convention rights set out in the Human Rights Act, is given in **Appendix B**.
- 17045-17099

## **Rights and Freedoms**

- 17100 The Convention is about protecting fundamental rights and freedoms against the power of the State. This means that the rights can be relied on by any victim who claims that his or her rights have been or will be interfered with. This can be an individual, non-governmental organisation or group of individuals and in some cases also companies and other bodies.
- 17101 The Convention guarantees the following rights and freedoms.

### **Article 2 - The right to life**

- 17102 Public authorities, such as the army, police, a prison or a hospital, must not cause the death of any person. Public authorities also have a positive obligation to protect life in some situations. The Convention defines a limited number of circumstances where it is not a contravention of this Article for a public authority to take someone's life, where the force used is no more than absolutely necessary, such as when defending a person from an attack, to effect a lawful arrest or when quelling a riot.

### **Article 3 - The right to freedom from torture and inhuman or degrading treatment or punishment**

- 17103 Torture is the most serious kind of ill treatment. Inhuman or degrading treatment is less severe than torture and may include certain physical assaults, inhuman detention conditions or corporal punishment. The ill-treatment relates to both mental and physical suffering. Whether ill-treatment qualifies as torture or inhuman treatment will depend on factors including its duration, severity and the vulnerability of the victim.

### **Article 4 - The right to freedom from slavery, servitude and forced or compulsory labour**

- 17104 Slavery means that a person is owned by someone else, just as if they were a piece of property. Someone in servitude is not actually owned by another person, though they may have to live on that person's property and be unable to leave. Certain kinds of labour, such as work which could ordinarily be expected to be carried out as part of a prison sentence, are excluded from this Article.

## **Article 5 - The right to liberty and security of person (subject to UK derogation)**

17105 People have the right not to be arrested or detained, except where the detention is authorised by law. This Article does not just apply to police arrests, but covers all aspects of detention, including for medical or psychiatric reasons. The Article defines the six circumstances under which it is acceptable for someone to be detained, including after conviction by a criminal court or where there is reasonable suspicion that someone has committed a crime.

17106-17119

## **Article 6 - The right to a fair and public trial within a reasonable time**

17120 This is a wide ranging and highly developed right which covers all criminal and many civil cases, as well as, for example, cases heard by tribunals and some internal hearings or regulatory procedures. Article 6 accords anyone charged with a criminal offence certain rights, including the right to be presumed innocent until proven guilty and to be given adequate time and facilities to prepare their defence. The emphasis on a public trial protects litigants against the administration of justice in secret with no public scrutiny.

## **Article 7 - The right to freedom from retrospective criminal law and no punishment without law**

17121 A person may not be convicted of an act which was not a criminal offence at the time it was committed. Nor can they face a penalty which was not in place when the act in question happened 'Criminal' and 'penalty' may have a broader meaning than under domestic law. This Article also requires that a law imposing a criminal offence or penalty be clear enough so that a person can reasonably be able to foresee the legal consequences.

17122-17129



## **Article 8 - The right to respect for private and family life, home and correspondence**

17130 This Article is very broad and has wide-ranging implications. Public authorities may only interfere with someone's private life where they have legal authority to do so, the interference is necessary in a democratic society for one of the aims stated in the Article and is proportionate to that aim. This Article covers matters such as the disclosure of private information, monitoring of employees' phone calls and email, carrying out body searches and restrictions on entering a person's home.

17131 It also touches on issues such as the right for families to live together or the right not to suffer from environmental hazard. It is important to note that the rights and freedoms expressed in Articles 8 to 11 may be limited where this is necessary to achieve an important objective such as protecting public health or safety.

17132-17139

## **Article 9 - The right to freedom of thought, conscience and religion**

17140 People have the right to hold whatever thoughts, positions of conscience or religious beliefs that they wish. Article 9 guarantees the right for everyone to manifest their religion or belief in worship, teaching, practice and observance. Article 9 points may be raised, for example, where a person's religious or other beliefs require or prevent them from carrying out a certain activity, such as wearing particular clothes or working on a Holy Day.

## **Article 10 - The right to freedom of expression**

17141 Freedom of expression covers such things as what we say in conversation or in speeches, publishing books, articles or leaflets, broadcasting, art, the Internet and many other areas. It applies to the media as well as individuals. The Strasbourg court has consistently emphasised the special importance of this right.

17142-17149

## **Article 11 - The right to freedom of assembly and association**

- 17150 This includes the right of people to demonstrate peacefully, and to join or choose not to join trade unions.

## **Article 12 - The right to marry and found a family**

- 17151 This Article may be relevant to rules and policy concerning adoption and fostering. The Strasbourg Court has decided that it does not require a State to grant transsexuals or homosexuals the right to marry.

## **Article 14 - The prohibition of discrimination in the enjoyment of the convention rights**

- 17159 Not all differences in treatment are discriminatory, but only those which have no objective and reasonable justification. Article 14 only applies to the rights set out in the Convention, and thus there must be another Convention right at issue to which a claim of discrimination can be attached.

## **Article 1 of Protocol 1 - The right to peaceful enjoyment of possessions and protection of property**

- 17160 Many possessions are regarded as property, not just houses or cars, but also things like shares, licences and goodwill. The right to engage in a profession can also, in some cases, be a property right. No one can be deprived of their property except where the action is permitted by law and justifiable in the public or general interest.

## **Article 2 of Protocol 1 - The right of access to education (subject to a UK reservation)**

- 17161 The right of access to education must be balanced against the resources available. This right may, for example, be relevant to the punishments used by schools, such as the expulsion of disruptive pupils. It may also be relevant to children with special needs.

17162-17169

## **Article 3 of Protocol 1 - The right to free elections**

- 17170 This Article applies to elections to the legislature, which must be free and fair and held at reasonable intervals. It may be relevant to issues of participation and access, such as ensuring that mechanisms for postal voting in general elections meet the needs of disabled or ill people.

## **Article 1 and 2 of Protocol 6 - The right not to be subjected to the death penalty**

- 17171 This provision abolishes the death penalty.

## **Interpreting the Convention**

- 17172 The Strasbourg court has adopted a number of principles of interpretation of the Convention:
- ❑ The Strasbourg court takes an overall view of the situation and seeks to give a practical and effective interpretation to the rights
  - ❑ While rights are widely interpreted and applied to the particular facts before the court, any limitation to those rights, for example the limitations to Articles 8-11, are interpreted narrowly
  - ❑ The Convention is, in the words of the Strasbourg court, a 'living instrument' which must be interpreted in the light of present-day conditions. Societies and values change and the Strasbourg court takes account of these changes in interpreting the Convention. In doing so, it looks to see whether there are common European standards
  - ❑ Terms or expressions in the Convention have the same meaning for all the countries bound by it. That meaning is given independently by the Strasbourg authorities. The use of an expression in the law of an individual state (such as whether a matter is considered to be criminal or civil) is not conclusive and may not be the same as the definition of that expression in the Convention
- 17173 Under the Human Rights Act, these principles of interpretation must be taken into account by UK courts and tribunals.
- 17174-17199

# Key concepts

## Introduction

17200 There are a number of concepts relating to the Human Rights Act or the European Convention on Human Rights which you should be familiar with. This section of the CFS Manual outlines some of the most important of these and gives some indication of their significance.

## Public Authorities

17201 The Act requires public authorities to act compatibly with the Convention rights. 'Public authorities' are not defined exhaustively but the term covers three broad categories:

- ❑ Obvious public authorities such as a Minister, Government Department or agency, local authorities, health authorities and trusts, the Armed Forces and the police. Everything these bodies do is covered by the Act. Parliament, though, is not a public authority for the majority of its functions
- ❑ Courts and tribunals
- ❑ Any person or organisation which carries out some functions of a public nature. Under the Act, however, they are only considered a public authority in relation to their public functions.

17202 In some cases it will be difficult to know if a body is a public authority. However, some key characteristics of a public authority include:

- ❑ Whether the body performs or operates in the public domain as an integral part of a statutory system which performs public law duties
- ❑ Whether the duty performed is of public significance
- ❑ Whether the rights or obligations of individuals may be affected in the performance of the duty
- ❑ Whether an individual may be deprived of some legitimate expectation in performance of the duty
- ❑ Whether the body is supported by statutory powers and penalties
- ❑ Whether the body performs functions that the government or local government would otherwise perform
- ❑ Whether the body is under a duty to act judicially in exercising what amounts to public powers

17203-17209



## The formulation of rights

- 17210 The Convention rights are formulated in three broad ways: some are absolute, some are limited and some are qualified.

### ***Absolute***

- 17211 Absolute rights include the right to protection from torture, inhuman and degrading treatment and punishment (Article 3), the prohibition on slavery and enforced labour (Article 4), and protection from retrospective criminal penalties (Article 7).

### ***Limited***

- 17212 Other rights, such as the right to liberty (Article 5), are limited under explicit and finite circumstances, defined in the Convention itself, which provide exceptions to the general right.

### ***Qualified***

- 17213 Qualified rights include the right to respect for private and family life (Article 8), the right to freedom of expression (Article 10), religion (Article 9) assembly and association (Article 11), the right to the peaceful enjoyment of property (Protocol 1, Article 1) and to some extent the right to education (Protocol 1, Article 2).

- 17214 Although these rights are qualified, interference with them is permissible only if what is done:

- ❑ Has its basis in law
- ❑ Is necessary in a democratic society, which means it must:
  - ⇒ fulfil a pressing social need
  - ⇒ pursue a legitimate aim
  - ⇒ be proportionate to the aims being pursued
- ❑ Is related to the permissible aim set out in the relevant Article, for example:
  - ⇒ the prevention of crime, or
  - ⇒ the protection of public order or health

17215-17219

## Proportionality

- 17220 Proportionality is a crucial concept. Any interference with a Convention right must be proportionate to the intended objective. This means that even if a particular policy or action, which interferes with a Convention right, is aimed at pursuing a legitimate aim (for example the prevention of crime) this will not justify the interference if the means used to achieve the aim are excessive in the circumstances.
- 17221 Any interference with a Convention right should be carefully designed to meet the objective in question and must not be arbitrary or unfair.
- 17222 Even taking all these considerations into account, in a particular case an interference may still not be justified because the impact on the individual or group is too severe.

## Victim

- 17223 Only a person considered a victim can bring proceedings against a public authority under the Act. A victim is someone who is directly affected by the act in question. Victims can include companies as well as individuals and may also be relatives of the victim where a complaint is made about his death. A victim may also be a person who is at risk of being directly affected by a measure.
- 17224 An organisation or interest group or trade union cannot bring a case unless it is itself a victim. But there is nothing to stop it providing legal or other assistance to a victim.
- 17225-17239

## Margin of Appreciation

- 17240 The Strasbourg court has made it clear that it will not substitute its own views on the needs of the State, but it will wish to satisfy itself that the State's act or law falls within a margin of appreciation. In deciding whether action is necessary in a democratic society factors to which the UK courts will look include:
- ☐ Whether or not there is a common European standard or approach
  - ☐ Whether the action taken was *proportionate* to the aim to be achieved
  - ☐ Whether or not a justification would be sufficiently weighty to satisfy the Convention

17241-17249

## Factors which might influence the court

17250 Factors which might influence the court are:

- ☐ The nature of the Convention right and the activity involved
- ☐ The nature of the restriction on the right
- ☐ Certain types of cases

### ***The nature of the Convention right and the activity involved***

17251 Certain rights are absolute and a State cannot legislate so as to reduce or qualify the right, whilst other rights specifically refer to the possibility of limitations on the right being imposed. Also, some rights are of particular importance since they relate to the fundamentals of a democratic society (freedom of expression, right to a fair hearing) and the courts will require in such cases very convincing reasons and evidence to be put forward to support a decision, policy or law that restricts such a right.

### ***The nature of the restriction on the right***

17252 Strasbourg is more likely to defer to the State in cases where the decision, law or policy requires a consideration of social, economic or political matters or relates to national security. This is based on the assumption that national governments are in a better position to judge the requirements of their society and to balance competing needs.

### ***Certain types of cases***

17253 Some cases, for example a challenge under Article 2 or 3 to the distribution of scarce resource within the health service, may cause the courts to think very carefully about whether to intervene. However in other cases, such as those involving the right to a fair trial, the court may feel well placed to assess more thoroughly whether or not a violation has taken place.

17254-17299

# What the Human Rights Act means in practice

## Introduction

- 17300 The Human Rights Act is about respecting and fostering the Convention rights in everything a public authority does. It provides protection of fundamental rights of every citizen.
- 17301 The Act does this in two ways:
- ❑ It places everyone under a duty to interpret all legislation compatibly with the Convention rights
  - ❑ Requires CFS, as a public authority, to act in accordance with the Convention rights
- 17302-17309

## Compatibility of legislation

- 17310 The Act requires that all legislation - Acts of Parliament, Regulations, Orders - so far as is possible, be read and given effect in a way which is compatible with the Convention rights.
- 17311 This is a very strong provision and CFS investigators must make every effort to interpret legislation in accordance with the Convention rights. Where there are two possible interpretations of a provision - one which is compatible with the Convention rights and one which is not - the one which is compatible must be adopted.
- 17312 The fact that a court may have interpreted a law in a certain way before does not mean that after the coming into force of the Human Rights Act, it will interpret the provision in that same way. Nor can that earlier interpretation be relied upon by CFS or any public authority.
- 17313 If a piece of primary legislation cannot be interpreted compatibly with the Convention rights, it will remain in force. The courts will not be able to overrule it. That would be to undermine the sovereignty of Parliament. But a higher court (defined in section 4(5) of the Human Rights Act) can make a declaration of incompatibility, which will create considerable pressure to find some way of amending the legislation so that it is compatible with the Convention rights
- .



17314 The courts may however quash subordinate legislation, such as a Statutory Instrument, that is not compatible with the Convention rights, unless the provision has to say what it does because of a provision of primary legislation. This also applies to legislation made by the devolved administrations.

17315-17319

## **Compatibility by public authorities**

17320 All public authorities have a positive obligation to ensure that respect for human rights is at the core of their day to day work. This means that you should act in a way that positively reinforces the principles of the Human Rights Act. The Human Rights Act underpins this by making it unlawful for a public authority to act (or fail to act) in a way which is incompatible with a Convention right. This covers all aspects of the public authority's activities including:

- ☐ Drafting rules and regulations
- ☐ Internal staff and personnel issues
- ☐ Administrative procedures
- ☐ Decision making
- ☐ Policy implementation
- ☐ Interaction with members of the public

## **Article 6**

17321 Article 6 guarantees a right to a fair trial in the determination of:

- ☐ A person's civil rights and obligations
- ☐ Any criminal charge

17322 Civil rights and obligations are rights and obligations which exist under private law, although they may arise in a public law context where a public authority is involved with or has affected private rights.

17323 The concept of civil rights and obligations is an autonomous one, and therefore the definition in the Convention is not necessarily the same as that in UK law.

17324 Decisions of public authorities are also covered where they affect private rights - for example, a decision to grant a licence to carry on a business activity, or a refusal to register a doctor with his professional body.

- 17325 Under the Convention, anyone who is having his or her civil rights or obligations determined or is facing any criminal charge is entitled to:
- ☐ The right of access to a court or tribunal
  - ☐ The right to a fair hearing
  - ☐ The right to a public hearing
  - ☐ The right to a hearing within a reasonable time
  - ☐ The right to an independent and impartial tribunal

17326-17339

***The right of access to a court or tribunal***

- 17340 The whole process needs to be considered. If the original decision is taken by an administrative body whose procedures do not satisfy Article 6, the requirement may nevertheless be met if that decision can be reviewed by a court or tribunal that does satisfy Article 6. Consequently, the review may need to be in the form of an appeal on both facts and law. What is required depends upon the nature of the case.

- 17341 If the conditions of Article 6 are met by the original decision, it is not necessary to provide for an appeal. The right of access to a court or tribunal is not absolute. But restrictions on it must not impair the essence of the right and they must be for a legitimate purpose and proportionate. The system must not be set up in such a way so as in practice to prevent access - for example, by creating inadequate time-limits, or not providing for the giving of notice of decisions.

17342-17349

***The right to a fair hearing***

- 17350 There should be a reasonable opportunity to present a case and, in certain cases, to examine witnesses. There should be equality of arms i.e. one party should not be placed at a procedural disadvantage compared with the other. In criminal proceedings, there is a right to the assistance of an interpreter, if needed.

***The right to a public hearing***

- 17351 It is possible to have a system that allows an oral hearing to be dispensed with in certain cases. It is also possible to exclude the public from the hearing (though not the judgement) where this can be justified on one of the grounds set out in Article 6, such as the protection of national security or public order.

***The right to a hearing within a reasonable time***

- 17352 A breach may arise if the public authority fails to organise its system so as to avoid delays, for example, by providing inadequate staff and resources to hear cases within a reasonable time. For more detailed information see below under Scotland Act.

***The right to an independent and impartial tribunal***

- 17353 Judges and tribunal members must be free from outside pressures, and should be independent of the executive and of the parties. The court or tribunal must not be biased. One element in securing this right is through the procedures and rules on the appointment and terms of office of judges and members of tribunals.

17354-17359

**The Scotland Act 1998**

- 17360 The provisions of the Human Rights Act 1998 and the incorporation of the Convention Rights in that Act both in terms of the Act itself and by reference to the Scotland Act 1998 must be borne in mind. Since 20 May 1999 the Lord Advocate and Procurators Fiscal have been required by the Scotland Act 1998 to ensure that they do not act incompatibly with any of the Convention Rights.
- 17361 This requirement extended to the whole of the Scottish Executive as from 1 July 1999. All other public bodies including specialist reporting agencies not included in the Scottish Executive became subject to the requirement to act compatibly with Convention Rights with the coming into force of the Human Rights Act 1998 on 2 October 2000.

17362-17369

***Specialist reporting agencies***

- 17370 All specialist reporting agencies are affected by this requirement. Even those agencies which are not public bodies subject to the Human Rights Act 1998 will be indirectly affected by the obligation on Procurators Fiscal not to act incompatibly with Convention rights. This is because Procurators Fiscal are under a duty to scrutinise all reports received by them which may form the basis of criminal proceedings.
- 17371 Procurators Fiscal must ascertain whether any evidence has been obtained in breach of any Convention Rights and whether, by seeking to rely on that evidence in taking proceedings, the Procurator Fiscal might breach the accused's Convention Rights.
- 17372 The guidance contained in this part of the CFS Manual will minimise the possibility of any breach of Convention Rights arising from the investigation of any case ultimately reported to the Procurator Fiscal.
- 17373-17379

***The Procurators Fiscal – Article 6***

- 17380 Since the incorporation of the European Convention on Human Rights by the Scotland Act 1998 and the commencement of the Human Rights Act 1998, Procurators Fiscal have regularly been faced with preliminary challenges to their right to prosecute based on Article 6 and the accused's right to a fair trial within a reasonable time.
- 17381 This might arise where the reporting agency reports cases to the Procurator Fiscal containing common law charges, which are not subject to time bar, or statutory charges where the time bar is in excess of six months.
- 17382-17389

***Procurator Fiscal needs a detailed explanation for any period of apparent delay***

- 17390 Such cases should be reported promptly to the Procurator Fiscal together with a detailed explanation for any period of apparent delay. Procurators Fiscal in the face of a challenge will require to satisfy the court that any delay is reasonable and can be explained. It may be necessary to justify the apparent delay taken in reporting the case to the Procurator Fiscal from:
- ☐ Date of offence
  - ☐ Date of discovery of offence by CFS
  - ☐ Date on which the accused is made aware by CFS that he or she is under suspicion for the alleged offence, e.g. during interview, caution and charge or on the execution of a search warrant

***Delay in case reported to Procurator Fiscal***

- 17391 In some instances the Procurator Fiscal may require to mark cases no proceedings where there has been a delay on the part of the CFS since to proceed would be regarded as incompatible with the Article 6 obligation. Delay in reporting cases can also detract from the public interest in prosecuting them.

17392-17399

**Article 8**

- 17400 Part of a CFS investigator's work can affect a person's private or family life. Article 8 says that everyone has the right to respect for his or her private and family life, his or her home and his or her correspondence. As a result of Article 8, the Regulation of Investigatory Powers (Scotland) Act 2000, known as RIP(S)A, was introduced in October 2000.

- 17401 Article 8 covers a vast range of issues and subjects including:
- ❑ Interception of correspondence
  - ❑ Telephone tapping
  - ❑ Search warrants
  - ❑ Access to information about a person's own identity
  - ❑ A person's right:
    - ⇒ to have and to express an identity
    - ⇒ to have the freedom to express one's sexuality
    - ⇒ to be free from severe environmental pollution
    - ⇒ to consent to medical treatment
    - ⇒ to have parental access and custody of children
  - ❑ The collection and use of information concerning an individual
  - ❑ The right to have and form social relationships and the protection of a person's reputation
- 17402 A public authority may not interfere with these rights except:
- ❑ In accordance with the law
  - ❑ Where it is necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, *for the prevention of disorder or crime*, for the protection of health or morals, or for the protection of the rights and freedoms of others
- 17403 As with Article 3, the State and public authorities may have positive obligations under Article 8 to take steps to provide the rights and privileges guaranteed by the Article and to protect people against the activities of other private individuals which prevent the effective enjoyment of these rights.
- 17404-17409

## Article 14

17410 Article 14 provides for people to enjoy the Convention rights without discrimination on any ground such as:

- ☐ Sex
- ☐ Race
- ☐ Colour
- ☐ Language
- ☐ Religion
- ☐ Political or other opinion
- ☐ National or social origin
- ☐ Association with a national minority
- ☐ Property
- ☐ Birth or other status

### ***Other status***

17411 The phrase "or other status" has been interpreted in Strasbourg to include, among other things, sexual orientation, marital status, illegitimacy, status as a trade union, military status and conscientious objection.

17412 The application of Article 14 involves more than simply deciding whether a person has been discriminated against in the enjoyment of a Convention right and if so whether he or she comes within one of the listed categories (including "other status"). The European Court of Human Rights would also consider whether there was an objective and reasonable justification for treating different categories of people in a different way, and whether any such differential treatment was proportionate to the aim pursued.

17413 In applying these additional considerations, the Court can give more or less weight to different types of discrimination. It has stated, for example, that discrimination on the grounds of sex, race or illegitimacy is particularly serious. It would therefore be particularly hard to justify discrimination in these areas.

17414 It is not possible to pursue a case on Article 14 grounds alone: there must be another Convention right at issue to which a claim of discrimination can be attached. Where another Convention right does arise, however, it is possible to find a breach of Article 14 even if there is no breach of the other Convention right.

## Race Relations (Amendment) Act 2000

17415      The Race Relations (Amendment) Act 2000 deals with some of the issues raised under Article  
14. For further information on this topic see CFS Manual – Prosecution of Crime in Scotland.

17416-17999



## Appendix A

# Outline of the Human Rights Act

1. This appendix gives a brief outline of the Human Rights Act itself.

## Section 1

2. Specifies which of the Convention rights are covered by the Human Rights Act.

## Section 2

3. Requires courts or tribunals determining questions which have arisen in connection with the Convention rights to take into account the decisions of Strasbourg (the European Court and Commission of Human Rights and the Committee of Ministers) so far as is relevant.

## Section 3

4. Requires legislation to be interpreted as far as possible in a way which is compatible with the Convention rights. This applies to all legislation, whenever enacted.

## Section 4

5. Allows the higher courts to make a 'declaration of incompatibility' where they find that primary legislation is incompatible with a Convention right. The continuing validity and enforcement of the legislation is not affected by such a declaration.

## Section 5

6. States that when a court is considering making a declaration of incompatibility, the Crown is entitled to notice and to be joined as party to the proceedings. This will enable a Minister to provide the court with information, which may be relevant to the Issue in question.

## **Section 6**

7. Defines a public authority and makes it unlawful for a public authority to act in a way which is incompatible with a Convention right unless it is required to do so by primary legislation or inevitably incompatible secondary legislation.

## **Section 7**

8. Victims may rely on the Convention rights in legal proceedings in UK courts and tribunals or institute separate proceedings. Separate proceedings must be brought within one year (or less) of the date on which the act complained of took place or after a longer period if the court or tribunal judges that to be fair under the circumstances. Shorter time periods may also apply. For example, if proceedings were brought by judicial review, then the shorter judicial review time limit would apply.

## **Section 8**

9. The court may grant such relief as it considers just and appropriate, provided they are within its powers.

## **Section 9**

10. Concerns methods of challenging acts of courts and tribunals, which are alleged to be incompatible with a Convention right.

## **Section 10**

11. The relevant Minister may by order amend infringing legislation following a declaration of incompatibility or a finding of the European Court of Human Rights if he is satisfied that there is a compelling reason to do so.

## **Section 11**

12. Makes clear that the Act does not restrict any existing rights that an individual might have under UK law or his right to bring proceedings under existing law

## **Section 12**

13. Contains safeguards concerning court or tribunal orders (particularly injunctions). Which might breach the right to freedom of expression.

## **Section 13**

14. Obliges the courts to have particular regard to the importance of the right to freedom of thought, conscience and religion.

## **Section 19**

15. Requires that when legislation is introduced into either House for a second reading, the Minister responsible must make a written statement that he considers the Bill is compatible with the Convention rights or that he or she is unable to make such a statement but wishes Parliament to proceed with the Bill anyway.

## **Section 21**

16. Interpretation section, in particular defining the meaning of primary and subordinate legislation.

## **Section 22**

17. Ensures that victims can rely on their Convention rights in proceedings brought by a public authority, even if the act in question took place before section 7 comes into force.

## Appendix B

# The Convention rights

1. These are the Convention rights set out in the Human Rights Act.

## Article 2 - Right to life

2. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
3. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force, which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

## Article 3 - Prohibition of torture

4. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

## Article 4 - Prohibition of slavery and forced labour

5. No one shall be held in slavery or servitude.
6. No one shall be required to perform forced or compulsory labour.
7. For the purpose of this Article the term "forced or compulsory labour" shall not include:
  - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
  - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - (d) any work or service which forms part of normal civic obligations.

## **Article 5 - Right to liberty and security**

8. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed bylaw;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it reasonably considered necessary to prevent his committing an offence or fleeing after having done so:
  - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
9. Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and of any charge against him.
10. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.
11. Release may be conditioned by guarantees to appear for trial.
12. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
13. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

## **Article 6 - Right to a fair trial**

14. In the determination of his civil rights and obligation) or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
15. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
16. Everyone charged with a criminal offence has the following minimum rights:
- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - (b) to have adequate time and facilities for the preparation of his defence;
  - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

## **Article 7 - No punishment without law**

17. No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
18. This Article shall not prejudice the trial and punishment of any person for any act or omission, which at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

## **Article 8 - Right to respect for private and family life**

19. Everyone has the right to respect for his private and family life, his home and his correspondence.
20. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security I public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## **Article 9 - Freedom of thought, conscience and religion**

21. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
22. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety I for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

## **Article 10 - Freedom of expression**

23. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
24. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

## **Article 11 - Freedom of assembly and association**

25. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
26. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals for the protection of the rights and freedoms of other. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

## **Article 12 - Right to marry**

27. Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

## **Article 14 - Prohibition of discrimination**

28. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

## **Article 16 - Restrictions on activity of aliens**

29. Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

## **Article 17 - Prohibition of abuse of rights**

30. Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.



## Article 18 - Limitation on use of restrictions on rights

31. The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.