Human Rights Act Reform: A Modern Bill of Rights

A consultation to reform the Human Rights Act 1998

Consultation response

March 2022

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Contents

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. 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.

2. JUSTICE has a long history of work relating to the Human Rights Act 1998 (the "**HRA**" or the "**Act**"). We were involved in the process of drafting the HRA, and in subsequent training of judges on its operation. We have contributed to various public debates and consultations relating to a British Bill of Rights[1] and have intervened in numerous cases involving the HRA.[2] Through all our work, through working parties of our members and responding to consultations and proposed legislation, we assess the impact of justice system processes on the rights of those using them.

3. Most recently we responded to the Independent Human Rights Act Review ("**IHRAR**") Call for Evidence.[3] To inform our response we convened a group of experts. We have reconvened the same group to help inform our response to this Consultation. The group comprises the following members:

    - Sir Michael Tugendhat (Chair);
    - Professor Brice Dickson, Queen's University Belfast;
    - Tessa Gregory, Partner, Leigh Day LLP;
    - Dominic Grieve QC, Temple Garden Chambers;
    - Raza Husain QC, Matrix Chambers;
    - Jonathan Moffett QC, 11KBW;
    - Christine O'Neill QC, Partner and Chairman of Brodies LLP; and
    - Professor Alison Young, Sir David Williams Professor of Public Law, University of Cambridge.

4. We are also immensely grateful to the following firms and individuals who provided us with domestic and international research that has informed and greatly assisted our response:

    - Dr Rosana Garciandia, Lecturer in Public International Law, Kings College London;
    - Dario Milo, Webber Wentzel;
    - Lily Walker-Parr, 5RB;

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[1] JUSTICE, 'A British Bill of Rights: Informing the Debate' (2007); JUSTICE, 'Commission on a Bill of Rights: Do we need a bill of rights?: JUSTICE's Response' (2011); JUSTICE 'Commission on a Bill of Rights: Response to Second Consultation' (2012).

[2] Including *R (Ullah) v Special Adjudicator* [2004] UKHL 26; *Jones v R (Al Jedda) v Secretary of State for Defence* [2007] UKHL 58; *Cadder v HM Advocate* [2010] UKSC 43; *Home Office v Tariq* [2011] UKSC 35; *Smith & others v Ministry of Defence* [2013] UKSC 41; and *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2.

[3] JUSTICE, 'Independent Human Rights Act Review Call for Evidence: Response' (March 2021).

- Professor Philippa Webb, Professor of Public International Law, Kings College London;
- Clifford Chance LLP;
- Herbert Smith Freehills LLP;
- King & Spalding LLP; and
- Reed Smith LLP.

5. The group members are experts in the field of human rights, and have a wide range of experience, including a former High Court judge, legal representatives who act for both claimants and public authorities, academics, a former Attorney General and representatives from Scotland and Northern Ireland. As we stated in our IHRAR response, despite the diverse experience of our advisory group members, there is a strong consensus that the HRA in its current form functions very well. The HRA is a well-crafted, delicately balanced piece of legislation. It enables the courts to give effect to and protect the rights of individuals whilst at the same time maintaining Parliamentary sovereignty and the balance between the different branches of Government. We do not believe the case for radical reform of the HRA as set out in the Consultation has been made out and in our view many of the proposals will have a significant detrimental impact on rights protection, legal certainty and the cost and length of litigation for all parties.

Overarching concerns

6. We have several fundamental concerns regarding the proposals in the Consultation.

7. **The case for change as set out in the Consultation lacks any proper evidential basis.** As Lord Carnwath stated:

> "*[A] proposal to replace, in substantially the same language, a code which has been part of our law for more than 20 years requires strong justification. Either it means the same thing, in which case what is the point? Or it does not, in which case we can expect a long learning process through the courts to find out what it does mean*."[4]

a) Many of the proposals are based on concerns that are not evidenced in the Consultation and, based on the experience of our advisory group members, do not appear to be an issue in practice.

b) Conversely, the Consultation ignores many of the findings of the IHRAR report pursuing proposals that were explicitly rejected by the IHRAR panel. The IHRAR panel sat for nine months, received over 150 responses, held fourteen roundtables including one with members of the public, held seven roadshows and produced a 580-page report. Following this huge evidence gathering process the IHRAR reported that it "***was provided with no evidence to show any depth of support for [repeal in order to replace the HRA with a British Bill of Rights] there was an overwhelming body of support for retaining the HRA. Furthermore, detailed arguments in favour of repeal and replacement of the HRA with a British Bill of Rights were not provided***."[5]

c) Other proposals in the Consultation go far beyond the scope of the IHRAR terms of reference, which were limited to the operation of the HRA and as expressly recognised by the panel, did not include an examination of substantive Convention rights.[6] By contrast, despite a commitment "*to the rights reflected in the Convention*",[7] a number of the proposals in the Consultation would have a significant impact on the substantive content of rights in the UK, including those regarding freedom of expression, positive obligations and deportation. The Government has not therefore had the benefit of an in-depth analysis and considered expert view on many of the proposals that was provided by the IHRAR.

d) This has been exacerbated by the limited time provided to respond to an incredibly wide-ranging Consultation. This means that the Government will not benefit from as full a set of responses as might otherwise have been provided.

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[4] Lord Carnwath, 'Is it time for a new British Bill of Rights?' (February 2022).

[5] Ministry of Justice, 'The Independent Human Rights Act Review' CP 586 (December 2021), Chapter 2, para 19.

[6] *ibid,* Chapter 1, para 5. With the exception of the examination of extra-territoriality.

[7] Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – a Consultation to Reform the Human Rights Act 1998' CP 588, (December 2021), para 96.

8. Whilst it is difficult to understand the exact scope of many of the proposals or how the Government envisages them operating in practice given the lack of detail provided, in our view the proposals will very likely **significantly increase, not decrease, the volume, time and cost of human rights litigation for both claimants and public bodies.** A number of the proposals would involve domestic courts setting aside over 22 years of jurisprudence on the meaning of rights and the operation of the HRA. Others would introduce new statutory definitions resulting in disputes over their boundaries and meaning. Proposed procedural changes such as the proposed permission stage are, in our view, unworkable in practice and would serve only to complicate and lengthen proceedings.

9. We welcome the Government's commitment to remaining a party to the European Convention on Human Rights (the "**ECHR**" or the "**Convention**"). However, **many of the Consultation's proposals will put the UK in breach of its international obligations** under that treaty. This will result in a significant increase in cases against the UK being brought in Strasbourg, which is costly both for individuals seeking to enforce their rights and for the Government. This puts the UK in a difficult position in respect of its international standing and foreign policy position - being authoritatively able to ask other countries to respect human rights or international law more generally is currently more important than ever.

10. Crucially, by unduly restricting the content of rights, putting up additional procedural barriers to enforcement and reducing accountability of public authorities **the proposals will weaken rights protection within the UK**.

11. The Government promised in its manifesto to examine the "*relationship between the Government, Parliament and the courts*". In our view the HRA is a carefully constructed piece of legislation specifically designed to protect the constitutional balance between the branches of Government. **The proposals in this Consultation tip that balance heavily in favour of Government** by seeking to shield executive action from proper scrutiny by the courts.

12. **We are concerned with the lack of explanation as to how the proposals within the Consultation will affect the devolved nations.** The HRA applies throughout the UK, including to the devolved administrations and the protection afforded to Convention rights, as currently protected by the HRA, is deeply embedded in the devolution settlements. In some cases, the mechanisms for the protection of the Convention rights given effect by the HRA which are contained in the devolution statutes closely reflect the position in England. In others, the distinct interests, histories and legal systems of the devolved nations mean that a different or more nuanced approach has been adopted and must be understood in the context of Scotland, Wales and Northern Ireland. For that reason, the responses provided below should be understood as being made in respect of all four nations of the UK. Nonetheless, there are aspects of the constitutional arrangements of each of the devolved administrations that are unique and therefore require discrete analysis in the light of the proposed reforms to the HRA. To that end, where we feel any proposed amendment to the HRA will have a further, significant impact on the legal system of Scotland, Northern Ireland or Wales, additional comment is made.

I. Respecting our common law traditions and strengthening the role of the Supreme Court

Interpretation of Convention rights: section 2 of the Human Rights act

Question 1: We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.

The case for reform

13. The Consultation states that in the Government's view "*there remains an over-reliance on Strasbourg case law, as well as too much uncertainty about how section 2 should be applied in practice*."[8] This position forms the basis of the Consultation's proposed replacements for s.2 HRA. However, as we set out in our response to IHRAR,[9] the courts apply the duty at s.2 HRA in accordance with the ordinary meaning of those words and we do not think that there is a case for change.

14. The proposals to replace s.2 appear to be predicated on an interpretation of this provision that has long been rejected – the 'mirror principle' from *Ullah – "no more, but certainly no less".*[10] This meant that in the early years of the HRA, the UK courts tended not to go below or beyond the level of rights protection provided by Strasbourg, although even this was not without exception.[11] However, the courts now apply an increasingly flexible approach to the Strasbourg case law [12] - providing both 'more' and 'less' than Strasbourg.

15. Whilst the UK courts will tend to follow a clear and consistent line of case law from Strasbourg, the Consultation's concern about the UK courts having to follow "*at times inconsistent and haphazard*" Strasbourg caselaw is misplaced. Domestic courts will not follow Strasbourg where it has fallen into error, misunderstood domestic law[13], misapplied the facts or adopted flawed reasoning,[14] even if there is a "clear and constant" line of

[8] *ibid*, para 190.

[9] JUSTICE, 'Independent Human Rights Act Review Call for Evidence: Response', n.33 above, paras. 12 to 25 and 31 to 34.

[10] *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26 at [20].

[11] Even under the mirror principle the courts still recognised there would be circumstances in which they could depart from Strasbourg: where there was no 'clear and constant' line of ECtHR decisions, or where Strasbourg had misunderstood the domestic position. For example, in *R v Spear* [2002] UKHL 31 the House of Lords disapplied the Strasbourg court's ruling in *Morris v UK* (2002) 34 EHRR 52, on the basis that Strasbourg had misunderstood the nature of the safeguards of independence in a court martial in the earlier case.

[12] See further, Masterman, 'The Mirror Crack'd', *UK Constitutional Law*.

[13] *R v Horncastle and others* [2009] UKSC 14. For example, in *R v McLoughlin* [2014] EWCA Crim 188 at [28]-[29] the Court of Appeal was asked to consider the legality of whole-life tariffs in light of the judgment of the Grand Chamber of the ECtHR in *Vinter v UK* (2013) App. Nos. 66069/09, 130/10 and 3896/10 (9 July 2013). Lord Thomas CJ declined to follow the ECtHR decision because he considered the Grand Chamber to have based their judgment on an erroneous understanding of domestic law.

[14] *R (on the application of Hicks and others) v Commissioner of Police for the Metropolis* [2017] UKSC 9.

Strasbourg Jurisprudence.[15] In particular, the courts have regularly declined to follow Strasbourg where they disagree with its reasoning.[16] For example:

a) In *R v Abdurahman* the Court of Appeal held that the appellant's conviction was not unsafe, despite a Grand Chamber decision which had held that the appellant's Article 6 rights had been violated.[17] As well as identifying areas where domestic procedures had been misunderstood, the Court of Appeal disagreed with a number of elements of the Grand Chamber's reasoning and the way in which it had applied the law and facts.[18]

b) In *Hallam v Secretary of State for Justice*, which concerned compensation payable for miscarriages of justice and the Article 6(2) presumption of innocence, the Supreme Court declined to follow an applicable Grand Chamber judgment. Lord Wilson dismissed the appeals despite stating that he thought the domestic legislation was incompatible with Article 6(2) on the basis of the meaning given to it by the ECtHR. His view was not based on the fact that the Strasbourg court had misunderstood the operation of domestic law, but because the relevant line of ECtHR jurisprudence was wrong and incoherent.[19]

c) The courts have also previously suggested that they may not follow Strasbourg jurisprudence if it was "*inconsistent with some fundamental substantive or procedural aspect of [UK] law*".[20]

16. This flexibility and freedom from slavishly following Strasbourg jurisprudence does, however, cut both ways. The other side of the coin is that UK courts will conduct their own analysis and may find breaches of rights even where Strasbourg has not considered the issue, or where it falls within the UK's margin of appreciation. JUSTICE therefore disagrees with the proposal at paragraph 195 of the Consultation to **codify Lord Reed's approach in *AB v Secretary of State for Justice* in primary legislation i.e. that UK courts should not go further than Strasbourg as there is no way for public authorities to correct this** as this would contradict the Government's own stated intention to promote "*a more autonomous approach to human right*s".[21] Rights protection in the UK cannot be free standing and fully independent from Strasbourg, while also having an outer limit on the rights protection provided by Strasbourg.

17. Further, Strasbourg's role is to consider the rights under the ECHR. Were the UK to implement the proposed Bill of Rights with a scheme of "British rights" divorced from the

[15] *Manchester City Council v Pinnock* [2010] UKSC 4 at [48]: "*Where, however, there is a clear and constant line of decisions [of the European court] whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."*

[16] JUSTICE, 'Independent Human Rights Act Review Call for Evidence: Response', n.33 above, paras. 22 – 23.

[17] *R v Abdurahman* [2019] EWCA Crim 2239; *Ibrahim v UK* [2016] ECHR 750.

[18] *R v Abdurahman* [2019] EWCA Crim 2239 at [111(c)].

[19] *Hallam v Secretary of State for Justice* [2019] UKSC 2 at [73]. The case is currently before the ECtHR.

[20] *Manchester City Council v Pinnock,* n.15 15 above, at [48] and [49].

[21] Consultation, n.7 above, para. 197.

ECHR, no party, whether individual or public authority, would be able to go to Strasbourg to "correct" the decision of the UK courts on those "British rights". Accordingly, in such a situation, it would make no difference that the public authority cannot make an application to Strasbourg, and it would not follow to set the ECtHR's interpretation of ECHR rights as the outer limit of "British rights."

18. Further, it is unclear what 'going further' than Strasbourg means in a particular case. Where Strasbourg has not considered the issue, it is the courts' duty to resolve the question before them as to whether a right has been violated, even where Strasbourg has yet to supply an answer, and they are required to do so by virtue of section 6 of the HRA.[22] In *R(AB)* Lord Reed expressly stated that "*that is not to say that [the UK courts] are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law*."[23] Further, a reluctance to express a view on an issue and an effective handing over of the issues to Strasbourg would diminish the valuable dialogue that takes place between the domestic courts and the ECtHR.[24]

19. In any event, UK courts are generally extremely cautious about 'going further' than Strasbourg. The Consultation cites *Rabone v Pennine Care NHS Foundation Trust*[25] as an example of the UKSC going 'further' than Strasbourg.[26] Yet whilst there was no Strasbourg authority on the exact point in question – whether there was a positive obligation to protect the life of a voluntary psychiatric patient – this is an example where there was a clear direction of travel in the Strasbourg caselaw. The UKSC merely held that the existing jurisprudence on the operational duty on the state under Article 2 applied equally to voluntary patients as it did to those forcibly detained.[27] That it was right to do so is evidenced by the fact that the Strasbourg Court subsequently confirmed the operation of positive obligations to patients hospitalised on a voluntary basis.[28]

20. In *R (AB)*[29], Lord Reed clearly articulated this principle in the context of Article 3 and solitary confinement of minors, recognising that a public authority would have no right to apply to the Strasbourg Court to correct an error made by a domestic court.[30] The

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[22] Lord Kerr, 'The UK Supreme Court: The modest underworker of Strasbourg?' Clifford Chance Lecture, (2012), p.8-9.

[23] *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28 at [59].

[24] Nicolas Bratza, 'The relationship between the UK courts and Strasbourg' [2011] 5 European Human Rights Law Review 505.

[25] [2012] UKSC 2. JUSTICE, together with INQUEST, Liberty and Mind submitted a join intervention in this case, available at: https://justice.org.uk/rabone-v-pennine-care-nhs-trust/.

[26] Consultation, n.7 above, para 134.

[27] See Lord Carnwath, n.44 above.

[28] *Fernandes de Oliveira v Portugal* (2019) App. No. 78103/14 (31 January 2019).

[29] *R (AB),* see n.23 above.

[30] *ibid* at [57]: "*If domestic courts take a conservative approach, it is always open to the person concerned to make an application to the European court. If it is persuaded to modify its existing approach, then the individual will obtain*

Supreme Court was clear that it was not appropriate for it to seek to use new principles not yet established in the Strasbourg jurisprudence to anticipate potential future developments in Strasbourg, stating clearly that "*it is not the function of our domestic courts to establish new principles of Convention law*".[31]

21. In addition, in areas where Strasbourg has granted a wide margin of appreciation to Contracting Parties, such as social and economic policy, Strasbourg is recognising that different countries may place different values on a particular right in a particular situation.[32] In these circumstances, the domestic courts are very careful to consider whether it is their role or that of the executive or legislature to determine the extent of a right in these situations.[33] This considerable judicial restraint can be seen in the recent decision in *Elan Cane,*[34] where in the context of non-gendered markers for passports, the wide margin of appreciation afforded to Contracting Parties by Strasbourg for the particular matter where there was no consensus across states and the fact that Strasbourg would therefore likely not find a breach of Convention rights, meant that it was not for the UK courts to find any such breach either.[35]

22. Where the UK courts consider that the case before them is one where they may want to go 'further' than Strasbourg they will often find a common law right that moves in that direction, instead of relying on the ECHR. This can be seen in the decision in *Kennedy v Charity Commission* where the "*common law presumption in favour of openness*" and open justice were considered by the UKSC to be central to the issue of disclosure by the Charity Commission to a journalist, rather than Article 10.[36]

23. In the light of the considerable flexibility the UK courts already have, and exercise, under s.2 HRA to depart from Strasbourg where they consider it necessary, we are not of the view that any changes to it are necessary.

24. In fact, amending s.2 HRA will likely undermine the valuable judicial dialogue between the UK courts and Strasbourg and weaken the UK's influence in Strasbourg. Section 2 allows UK courts to raise concerns with the application of Strasbourg jurisprudence to the UK,

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a remedy, and the domestic courts are likely to follow the new approach when the issue next comes before them. But if domestic courts go further than they can be fully confident that the European court would go, and the European court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected.".

[31] *ibid* at [59]. It is however also worth noting that Lord Reed went on to say that the courts, in situations which have not yet come before the Strasbourg Court *"can and should aim to anticipate, where possible, how the [Strasbourg Court] might be expected to decide the case, on the basis of the principles established in its case law."* An approach which is perfectly ordinary in any legal system, not least the UK common law system based on precedent.

[32] *Handyside v UK* (1976) App. No. 5493/72 (7 December 1976).

[33] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 at [70], [162].

[34] *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56.

[35] *ibid* at [72] – [81]. This was not to say that the UK Parliament could not take a decision either way – it just was not appropriate for the UK courts to find a breach where Strasbourg has already answered the question as there being no breach because it fell within the margin of appreciation. See [79], "Of *course, it remains open to the contracting states to go beyond the limits of the Convention right, in the exercise of their own national sovereignty, as the Convention itself recognises in article 53*.".

[36] *Kennedy v Charity Commission* [2014] UKSC 20 at [47] and [109] – [132].

which Strasbourg has subsequently "corrected".[37] It also allows the UK to 'speak first' on an issue, to which Strasbourg has then listened.[38] The IHRAR report found that not only was the judicial dialogue "*working well*"[39], but also emphasised "*the high regard in which the UK Courts and Judiciary are held in Strasbourg and the beneficial influence this has, both domestically and for the ECtHR*."[40] This would be jeopardised by amending s.2.

Proposed options for reform

25. The draft clauses at paragraph 4 of Appendix 2 to the Consultation go considerably further than the recommendation made by IHRAR, which we address below at paragraphs 37 to 45. **Both would decouple the interpretation of rights under a Bill of Rights from that of the rights under the Convention**:

    a) Option 1 provides that the meaning of rights in the Bill of Rights is not determined by the meaning of rights in any international treaty (including the ECHR) nor is it necessary for a right in the Bill of Rights to have the same meaning as rights in the ECHR or HRA.

    b) Option 2 provides that the Supreme Court has ultimate responsibility for the interpretation of rights in the Bill of Rights and that courts and tribunals are not required to follow decisions of the ECtHR.

26. The Government has, however, committed to the UK remaining a signatory to the ECHR. The content of the rights contained in the ECHR are determined authoritatively by the Strasbourg Court. The UK will continue to be under an international obligation to respect those rights. As Lord Reed said in *Elan-Cane, "since the rights have the same content at the domestic level as at the international level, it follows that the relevant articles of the Convention should in principle receive the same interpretation in both contexts."*[41]

27. If the courts repeatedly without good reason decline to find a breach of a Convention right in circumstances where Strasburg has, or would, the UK risks being more frequently found in breach of the ECHR and non-compliant with its international treaty obligations. This will undermine the protection, and enforceability, of Convention rights in the UK as individuals will be required to go to Strasbourg to ensure rights protection. This directly contradicts the aim of the HRA in "bringing rights home".[42] It reserves the remedy for violation of human rights to those who can afford the cost and time of taking a case to Strasbourg. It

[37] See the examples provided at para. 31 of JUSTICE, 'Independent Human Rights Act Review Call for Evidence: Response', see n.3 above.

[38] *ibid,* see the examples provided at para. 32.

[39] The Independent Human Rights Act Review, see n.5 above, Chapter 4, para. 88.4.

[40] *ibid*, Chapter 4, para. 89. The IHRAR Panel identified in particular the case *of S., V. and A. v. Denmark* (2018), App. No. 35553/12 (22 October 2018), to which the UK was not a party but in which the which the Grand Chamber referred to the "sophisticated analysis" of the Strasbourg case-law by the UK Supreme Court in *R (Hicks) v The Commissioner of Police for the Metropolis* [2017] UKSC 9 to support a review of the Grand Chamber's own earlier decision. *ibid,* Chapter 4, para. 36.

[41] *R (Elan-Cane),* see n.34 above at [87].

[42] Secretary of State for the Home Department, 'Rights Brought Home: The Human Rights Bill' CM 3782 (1997).

will also result in the Government incurring increased costs defending the rising number of cases at Strasbourg.

28. Further, what will happen where a Strasbourg decision is addressed to the UK but the interpretation of rights by Strasbourg conflicts with that under the new Bill of Rights? Article 46(1) of the ECHR requires the UK to abide by the final judgment of the Strasbourg Court in any case to which it is party, however trying to limit the application of the Convention by UK courts is likely to make this more difficult.

29. Both of the options set out in the Consultation would **greatly undermine legal certainty and result in lengthier and a greater volume of litigation**:

    a) Regard to other jurisdictions: Currently nothing in principle prevents parties referring to other jurisdictions in their submissions, or the court considering these in its decision.[43] However, options 1 and 2 both actively encourage courts to consider a huge range of sources to determine the content of rights. This is likely to result in arguments, for example, as to which jurisdictions and international treaties have greater or lesser weight, which judicial authorities should be considered more authoritative and what weight international law and other jurisdictions should have compared to the Strasbourg jurisprudence. It will also encourage litigants – both claimants and defendants – to seek out and refer to different jurisdictions, lengthening court proceedings and the judgments and reasoning of a court.

    Parties will still have to ensure that they put forward arguments in relation to the ECHR rights domestically in order to preserve their ability to bring a claim in Strasbourg.[44] Encouraging other jurisdictions to be referred to as well will only lengthen proceedings and increase costs and uncertainty.

    Encouraging increased consideration of different jurisdictions appears to be at odds with the Government's aim of *"[reinforcing] the supremacy of the UK Supreme Court in the interpretation of human rights"*[45] and would likely result in legal uncertainty. These issues are demonstrated by reference to South Africa and the state of Victoria, Australia. The South African Constitution states that courts *"may consider foreign case law"* when interpreting its Bill of Rights, and since its establishment in 1994 until the end of 2011 the South African Constitutional Court has handed down 437 judgements, half of which (223) cited a total 3047 foreign cases.[46] This reliance

[43] In fact, there are numerous leading cases where the persuasiveness of foreign jurisprudence has been highlighted, see for example, *Fairchild v Glenhaven Funeral Services Ltd*. [2002] UKHL 22 at [32]; *SerVaas Inc v Rafidain Bank* [2012] UKSC 40 at [28]. For an example in the Human Rights context see *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court, Article 19* [2012] EWCA Civ 420.

[44] For instance, in *Lee v United Kingdom* (2022) App. No. 18860/19 (6 January 2022) The ECtHR rejected a case, which was challenging the refusal by a bakery in Northern Ireland to make a cake with the words "Support Gay Marriage", as inadmissible since the applicant had failed to rely on his Convention rights in the proceedings brought in the UK courts. The Court considered that the applicant had denied the domestic courts the opportunity to address any Convention issues raised and was instead asking the ECtHR to "usurp the role of the domestic courts" when he had failed to exhaust domestic remedies.

[45] See Consultation, n.7 above, para 189.

[46] C Rautenbach, 'The South African Constitutional Court's use of foreign precedent in matters of religion: Without fear or favour?' (2015) 18(5) PER.

of foreign jurisdictions has attracted criticism on the basis that the lack of methodology for assigning value to different jurisdictions apparent in the Constitutional Court's approach facilitates the kind of cherry picking which may result in an inaccurate assessment of that field of law.[47] Similarly, a Scrutiny of Acts and Regulation Committee review of the Victorian Charter, expressed concerns that s. 32(2), which allows for consideration of foreign and international jurisdictions,[48] was permitting litigants and courts to 'cherry pick' from decisions of hundreds of different countries. It noted that *"Victorian Supreme Court decisions to date have taken differing approaches, with one judge ruling that it is limited to judgments from jurisdictions with similar constitutional arrangements to Victoria, while others are willing to consider any overseas decision, including communications of the United Nations Human Rights Committee".*[49]

b) Interpretation of the new clause: both of the options are lengthy and neither straightforward. There is likely to be extensive argument and litigation over the meaning of the various subsections in the new clause, how they should interact with each other and what weight the courts should provide to each in interpreting a right.

The proposals appear to be contradictory – they both wish to limit the UK courts following of Strasbourg's jurisprudence when interpreting the rights under the proposed Bill of Rights, whilst simultaneously wishing to tie the UK courts to the upper limit of Strasbourg's jurisprudence (see paragraph 16 above). For instance, under Option 2 the courts would be on one hand encouraged to look to decisions of other jurisdictions and international courts, which could involve broader rights protections than under the ECHR, while also being asked to consider the *travaux préparatoires* specific to the ECHR which may encourage a more restrictive approach to rights (see paragraph 30 below). This is not only unprincipled but contradictory and will lead to uncertainty.[50]

c) Lack of clarity regarding existing precedent: prior precedent from the HRA and Strasbourg would be set aside, with no clarity as to what relevance, if any, it would have in interpreting the rights under the proposed Bill of Rights. The courts will risk having to start again from scratch in interpreting what the rights mean in practice. This could result in decades of litigation over matters that have previously been determined by the UK courts or Strasbourg. As Lord Carnwath has said:

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[47] For instance, in *Gauteng School Education Bill of 1995* [1996] (39) SA 95, the Constitutional Court's reference to the Framework Convention as the latest minority rights instrument has been criticised as inaccurate and as having ignored more recent developments which contained detailed obligations in respect of protection of minority language. See, Erika de Wet, 'The "Friendly but Cautious" Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks' (2004) 28(6) Fordham International Law Journal 1528

[48] Section 32(2) Charter of Human Rights and Responsibilities Act 2006 ('The Victorian Charter': *"International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision."*)

[49] Scrutiny of Acts and Regulations Committee, 'Review of the Charter of Human Rights and Responsibilities Act 2006' (2011).

[50] Alison Young, 'Human Rights Act Review: Whose Rights are they anyway?' Constitutional Law Matters (February 2022).

"*The court is invited in effect to set aside the jurisprudence developed over the years since the HRA came into effect as to the meaning of the various rights, and to start again. In doing so it is not required to give particular weight to decisions of the Strasbourg court, or even of the UK courts, on the meaning of the Convention rights, but can draw as it thinks fit from the case law of countries round the world and from international law. The court is given no assistance as to which if any it should prefer, or by what criterion. I confess that, as a judge trying to interpret the will of Parliament, I would come close to despair. Nor can I see how offering that degree of choice to the courts is expected to curb the judicial activism of which the paper complains, still less to advance the stated objective of promoting greater certainty.*[51]

d) Lack of certainty regarding common law rights: the Consultation states that "*whilst the courts have retreated a little from this maximalist position, the ambiguity of section 2 continues to give rise to legal uncertainty and promote an over-reliance on the Strasbourg case law, at the expense of promoting a home-grown jurisprudence tailored to the UK tradition of liberty and rights*."[52] However, it is not clear why 'home-grown jurisprudence' or the UK common law should be any more certain. One of the key reasons for introducing the HRA was the fact that the rights under the common law were uncertain and, in some areas, limited.[53] Further, rights under the UK common law have continued to develop alongside the HRA, and arguably have done so under the HRA's influence, in some areas absorbing at least something of the rights and protective techniques contained in the ECHR.[54] By its nature there is no fixed or determined statement as to the rights under the common law, for instance Lady Hale has noted that any list of common law rights is "*inherently contestable*".[55]

30. **Textualist approach:** The Consultation and Option 2, subsection (3) directs courts to have "*particular regard to the text of the right or freedom, and in construing the text may have regard to the preparatory work*" of the ECHR, known as the *travaux préparatoires*. However, the wording of the ECHR rights is high-level and open-textured. As a result, directing the courts to have regard to the "*text of the right or freedom*" under the ECHR, or the Bill of Rights, is unlikely to provide any indication (if anything) about how the rights are to apply in practice across a potentially vast range of contexts. For example, the words of Article 8 do not tell one very much about what constitutes a "*private life*" or how "*respect*" for it must manifest itself in practice.

[51] Lord Carnwath, see n.4 above.

[52] Consultation, see n.7 above, para. 114.

[53] For example, *Golder v. United Kingdom* (1975) App. No. 4451/70 (21 February 1975) in which a UK court's literal interpretation of the Prison Rules resulted in the infringement of a prisoner's rights under Articles 6 and 8.

[54] Mark Elliott and Alison Young, 'The common law and the European Convention on Human Rights: Do we need both?' Public Law for Everyone, (February 2022).

[55] Lady Hale, 'UK Constitutionalism on the March?' (2014), p.9.

31. The proposal also goes directly against the 'living instrument' approach to interpretation adopted by the Strasbourg Court.[56] This approach encourages the ECHR to be read in a way that reflects changes in society,[57] recognising that a previous statement of law may have been overtaken by societal changes.[58] The *travaux préparatories* were written at a certain moment in history and therefore the meaning of a right as developed under the 'living instrument' doctrine, may no longer align with the *travaux préparatories*.

32. The 'living instrument' approach has resulted in, for instance, the ECtHR deciding that illegitimate children could not be treated differently to legitimate children,[59] that homosexuality could not be criminalised,[60] recognising same-sex couples fall under the definition of family,[61] gender equality[62] and transgender rights.[63] Further, due to the 'living instrument' doctrine, the ECtHR has been able to consider the human rights implications of technologies and sciences that did not exist when the ECHR was drafted and will be able to continue to do so as technology advances. For instance, it has considered issues concerning information and freedom of expression on the internet, the protection of personal data,[64] mass surveillance,[65] interception of communication,[66] and surrogacy.[67]

33. Requiring courts to consider the *travaux préparatories* therefore risks the UK courts being left behind, or even moving backwards from, both the Strasbourg Court and society's respect of rights.[68]

34. The approach put forward in Option 2, subsection 3 of the Consultation, appears similar to the concept of 'originalism' found in U.S. jurisprudence, in so far as it purports a method of interpretation based primarily on the original meaning of the language at issue. However, as has been borne out in the U.S. context, identifying the original interpretation of a piece of legislation is rarely cut and dry, with both sides of a debate often arguing that

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[56] Alison Young, see n.50 above.

[57] Including developments in international law, *Demir and Baykara v. Turkey* [2008] App. No. 34503/97 (12 November 2008).

[58] *Tyrer v. United Kingdom* (1978) App. No. 5856/72 (25 April 1978).

[59] *Marckx v. Belgium* (1979) App No. 6833/74 (13 June 1979).

[60] *Dudgeon v the United Kingdom* (1981) App. No. 7525/76 (22 October 1981).

[61] *Oliari and Others v Italy (*2015) App. Nos. 18766/11 and 36030/11 (21 July 2015).

[62] *Konstantin Markin v. Russia* (2012) App. No. 30078/06 (22 March 2012), which concerned parental leave for men and discrimination.

[63] *Christine Goodwin v. United Kingdom* (2002) App No. 28957/95 (11 July 2002)*; Y.Y. v. Turkey* (2015), App No.14793/08 (10 March 2015); *A.P. Garçon and Nicot v. France* (2017), App Nos. 79885/12, 52471/13 and 52596/13 (6 April 2017).

[64] *Malone v. United Kingdom* (1984), App. No. 8691/79, (2 August 1984).

[65] *Szabó and Vissy v. Hungary* (2016), App. No. 37138/14 (12 January 2016).

[66] *Roman Zakharov v. Russia* (2015), App. No 47143/06 (4 December 2015).

[67] *Mennesson and Others v. France* (2014), App No. 65192/11 (26 June 2014), and *Labassee v. France* (2014), App. No. 65941/11 (26 June 2014).

[68] Insisting on an originalist and/or conservative textualist understanding of Convention rights can also be considered a form of judicial activism which denies individuals the full exercise of their rights, see further, S. Grover 'Judicial Activism, the 'Living Instrument Doctrine' and the European Court of Human Rights', *Judicial Activism and the Democratic Rule of Law: Selected Case Studies* (Springer International Publishing, 2020), p. 191–231.

their interpretation is the truly 'original' one.[69] This creates a two-fold risk. First, the linguistic and historical analysis inherently involved in this approach puts lawyers in the position of arguing matters in which they have no expertise, allowing for "*the selective use of historical sources to support a conclusion reached partly on other grounds*".[70] Second, insofar as the aforementioned risk is to be avoided, adopting an originalist approach would require increased reliance on expert evidence, generating further costs and creating delays. Indeed, it is notable that the adoption of the 'originalist' approach in the US has corresponded with an increasing reliance on expert evidence regarding linguistics and history.[71]

35. This concept of originalism is alien in the UK common law system, which by its nature evolves, and will likely result in considerable uncertainty. In fact, the 'living instrument' approach of the ECHR may have been derived from English law; there are numerous references to a similar approach throughout UK jurisprudence. For instance, Lord Mansfield stated in 1784 "*the usages of society alter, the law must adapt itself to the various situations of mankind*."[72] Likewise, Lord Sankey LC in 1930 classically described the Constitution established by the British North America Act 1867 (30 & 31 Vict c 3) as "*a living tree capable of growth and expansion within its natural limits*." The provisions of the Act were not to be cut down "*by a narrow and technical construction*," but called for "*a large and liberal interpretation*."[73]

36. Courts will likely be directed to consider texts from nearly 70 years ago which may or may not provide any sort of coherent guidance as to the original intentions of the drafters or applicable first principles, often because the issues that arise under the Convention may have just not been contemplated by the original drafters.[74] Looking back at the *travaux préparatories* will also provide little or no indication of what the drafters would have contemplated the result of the Convention to be when applied to the particular facts of a case in practice. Parties to litigation are of course always free to use the *travaux préparatories* as evidence to support their argument in a case. However, directing courts to consider these documents will encourage additional arguments and disputes over the meaning and relevance or not of these (often long) documents, when the court's time could be more efficiently spent addressing the facts of the case before it.

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[69] For example, in Bostock v. Clayton County, 140 S. Ct. 1731 (2020), a sharply divided Court ruled that the 1964 Civil Rights Act, which bars discrimination "because of . . . sex," applies to discrimination based on sexual orientation or transgender status. The opinion was authored by a conservative-leaning justice and involved detailed analysis of the textual language.

[70] David A. Strauss, 'Common Law, Common Ground, and Jefferson's Principle', 112 Yale L.J. 1717, 1727 (2003).

[71] For instance, some scholars collect and analyse reams of data on usage of terms at different points in history. See, e.g., James C. Phillips, Daniel M. Ortner & Thomas R. Lee, 'Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical', 126 Yale L.J.F. 21 (2016).

[72] *Barwell v Brooks* (1784) Douglas 371, 373; 99 E.R. 702.

[73] *Edwards v Attorney General for Canada* [1930] AC 124 at [136]. See also David Maxwell-Fyfe: "*The law is a living thing. It is not rigid and unalterable. Its purpose is to serve mankind, and it must grow and change to meet the changing needs of society*." Trial of the Major War Criminals before the International Military Tribunal, Nuremburg, 14 November 1945 - 1 October 1946, vol 22, p172, 28 August 1946.

[74] Milanovic, 'A Really, Really Foggy Report', EJIL: Talk!, (2015), (in the context of the Convention's extraterritorial application).

Para 191: IHRAR recommends amending section 2 HRA to clarify the priority of rights protection by making UK legislation, common law and other case law the first port of call before, if then proceeding to interpret a Convention right, ECtHR case law is taken into account. (IHRAR proposed a draft clause to this effect).

37. The IHRAR proposal would give statutory effect to the approach which is often already taken by the UK Courts and was expounded in *Osborn*[75] and *Kennedy*[76] - that UK domestic statute, case law and common law should be applied first by the courts before proceeding to interpret a Convention right and considering ECtHR case law. However, we are concerned that the proposal will limit the important judicial flexibility in applying the law to the case before them, and result in uncertainty for litigants and the court.

38. It often makes more sense for courts to take the 'shortest' and least complex route to resolving disputes before them, not least in terms of costs and time of proceedings. Often the protection provided by common law rights is not as extensive as that guaranteed by Convention rights. For instance, with regard to the common law tort of false imprisonment[77] it is not possible to challenge the lawfulness of a detention where a person has been remanded in custody by a court[78], even if the court was not made aware of critical information which undermined the basis for the detention.[79] If using a Convention right and taking into account ECtHR case law is the most efficient way to resolve a dispute, especially given the uncertainty as to the scope and application of rights under the common law, the courts should have the freedom to take this approach first.

39. The courts are also, in general, tied to deciding cases based on the grounds and submissions made to them. If neither party makes submissions on the common law or statute it is not clear how a court, and especially first instance courts, can be required, on its own initiative, to locate and consider other potential grounds for a claim.[80] This would result in delays in the resolution of claims as claimants, who in principle are entitled to rely

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[75] *Osborn v Parole Board* [2013] UKSC 61.

[76] *Kennedy see* n.36 above at [46] (Lord Mance).

[77] In *ex parte Evans (No. 2)* [2001] 2 AC 19 the House of Lords confirmed that any detention that is unlawful under domestic law will automatically be unlawful under Article 5(1), however if detention is lawful under domestic law it may nonetheless be unlawful under Article 5(1) if not sufficiently accessible and precise, or if it is disproportionate or undertaken for an improper motive. (Lord Hope at [38C] – [38E]).

[78] *Henderson v Preston* (1888) 21 QBD 362.

[79] Hodge Jones & Allen, 'Common law: a poor substitute for the protections afforded by the Human Rights Act', (2015).

[80] The decision in *Kennedy* (see n.36 above) concerned a request first made in 2007 by a journalist for information held by the Charity Commission in connection with a statutory inquiry. It was only when the case reached the Supreme Court in 2013 that it was suggested for the first time (by the court rather than the either of the parties) that the journalist could and should have relied on a common law right. It is unclear how lower courts could be expected to undertake a similar exercise and identify other rights beyond the Convention when neither party have raised them as grounds.

For instance, see Lord Carnwath's dissent in *Kennedy* (see n.36 above), in respect of the application of the common law stating: "*I approach it with caution, conscious that, because it is not before us for decision and was not supported by any of the parties, we have not had the advantage of full argument*" at [234].

on the rights that they have in law, have to wait for the court to first search through the common law.[81] It would also consume considerable judicial time and resources.

40. Further, the HRA provides a clear account of the rights under the Convention which parties, courts, public bodies when making decisions and the general public can easily refer to. In contrast, there is continuing uncertainty on the extent and scope of common law rights (see paragraph 29.d) above). By requiring courts to consider the common law first, further jurisprudence may be developed, but this is unlikely to be as clear or as accessible for the public and public authorities as the list of rights at Schedule 2 of the HRA. The IHRAR Panel specifically recommended the importance of improving the public's understanding of and ownership of human rights.[82] Clarity, certainty and access is key to this and, in our view, is provided by the ECHR rights. Further, while the courts develop the necessary jurisprudence for the common law rights which, in some areas, are less developed, there will be increased uncertainty for all parties.

41. A different approach to damages may also apply to a claim bought under the HRA than one brought under statute or the common law.[83] These will be considerations that claimants will consider when deciding what cause of action to bring their claims under. It would be odd for courts to disregard this and to consider different causes of action, and thus different approaches to compensation/damages.

Application in Wales, Scotland and Northern Ireland

42. Finally, we are disappointed at the lack of clarity about how these proposals will impact the devolved nations and the practices established therein for taking into account Strasbourg jurisprudence.

43. For example, in Scotland, the duty to take into account Strasbourg law when deciding a devolution issue has been implied via the common law by the Scottish courts and House of Lords in *Clancy v Caird*[84] and *HM Advocate v R.*[85] This is despite the Scotland Act 1998 being silent on this issue. It can be assumed that the same approach would be taken under the Northern Ireland Act 1998.

44. Indeed, taking account of Strasbourg jurisprudence ensures a clear and consistent line of judicial authority across the four constituent parts of the UK. We are concerned that weakening this duty could lead to a situation whereby the jurisprudence of certain parts

[81] As Lord Carnwath has said: "*a great strength of the HRA is that it confers the rights under the Convention in clear and unqualified form. In principle, anyone who falls within the wording of a Convention right should be allowed to assert that right, without waiting for the court to search for some common law equivalent*." Lord Carnwath, n.4 4above.

[82] The Independent Human Rights Act Review, see n.5 above, para. 52.

[83] For instance, s.8 HRA specifies that no award of damages under the HRA may be made unless the Court is satisfied having regard to all the circumstances that the award is necessary to afford just satisfaction to the person in whose favour it is made.

[84] [2000] SLT 546, at [549].

[85] [2003] SC (PC) 1.

of the UK develop asymmetrically to others. We consider that this will only cause confusion and uncertainty.

45. Furthermore, we are also concerned about the impact of these proposals in relation to Northern Ireland and the Good Friday Agreement (the **"GFA"**). The GFA obliges the UK Government to provide "*complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency*".[86] If domestic courts diverge significantly from Strasbourg jurisprudence, there is concern that this may result in individuals being unable to enforce their Convention rights domestically in breach of the GFA.

The position of the Supreme Court

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights.

How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

46. JUSTICE does not consider that there is any need for change as to the position of the UK Supreme Court. The UK Supreme Court is already the ultimate judicial arbiter of UK law, including on the implementation of human rights in the UK. As set out in *Kay v Lambeth LBC,*[87] lower courts in the UK will also, subject to a limited exception in exceptional circumstances, follow the Supreme Court's precedents, including on human rights, even where the ECtHR has decided an issue differently. Lord Bingham was clear in *Kay* that "*it is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply."*[88] For instance, in *Purdy*[89] the Divisional Court considered itself bound by decisions of the House of Lords that assisted suicide did not engage Article 8, despite a different and wider view from the ECtHR.[90]

47. Further, as set out above (see paragraphs 14 to 17) and as concluded by the IHRAR Report, the courts do often question the Strasbourg jurisprudence and do not treat it as "*having presumptive authority*" as the Consultation states.[91] However, as the UK is a signatory to the Convention, and intends to remain so, too great a divergence from the interpretation of those rights by Strasbourg will put the UK in breach of its international

[86] Secretary of State for Northern Ireland, 'The Belfast Agreement: an agreement reached at the multi-party talks on Northern Ireland' CM 3883, (1998), Rights, Safeguards and Equality of Opportunity, p.2.

[87] [2006] UKHL 10.

[88] *ibid* at [44]. See also *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 at [64].

[89] *R. (on the application of Purdy) v DPP* [2008] EWHC 2565 (Admin) at [45].

[90] Likewise in *R. (on the application of GC) v Commissioner of Police of the Metropolis* [2010] EWHC 2225 (Admin), the Divisional Court also followed an earlier domestic precedent of the House of Lords that the retention of biometric samples did not infringe an individual's rights under Article 8, rather than a subsequent decision of the ECtHR. See also, for instance, *R (Kaiyam) v Secretary of State for Justice* [2013] EWCA Civ 1587 at [5].

[91] Consultation, see n.7 above, para. 198.

obligations and limit the ability of individuals to enforce their rights domestically. The fact therefore that the UK courts will normally follow the clear jurisprudence of Strasbourg even though they are not bound to do so makes clear sense.[92]

48. In support of its argument for limiting the impact of the jurisprudence of the ECtHR in the UK, the Consultation states that the "*Constitutional Court in Germany reserves the right to review legal acts by European institutions and courts against the fundamental principles of the German Constitution*".[93] However, this is not an appropriate comparison and mischaracterises the German position. The German Constitutional Court has the ability to review legal acts of European Union institutions and decisions of European Union courts in very limited circumstances.[94] Not only are the circumstances extremely narrow, but the context is clearly different as it relates to the EU and not the ECHR / Strasbourg Court. Further, in the context of the ECHR, the German Federal Constitutional Court has ruled that the Constitution requires that state bodies, including courts, take into account decisions of the ECtHR:[95]

> "*The principle that the judge is bound by statute and law (Article 20.3 of the Basic Law (Grundgesetz – GG)) includes taking into account the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights as part of a methodologically justifiable interpretation of the law."*[96]

This mirrors the current requirement on under s.2 HRA for UK courts and tribunals to "take into account" the jurisprudence of the ECtHR.

Trial by jury

Question 3: Should the qualified right to jury trial be recognised in the Bill of Rights? Please provide reasons.

49. Juries play an integral role in the criminal justice system of England and Wales and are vital in ensuring a fair trial. A wealth of evidence demonstrates that juries work well, despite severe financial cuts to critical criminal justice organisations over the past decade.[97] For example, Professor Cheryl Thomas, in her government report '*Are Juries Fair?*' (2010) found that juries are efficient, effective, and less likely to exhibit bias than summary procedures.[98] The Lammy Review (2017) concurred, noting that "*juries deliver equitable results, regardless of the ethnic make-up of the jury, or of the defendant in*

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[92] *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 at [340]: *"ur refusal to follow a decision of the ECtHR, particularly of its Grand Chamber, is no longer regarded as, in effect, always inappropriate. But it remains, for well-rehearsed reasons, inappropriate save in highly unusual circumstances"*

[93] Consultation, para 199.

[94] In the case of *ultra vires* or identity review Streinz/Streinz, EUV/AEUV, 3rd ed. 2018, EUV Art. 4, recital 21.

[95] Cp. Dürig/Herzog/Scholz/Walter, 95th ed. July 2021, GG Art. 93, recital 174.

[96] German Federal Constitutional Court, Order of 14 October 2004, file no. 2 BvR 1481/04 – "Görgülü decision".

[97] 'Legal aid: UK's top judge says cuts caused 'serious difficulty'', BBC News (2019).

[98] Cheryl Thomas, 'Are Juries Fair?', Ministry of Justice (2010), p.28 and p.45.

question".[99] The value of jury trials has also been endorsed by lawyers,[100] academics,[101] the Supreme Court,[102] and by the Government itself.[103]

50. On the contrary, JUSTICE envisages **three** key problems that could result from such an attempt.

Codification of the right to a jury trial is unnecessary

51. The Consultation rightly recognises that the jury system in England and Wales has been a fundamental part of our legal scaffolding since the 13th century.[104] Since then, both legislation[105] and case law[106] have resulted in a robust and sophisticated legal framework that serves to guarantee and protect an individual's right to a jury trial. As such, the reasons for the Government's proposal to codify this right in a 'Bill of Rights' remain unclear and in our view is unnecessary. As stated by Kirsty Brimelow QC in her recent evidence to the Justice Committee, "*there is no actual requirement to embed a right to jury within a Bill of Rights*" given the fact that the right is already well-established within our legal system.[107]

52. Caselaw is replete with discussions of the importance and entrenchment of the right to a jury trial in our legal system. It is always referred to as a right. For example, in *R v Twomey (John)* it was held by the Lord Chief Justice that:

> *"[i]n this country trial by jury is a hallowed principle of the administration of criminal justice. It is properly identified as a **right**, available to be exercised by a defendant unless and until the right is amended or circumscribed by express legislation"*.[108]

> *'the **right to trial by jury** is so deeply entrenched in our constitution that, unless express statutory language indicates otherwise, the highest possible forensic standard of proof is required to be established before the right is removed' (emphasis added)*.[109]

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[99] David Lammy, 'The Lammy Review', (2017), p.6.

[100] Paul Mendelle, 'Why juries work best', The Guardian (2010).

[101] Thom Brooks, 'The Right to Trial by Jury', Journal of Applied Philosophy 21, no.2, (2004), p.197-212.

[102] Lord Hodge, 'The involvement of the public in the criminal process in the United Kingdom', (2018). See below for judgments in various case law.

[103] Consultation, see n.7 above, p.3.

[104] *ibid*, para 13. Judges introduced jury trials in criminal cases, after the Church, at the Fourth Lateran Council, held in 1215, forbade the clergy to participate in trials by ordeal, thus making such trials impossible. See J.H.Baker, An Introduction to English Legal History (4th edn, OUP 2007) 5, 73, 507.

[105] Section 64 Criminal Law Act 1977; s.17, 20, 25 Magistrates' Courts Act 1980; s.69 Supreme Court Act 1981; Sch.1, pt.1, HRA 1998; Article 6 ECHR.

[106] See *Safeway Stores Plc v Tate* [2000] WL 1841672; *J, S, M v R* [2010] EWCA Crim 1755 and *KS v R* [2010] EWCA Crim 1756.

[107] Justice Committee, 'Oral evidence: Human Rights Act Reform', HC 1087 (February 2022), Q132.

[108] *R v Twomey (John)* (2009) EWCA Crim 1035 at [10].

[109] *ibid* at [16]. See also: In *R v Islington North Juvenile Court ex parte Daley* [1983] 1 AC 347 [364], Lord Diplock held that the *"right of an accused to be tried by a jury"* is ***"a right that is deeply rooted in tradition"***. He continues *"that Parliament intended that an accused person, old enough to make an informed choice, should not be deprived of this right except by the exercise of his own free will is apparent from the elaborate provisions to safeguard the*

53. The Minister, Lord Wolfson appears to agree that the status quo is satisfactory. In his evidence to the Joint Committee on Human Rights ("**JCHR**"), he noted that *"we are not proposing any changes... to the right to a jury trial"*.[110] The Government's concern appears to be that *"there have been challenges to the right to jury trial in Strasbourg".*[111] However, the Strasbourg jurisprudence that addresses trial by jury suggests the opposite.

54. In *Taxquet v Belgium,* the ECtHR stated that *"[a] State's choice of a particular criminal justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention".*[112] It further noted that "*several Council of Europe member States have a lay jury system"* and clarified that Contracting States are free to choose how their criminal justice system complies with Article 6 ECHR. It is not, therefore, "*the Court's task to standardise them"*.[113]

55. From the case law, it is evident that Strasbourg only intervenes where a jury trial will not be fair because the inclusion of certain individuals on the jury makes them biased – for instance in cases of suspected racial bias such as *Gregory* and *Sanders*.[114] Consequently, Strasbourg jurisprudence cements, rather than erodes, the fair process of a jury trial. If this is what Lord Wolfson meant by "*challenges to the right to jury trial in Strasbourg*", such challenges have been overwhelmingly positive, and should be welcomed.

56. Indeed, cases like *R v Abdroikov* show that our own Supreme Court has a similar threshold for assessing when a jury might risk contravening Article 6 ECHR – "*A fair-minded and informed observer would conclude that there was a real possibility that a jury trial was biased where a juror was a serving police officer who shared the same local service background as the police officer who was the victim of the alleged offence, or where a juror was a full-time, salaried, long-serving employee of the prosecuting authority*".[115]

57. Consequently, the ECtHR's influence has only been to strengthen and solidify the longstanding right to a jury trial in England and Wales. Given that the Supreme Court has itself found jury bias to be grounds for invalidity, the same ruling from Strasbourg should

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freedom of choice of the accused to be tried by jury". (emphasis added). In *Safeway Stores Plc v Tate* [2000] WL 1841672, LJ Otton repeatedly refers to the right to a trial by jury as a "*fundamental right*". Likewise, in *J, S, M v R* [2010] EWCA Crim 1755 [8], the Lord Chief Justice stated that *"[t]he trial of a serious criminal offence without a jury ...* ***remains and must remain the decision of last resort****"* which he reiterated in *KS v R* [2010] EWCA Crim 1756.

[110] Joint Committee on Human Rights, 'Oral evidence: Human Rights Act reform', HC 1033, (February 2022), p.21.

[111] *ibid*.

[112] *Taxquet v Belgium* (2010) App. No. 926/05 (16 November 2010) at [83] and [84].

[113] *ibid*.

[114] *Gregory v United Kingdom* (1997) App. No. 22299/93 (25 February 1997) and *Sander v United Kingdom* (2000) App. No. 34129/96 (9 August 2000): sufficient guarantees must exist to exclude any objectively justified or legitimate doubts as to the impartiality of the jury, a jury must be impartial from a subjective as well as an objective point of view.

[115] *R v Abdroikov* [2007] UKHL 37.

be viewed favourably, rather than treated with suspicion. In this light, Lord Wolfson's reasons for recognising the right to a jury trial within the Bill of Rights are unsatisfactory. Moreover, it is unclear that challenges from Strasbourg on this matter would vanish purely because the right to a jury trial is codified – cases of bias, unfair process and tampering would still materially impact the fairness of a jury, and would therefore still be challenged in the same way.

Codification of the right to a jury trial could increase the court backlog

58. The proposal could be counterproductive. If the Government's aim is to provide a consistent, robust, and accessible framework for protecting the right to a jury trial, the case law suggests that this is already firmly in place. Consequently, inclusion in the Bill of Rights could risk confusion – for legal practitioners, judges, and defendants – leading to procedural complications and a potential increase in case backlog. This is because the two 'rights' - codified and uncodified – might not overlap entirely, which would result in two slightly distinct legal frameworks for the right to jury trials. Confusion as to the nature of this right would inevitably follow.

59. Alongside seeking to codify the right to a jury trial, the Government is seeking to increase sentencing powers of magistrates in an attempt to reduce the court backlog.[116] The policy is premised on the assumption that measures could *"save 1,700 sitting days in Crown Courts by enabling 500 jury trials to be switched to magistrates"*.[117] However, this argument presumes that defendants will not exercise their right to opt for a jury trial, which would seem to run counter to this proposal, which cements and endorses such a right. Kirsty Brimelow QC, in her evidence to the Justice Committee, concurred, suggesting that increasing the sentencing power of magistrates *alongside* cementing the right to a trial by jury would lead to further increases in the backlog, as defendants are more likely to opt for a jury trial because "*people trust jurors and do not necessarily trust the magistrates before whom they are appearing in the same way*".[118]

The proposal raises more questions than it answers

60. It is difficult to properly assess the proposal of a codified right to jury trial without specific wording, since any substantive analysis will hinge on its precise formulation.

61. Nevertheless, JUSTICE remains concerned about the Government's description of the right to a jury trial as a "*qualified right*".[119] At present, defendants are entitled to a jury trial where they are charged with a triable either-way or indictable-only offence. English law provides no other qualification to this right, except where there is a "*very significant danger*

[116] Law Society, 'Written evidence submitted by the Law Society of England and Wales',RBC0002; Ministry of Justice, 'Magistrates' Courts given more power to tackle backlog' (January 2022).

[117] Charles Hymas, 'Tougher powers for magistrates to jail criminals and clear courts backlog', The Telegraph, (January 2022).

[118] Justice Committee, HC 1087, see n.107 above, Q142.

[119] Consultation, see n.7 above, Question 3, p.61.

of jury tampering".[120] Even then, this bar has only been surpassed once,[121] with the Lord Chief Justice emphasising that it is a "*decision of last resort*".[122] As such, a new qualified right could risk raising the threshold, or imposing barriers, on the already well-established right to a jury trial. This would clearly be a significant step backwards and would contradict the Government's stated aim of "*securing the fairness of certain trials*".[123]

62. We are particularly concerned in the light of steps currently being taken by the Government which could compromise the right to trial by jury. In the Judicial Review and Courts Bill, the Government is seeking to introduce additional circumstances in which the court can proceed with the plea before venue and allocation hearing in a defendant's absence which could compromise the defendant's right to a jury trial.[124] Alongside this, the Attorney General, Suella Braverman MP's announcement that she is considering referring the acquittal of the 'Colston 4' to the Court of Appeal sets an unnerving precedent of Government interference with the right they are supposedly so keen to enshrine.[125]

Application in Scotland and Northern Ireland

63. We note recent comments made by Lord Wolfson acknowledging that the right to jury trial is applied differently in Scotland and Northern Ireland, compared to in England and Wales.[126]

64. However, we see no evidence of those differences being considered within the Consultation. Indeed, we are disappointed at the lack of explanation provided about how this proposal is intended to apply within Scotland and Northern Ireland in practice. This is particularly concerning given that the issue of jury trials falls squarely within the devolved competence of each of these countries. Should the proposal be intended to apply to all constituent parts of the UK, it will surely impact on the devolved legislative consent conventions. Again, we note that the Consultation is silent on this.

65. Without adequate detail or explanation as to how this proposal is to operate within Scotland and Northern Ireland, it is not possible to comment further. Nonetheless, we draw attention to the fact that jury trials have developed according to different histories and legal traditions within Scotland and Northern Ireland. This is particularly true in respect of Scotland which has a unique juror system within the UK, particularly in the criminal law context.[127] Scotland is also currently conducting its own review of jury trials

[120] Section 44 Criminal Justice Act 2003.

[121] *R v Twomey (John)*, see n.108 above, see also Jeremy Britton, 'Jury-free court case makes history in England' BBC News (2010).

[122] *J, S, M v R*. see n.106 above, at [8].

[123] Consultation, see n.7 above, para 203.

[124] Section 9 Judicial Review and Courts Bill, 26 January 2022, p.22.

[125] Will Humphries and Matt Dathan, 'Judges could be asked to clarify Edward Colston statue case', The Times, (January 2022).

[126] Joint Committee on Human Rights, HC 1033, see n.110 above, p.22.

[127] For example, a jury in Scotland is composed of 15 members rather than 12. It can reach a decision based on a simple majority e.g., with agreement of 8 out of 15 jurors. What makes Scotland particularly unique is that jurors have 3 verdicts available to them: guilty; not guilty; and not proven.

and verdicts[128] and has done so on several previous occasions including in 2019 and 2008.[129] Again, there is no evidence that the existence of these reviews have been taken into account within the Consultation, nor that the proposal has been designed to complement the distinct regimes in Scotland and Northern Ireland.

66. Consequently, this proposal raises more questions than it answers, and without further clarity it risks obscuring a right that is currently well understood. Indeed, in the Oral Evidence to the Justice Committee, Kirsty Brimelow QC expressed her confusion "*as to why it is in the consultation paper at all, other than a political reason for it to be there*".[130] JUSTICE agrees – the proposal is manifestly unnecessary, potentially counterproductive, and devoid of an evidential base to justify its introduction.

Freedom of expression

67. These questions go far beyond the scope of the IHRAR. It was outside the IHRAR terms of reference to consider the substantive content of rights under the HRA. In particular, the IHRAR did not consider whether any changes are required to the right to freedom of expression and the balance between this and the right to privacy.

68. In our view this Consultation is not the appropriate mechanism for addressing substantive issues relating to freedom of expression. The Consultation is concerned about specific substantive issues such as the regulation of online speech, the influence of private companies over online speech,[131] protecting users of social media companies from harm,[132] the importance of academic freedom,[133] and reforms to increase protection of journalistic sources. These issues are complex and reforms in these areas will impact not only the human rights framework but also the common law and other legislative areas such as data protection. Such exercises need to be undertaken with considerable care, and not by way of a mere 14 paragraphs of explanation in a wide-ranging Consultation looking at a plethora of other issues. It would, for example, be more appropriate for the Law Commission to consider whether changes are required in this area. Our responses below should be read subject to this caveat.

69. Freedom of expression is a crucial right within both domestic and international human rights frameworks, however, it is a qualified right – it is not absolute or unlimited. The Consultation recognises the non-absolute nature of freedom of expression, but appears to limit the countervailing factors, to national security, keeping citizens safe and protecting individuals from "harm", subsequently appearing to suggest that the criminal law should

[128] See Scottish Government, 'The Not Proven Verdict and Related Reforms: Consultation' (December 2021).

[129] See J. Chalmers et al, '*Scottish Jury Research: Findings from a Large Scale Mock Jury Study*' Scottish Government, (2019) and Scottish Government, 'The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses' (2008).

[130] Justice Committee, see n.107 above, Q132.

[131] Consultation, see n.7 above, para. 207.

[132] *ibid*, para. 209.

[133] *ibid*, para. 210.

be the ceiling of any limit on freedom of expression.[134] However, as with any qualified right it must be balanced against individuals' other qualified rights as part of the broader human rights framework within the UK – under the HRA, statute and common law.[135] It is unavoidable that in some instances these rights will conflict, in which case they must be balanced, considering carefully the specific rights in the individual case.[136] Freedom of expression cannot automatically take precedence over the right to private and family life.[137]

70. As well as protecting freedom of expression, national security and the safety of its citizens, referred to at paragraph 211 of the Consultation, it is also the duty of all arms of the UK state to protect private and confidential information, including commercial and personal information, copyright and other property rights, and the right to a fair trial. These obligations have long been recognised in both the common law and statute, and more recently in international law by the adherence of the UK to international treaties including the ECHR, the International Covenant on Civil and Political Rights[138] Articles 14, 17 and 18, and the Universal Declaration of Human Rights Articles 12 and 18. It is important that these key issues are provided the appropriate weight in the balance of rights.

Question 4: How could the current position under section 12 of the Human Rights Act be amended to limit interference with the press and other publishers through injunctions or other relief?

71. Section 12 is engaged in any case in which the domestic courts are asked to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression, other than criminal proceedings.[139] It was included in the HRA precisely in recognition of the importance of the right to freedom of expression and in particular the freedom to publish.[140] It also reflects of the approach of the ECtHR which has made clear that prior restraints to publication and expression "*call for the most careful scrutiny*."[141]

72. In our view s.12 HRA is working well and has had an impact in ensuring that courts provide appropriate consideration to freedom of expression on the facts of the case before it. We do not consider that the case has been made out for change, and are concerned that any changes to s.12 would introduce practical and theoretical uncertainties, as well as risking wider negative consequences.

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[134] *ibid*, para. 216.

[135] As made clear by Article 17 ECHR.

[136] This involves the courts starting with an "*intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary*", taking into account the justifications for interfering with or restricting each right, and applying the proportionality test to each right: *In re S (FC) (A Child)* [2004] UKHL 47.

[137] *Taveta Investments Ltd v Financial Reporting Council* [2018] EWHC 1662 (Admin) at [97]-[98] per Nicklin J.

[138] Only 21 of 193 UN member states have not ratified the ICCPR.

[139] s.12(5) HRA.

[140] I. Christie and M. Tugenhadt, The Law of Privacy and the Media (Oxford University Press, 2016), paras 12.02 to 12.13.

[141] *Yildirim v. Turkey* (2012) App. No. 3111/10 (18 December 2012) at [47].

Section 12(3)

73. We do not consider that a case has been made by the Consultation that s.12(3) has not had the desired effect or that it requires changing to a "*higher threshold*."[142]

74. Section 12(3) already creates a higher threshold test for obtaining interim injunctive relief before trial in all cases where freedom of expression is engaged.[143] Specifically, this is a higher test than that typically required under the common law for interim injunctions under *American Cyanamid* which merely requires the applicant to prove that there is a serious issue to try or a *prima facie* case is made out.[144] Under s.12(3) court must be satisfied that the applicant is "*likely*" to succeed in establishing that publication should not be allowed. It is, of course, impossible to know how many more interim injunctions would have been granted in privacy cases if the court had been applying the lower American Cyanamid test instead of the s.12 test.

75. It is very unclear what any "*higher threshold*" would be for s.12(3) or how it could be applied in an effective manner by a court at such an early stage of proceedings. Under s.12(3) "*likely*" generally means "*more likely than not*".[145] However, there are some important exceptions to this; namely, where the tribunal has not had sufficient time to hear the evidence or where publication is likely to lead to severe consequences.[146] We are concerned that any higher test than that currently applied by the courts pursuant to s.12(3) would almost inevitably mean that interim injunctions are refused in more cases where the applicant would have succeeded at trial, potentially resulting in irreversible harm.

76. There also continues to be a higher common law test for interim injunctions in respect of libel.[147] A pre-trial injunction will be refused "*in all but exceptional cases*" and a claimant will ordinarily be unable to obtain an interim injunction to restrain an apprehended alleged defamatory publication where a defendant states an intention to raise an affirmative defence (known as 'the rule in *Bonnard v Perryman*'[148]). The law in this context requires an applicant to prove that it will succeed at trial – a higher test than that under s.12(3). In general it is only if the defendant does not appear, or if the defendant appears but fails to assert any arguable case, an interim injunction may be granted.[149]

77. The rule in *Bonnard v Perryman* has co-existed with s.12 HRA for a long time and its practical effect is that in the limited context of the publication of defamatory material,

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[142] Consultation, see n.7 above, para. 214.

[143] See *PJS v News Group Newspapers Ltd* [2016] UKSC 26 where the court directed itself that s.12 enhances the weight which Article 10 rights carry in the balancing exercise when considering whether to grant interlocutory injunction, but it des not alter the tests and principle to be applied when a court is deciding, at trial, whether a permanent injunction should be granted.

[144] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

[145] *Cream Holdings Ltd v Bannerjee* [2004] UKHL 44.

[146] *ibid*.

[147] *Greene v Associated Newspapers* [2004] EWCA Civ 1462.

[148] [1891] 2 Ch 269.

[149] See for example, *ZAM v CFW & Anor* [2011] EWHC 476 where the Defendants did not appear and were not represented.

interim injunctions before trial are incredibly rare. One example being *LJY v Persons Unknown*[150], where the respondent failed to put in evidence to demonstrate a sufficient basis for a defence of truth or public interest.[151] The primary rationale for the rule in *Bonnard v Perryman* is said to be that – unlike private information which, once published, the horse is considered to have 'bolted' or the iceberg melted – injury to reputation can be compensated following trial, with damages or some other remedy.[152] It is not clear to us why the Government is of the view that there needs to be any higher general threshold to all circumstances where freedom of expression is engaged ("**s.12 cases**") through an amendment to s.12(3).

Section 12(4)

78. Where proceedings relate to journalistic, literary or artistic material, section 12(4), requires the domestic courts to "*have particular regard to the Convention right of freedom of expression*" and to consider the extent to which material has, or is about to, become available to the public and whether it is in the public interest for the material to be published. Further, s.12(4) also requires the court to consider the impact of any relevant privacy code.

79. The Consultation states that s.12(4) "*has had no real effect on the way*" issues concerning freedom of expression "*have been determined by the courts*."[153] No evidence is provided by the Consultation however to support this statement, and in our view the evidence suggests that s.12(4) has influenced the courts' reasoning in certain circumstances to provide heightened consideration of freedom of expression. This can be seen, for instance, by the Supreme Court's recent decision in *Bloomberg v ZXC*[154] where the different elements of s.12(4) were repeatedly referred to by the Supreme Court in its reasoning[155], including as to the importance of freedom of expression.[156] As was stated by Lord Nicholls in *Reynolds v Times Newspapers Ltd* "*… the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion*."[157] This statement

[150] [2017] EWHC 3230 (QB).

[151] See also, *Sunderland Housing Corporation v Baines* [2006] EWHC 2359 (QB), where the respondent failed to put in sufficient evidence to counter the applicants "very clear denials" of the allegation, despite the minimal requirements that a respondent to such an application needs to (1) identify the meaning or meanings they intend to justify and (2) put in evidence (by witness statement backed by a statement of truth) that he believes in the truth of that meaning / those meanings.

[152] *Greene* see n.147 above at [61].

[153] Consultation, see n.7 above, para. 213.

[154] [2022] UKSC 5.

[155] *ibid* at [44], [48], [54], [59] and [61].

[156] *ibid* at [59].

[157] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at [205]. This also reflects the approach of the ECtHR, see, for instance *Axel Springer AG v Germany* (2012) App. No. 39954/08 (7 February 2012) at [79]: "*The Court has also repeatedly emphasised the essential role played by the press in a democratic society*…"

reflects the guiding principles of the domestic courts in respect of relief, including interim injunctions, and s.12(4).[158]

80. Moreover, s.12(4)(b) also requires the court to consider the impact of any relevant privacy code which applies to the publisher and are voluntarily adopted. These codes typically include both a definition of what is meant by privacy, and a definition of public interest, which distinguishes public interest from private matters. For instance, in relation to newspapers and magazines the relevant privacy code is the Editors' Code of Practice, established by the Editors' Code of Practice Committee and overseen by the Independent Press Standards Organisation.[159] It is difficult to see how any publisher who voluntarily submits to such a code can then complain that s.12 requires them to have regard to the code. Nor is it easy to see how they can say that the code which they have voluntarily adopted represents an undue interference with freedom of expression.[160]

Additional concerns with the proposals in respect of s.12

81. Relief, including interim injunctions, which prevent publication or impacts freedom of expression in some other way can have a very important role in protecting individuals' rights. The consequences of not granting an order can be extremely serious. In the context of confidential information – once published it is irreversible. As the House of Lords noted in *Cream Holdings*, "*confidentiality once breached is lost forever*."[161] It has long been recognised that in cases of breach of confidence and in some cases of misuse of private information, if no interim injunction is granted, then the claimant's rights cannot be pursued at trial. If priority is given to freedom of expression in such cases, there may be no remedy and thus effective right to privacy.[162] As the courts stated in 1849: "*Where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether*."[163] Further, the failure to obtain relief could result in serious violations of privacy or even result in personal injury, where, for example, someone who has given evidence in a trial had their whereabouts disclosed. We are concerned that such risks have not been given appropriate consideration.

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[158] See also *Griffiths v Tickle* [2021] EWCA Civ 1882 at [40]: "*Section 12(4)(a)(i) of the Human Rights Act 1998 ("HRA") requires the court to have regard to this factor, when considering whether to make an order which affects the right to freedom of expression, in proceedings that relate to journalistic material. This will be a relevant factor in decisions about publication of a judgment, whether or not the statutory wording is strictly applicable. It is obvious that where disclosure of the same information has already taken place, or is imminent, the case for keeping the judgment private is weakened*."

[159] This code lays down standards on accuracy, privacy, harassment, intrusion into grief and shock, reporting suicide, children, hospitals, reporting of crime, clandestine devices and subterfuge, victims of sexual assault, discrimination, financial journalism, and confidential sources. This voluntary code makes all of these protections of privacy subject to a detailed definition of the public interest. Editors invoking the public interest are required to demonstrate that they reasonably believed publication - or journalistic activity taken with a view to publication – would both serve, and be proportionate to, the public interest and explain how they reached that decision at the time.

[160] *Douglas v Hello! Ltd (No 1)* [2001] QB 967 at [94]; *Sicri v Associated Newspapers* [2021] EMLR 10 at [74].

[161] *Cream Holdings* see n.145 above, at [18].

[162] It is a clear principle of UK law that where there is a right there must be a remedy, see, for example *Lehtimaki & Ors v Cooper (Rev 1)* [2020] UKSC 33 at [144].

[163] *Prince Albert v Strange* (1849) 41 E.R. 1171, 1179.

82. The proposals in the Consultation are incredibly vague, for instance, there is no indication of what "*exceptional reasons*" would mean for the proposed change to s.12(4). There is little to no consideration of their potential implications – including in terms of impracticalities and uncertainties, as well as potentially severe negative adverse consequences.

83. Section 12 is engaged in an incredibly wide range of cases across the justice system. For instance, common examples of cases where relief is sought that may affect the exercise of the right to freedom of expression include claims for:

    a) breach of copyright (for example where the intended publication is of a letter or drawing, or of a photograph taken by consent);

    b) breach of confidence (when the proposed publication is of information disclosed in confidence to an employee or agent, or to a legal, medical, financial or other adviser);

    c) misuse of private information;

    d) defamation;

    e) breach of the Data Protection Act 2018;

    f) harassment under the Protection from Harassment Act 1997;

    g) the torts of trespass to land and of interference with goods, (for example removal of papers in the context of newsgathering); and

    h) the tort of nuisance in the context of the use of public or private land for demonstrations or artistic performances.

84. Relief which may affect freedom of expression is also commonly sought as ancillary relief in all kinds of proceedings. Common examples are applications for anonymity or other special measures to protect a vulnerable party or witness, for restrictions on reporting of criminal or civil proceedings, and to restrain or punish a contempt of court where the publication in question is of information which might prejudice, or might have already prejudiced, a person's right to a fair trial.

85. There is a real risk that any changes to s.12, by tipping the balance towards freedom of expression and making it more difficult to obtain relief, including interim injunctions, will have significant and unpredictable effects in a range of different areas of law. It would also move the UK's domestic approach away from that of the ECtHR and the ECHR. For instance, it would be incredibly concerning if the change made it more difficult for witnesses' location to be kept private, or for journalists to obtain injunctions to stop foreign states harassing them.[164]

[164] *Davies v Carter* [2021] EWHC 3021 (QB).

Question 5: The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?

86. In our view no case has been made for changing the circumstances in which Article 10, a qualified right, can be interfered with. Freedom of expression has a strong protection by the courts – both in the UK and the ECtHR – with the courts recognising that as well as having intrinsic importance, freedom of expression has special instrumental importance in democratic society. Any changes to the careful balancing exercise the courts undertake in balancing freedom of expression against other competing rights, including Article 8, is unwarranted, risks undermining the protection of ECHR rights in the UK, creating confusion and uncertainty, and increased divergence from the ECtHR.

87. The Consultation appears to suggest that the protection of freedom of expression is at risk, with the case law of the ECtHR showing "*a willingness to give priority to personal privacy*".[165] We do not agree with this position. In respect of Article 10, the case law of the ECtHR has been instrumental in ensuring that the domestic laws of the UK give greater protection to freedom of expression than otherwise would have existed. There are several well-known cases where the UK has been found by Strasbourg to be in breach of the right to freedom of expression.[166]

88. Article 10 is a qualified right however, and must be balanced against Article 8. There will therefore inevitably be some cases where states will be held to be in breach of Article 8 due to reports on personal information.[167] Furthermore, as the JCHR has previously noted: "*English courts have long protected confidential information, good reputation and aspects of personal privacy at common law and in equity, quite apart from Article 8 of the [ECHR] and The [HRA*]",[168] including as far back as *Prince Albert v Strange* – a case from 1849.[169]

89. In respect of the reference to the "*right to be forgotten*" and the case of *ML v Slovakia* referenced at paragraph 206 of the Consultation, concerns around one specific case do not justify implementing potential wide-ranging changes to freedom of expression and changing the 'balance' between Article 10 and other rights. Further, the concept that some personal information should not be accessible for longer than necessary is not alien to

[165] Consultation, see n.7 above, para. 206.

[166] *Sunday Times v UK (No 1)* (1979) App. No. 6538/74 (26 April 1979) (contempt of court); *Sunday Times v UK (No 2)* (1991) App. No. 13166/87 (26 November 1991) (Spycatcher confidentiality injunction); *Observer and Guardian v UK* (1991) App. No. 13585/88 (12 July 1990) (Spycatcher confidentiality injunction); *Tolstoy v UK* (1995) App. No. 18139/91 (13 July 1995) (damages for defamation); *Goodwin v UK* (1996) App. No. 17488/90 (27 March 1996) (protection of journalists' sources); *Bowman v UK* (1998) App. No. 24839/94 (19 February 1998) (leaflets prior to an election); and *Steel and Morris v UK* (2005) App. No. 68416/01 (15 February 2005) (damages for defamation).

[167] For instance, *ML v Slovakia* (2021) App. No. 34159/17 (14 October 2021) and *Von Hannover v. Germany (No. 2)* (2012) Application Nos. 40660/08 and 60641/08 (7 February 2012).

[168] Joint Committee on Human Rights, 'Work of the Committee 2007–2008', HL 10/HC 92, 2009, para. 14.

[169] See also *Argyll v Argyll* [1967] Ch 302.

the UK and has been implicitly recognised by Parliament on several occasions, such as in the Rehabilitation of Offenders Act 1974 and in the prior Data Protection Acts 1998 and 2018.[170]

90. To suggest that freedom of expression is under "*challenge*"[171] also fails to recognise the large number of ancillary provisions in English law, in accordance with the Strasbourg case law, to secure increased protection for freedom of expression, for example: a short limitation period (just 12 months for victims of libel or slander);[172] the offer of amends procedure, set out in s.2 - 4 Defamation Act 1996; provision for applications to strike out abusive claims; a *forum conveniens* rule to limit forum shopping under s.9 Defamation Act 2013; and a threshold of seriousness and a range of statutory public interest defences in addition to the defence of truth in the Defamation Act 2013.

91. It is not clear what the proposal at Question 5 seeks to implement, however the intention appears to us to be to further restrict the circumstances under which Article 10 can be interfered with, particularly when it conflicts with "*competing rights (such as the right to privacy) or wider public interest considerations*."[173] JUSTICE is opposed to any changes which would seek to change the balance between different Convention rights, as this will undermine the careful jurisprudence developed by the UK courts.

92. In respect of the reference to "*competing rights (such as the right to privacy*)", it is well recognised under the HRA that neither freedom of expression under Article 10 nor respect of an individual's privacy under Article 8 have precedence over the other.[174] Where the value of the two Articles conflict, the courts must engage in "*an intense focus on the comparative importance of the rights being claimed in the individual case, taking into account the justifications for interfering with or restricting each right*" and then applying the proportionality test.[175] As the court said in *Molsey v News Group Newspapers Ltd* this is a "*very well established*" methodology[176] and as the Supreme Court noted in *PJS v News Group Newspapers Ltd* its application by the court is one "*which, if undertaken on a correct basis, will not readily attract appellate intervention*."[177] This exercise is incredibly context specific, often requiring the courts to consider weighty human rights considerations on both sides.[178] Legislating for such a fact specific balancing exercise will not only be very difficult and will result in uncertainty when applied by the courts, and by

[170] The third, fourth and fifth data protection principles are that, in specified circumstances, personal data must not be excessive, must be kept up to date, and must be kept for no longer than is necessary for the purpose for which it is processed.

[171] Consultation, see n.7 above, para. 207.

[172] Section 4A Limitation Act 1980.

[173] Consultation, see n.7 above, para. 215.

[174] *Campbell (Appellant) v. MGN Limited (Respondents)* [2004] UKHL 22; *Taveta Investments Ltd* see n.137 above, at [97]-[98] per Nicklin J.

[175] *In Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47 at [17]; *McKennitt v Ash* [2008] QB 73 at [47].

[176] *Molsey v News Group Newspapers Ltd* [2008] EWHC 687 (QB) at [28] (Eady K).

[177] *PJS,* see n.143 above at [20].

[178] As can be seen, for example in *Lee v Ashers Baking Company Ltd and others* [2018] UKSC 49.

publishers when they make decisions on publications, but also risks undermining the flexibility the court requires in this area.[179]

93. It is also unclear what the reference in the Consultation to "*competing rights (such as the right to privacy*)" is to, or what "*wider public interest considerations*" are, beyond that which is already reflected in Article 10(2). If the proposal at Question 5 is to seek to 'tip the balance' in favour of freedom of expression, such as introducing a presumption, in all cases where this right is engaged, it is unclear how any such departure could offer the requisite protection of Article 8 rights in respect of publication of all but the most serious information (which is not the only information that Article 8 seeks to protect), or any of other rights set out in the Bill or the ECHR (including absolute rights). Article 10(2) already sets out the permitted countervailing grounds for interference, an attempt to produce any other list or introduce a test which is different to that under the ECHR would cause considerable uncertainty and risk an increase in instances of the UK being found in breach of the Convention. Legislating or providing guidance on such a wide-ranging set of issues as "*wider public interest considerations*" or "*competing rights*" will also be very unclear. Any such list would also lead to the difficulty because the more specific the list the greater the risk of excluding a ground which was unforeseen and the risk of debate over the meaning of terms, and the vaguer the list the less it will mean.

94. A general presumption in favour of freedom of expression in all cases would risk impacting other areas of law, for example weakening copyright protection. However, a presumption which sought to only apply to specific types of cases involving freedom of expression (for example, misuse of private information) would result in a distinction which would be difficult to draw in a manner which is non arbitrary.[180]

95. It is also important to recognise that in many cases where judgments have been given against newspapers and broadcasters, a key issue in fact was that the publishers did not consider the claimant's "*right to privacy*" or requests for confidentiality. For instance, the failure of the BBC adequately to address Cliff Richard's privacy right was a factor in the judgment against the BBC in *Richard v The British Broadcasting Corporation (BBC) & Anor.*[181] Arguably, if, in these cases, the editors had weighed the claimant's right to privacy against the public interest in publication, they would either not have published in the first place, or they would have explained to the court why, in their view, there was no reasonable expectation of privacy, or why the public interest prevailed over the right to privacy. The judges would have taken into account the editorial judgment. Any changes

[179] The Culture, Media and Sport Committee in 2010 after conducting what their report described as the *'most wide-ranging enquiry this committee has undertaken*', concluded that they did not consider that it would be right to legislate on privacy and that "*privacy should continue to be determined according to the common law, and the flexibility that permits, rather than set down in statute*": Culture, Media and Sport Committee, 'Press Standards, privacy and libel' HC-362/I, (2010), para. 67.

[180] This is especially since the line to be drawn between cases based on defamation and those based on confidentiality (or the tort of misuse of private information) is not clear (see further *Bloomberg* v *ZXC* [2022] UKSC 5).

[181] [2018] EWHC 1837 (Ch) at [111], " *'the principal concern of the BBC seems to have been factual accuracy and defamation, and not privacy-related concerns. Apparently the lawyers had not flagged that up to her as a specific risk. [The editor] regarded such matters as editorial, not legal*...". See also *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB), as recorded by Warby J at para 136(3) and Appendix B and the High Court decision in *ZXC V Bloomberg* [2019] EWHC 970 (QB).

to the approach to freedom of expression may not have any impact on those cases where the claimant's right to privacy was simply disregarded by the editor or journalist.

Question 6: What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?

96. We agree that the protection of journalist sources is of great importance to the freedom of the press. Indeed, this has been recognised by both the Strasbourg Court[182]and domestic courts.[183] The Consultation states the Government wishes to ensure that sources "*are properly protected*", implying that it is of the view that currently they are not sufficiently protected. However, no evidence is provided in support of this conclusion and in our view there is no evidence to suggest that it is an issue.

97. Journalistic sources are currently protected under s.10 of the Contempt of Court Act 1981 ("**CCA**") which sets out a qualified duty on the courts not to order the disclosure of journalists' sources save where necessary in the interests of justice, or national security or for the prevention of disorder or crime, where the burden is on the applicant.[184] In our view this already provides sufficient protection for sources. 'Source' has been widely defined to capture "*anyone provide[s] information to others with a view to that information being published to the public or a section of the public*"[185] and the courts already provide a high degree of protection. For example, the court has refused to order disclosure even where the identity of a source is known,[186] or the details of individuals behind a campaign which accused the applicant of murder and was found to constitute libel and harassment.[187]

98. Conversely where disclosure has been ordered it is generally in limited and fact specific circumstances. For example, in *Various Claimants v MGN Ltd*[188] the court refused to vary an order requiring a newspaper publisher to disclose call data relating to the unlawful interception of voicemail messages of various celebrities, even though it was possible that the journalistic identity of some sources might be revealed. Disclosure would have large cost savings to the parties, was limited to only what the applicants required, concerned unlawful activities and not activities as confidential journalistic sources, and there was no public interest claimed in the information.

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[182] See *Goodwin v UK* (1996) App. No. 17488/90 (27 March 1996) in which the Court held that protection of journalists' sources "*is one of the basic conditions for press freedom*".

[183] In *Terry (formerly LNS) v Persons Unknown* [2010] EMLR 16 at [20], Tugendhat J (as he then was) held, in the context of a discussion in respect of injunctions against persons unknown, that:

> "Journalists do not normally reveal their sources and can rarely be obliged to do so: *Financial Times Ltd v United Kingdom* [2010] EMLR 21. As that case showed, even leak enquiries conducted with the resources of a major corporation, backed up by specialist investigators, commonly fail to identify the source of a leak."

[184] P. Londono, *Arlidge, Eady and Smith on Contempt* (Sweet and Maxwell, 2019), p.106.

[185] *Hourani v Thompson* [2017] EWHC 173 (QB), [2017] 1 WLR 933 At [33] per Warby J (as he then was).

[186] *Various Claimants v News Group Newspapers* [2020] EWHC 1435 (Ch).

[187] *Hourani* see n.185 above.

[188] [2019] EWCA Civ 350.

99. Given the fact specific circumstances in which the genuine need for disclosure might arise, it is important that the courts retain flexibility as to the circumstances in which to order it. Further, any significantly greater protection to journalists' sources may have adverse consequences including:

    a) abuse of the privilege by journalists, who may feel less inclined to thoroughly vet their source, thus increasing the risk of misinformation;

    b) lacunas arising in respect of social media publishers, who may fall outside the section but nonetheless need to be required to disclose their source; and

    c) abuse of the privilege by sources themselves, who may feel less inclined to be truthful/ avoid hyperbole.

100. If the problem the Government is seeking to address is not with the courts compelling disclosure but the number of production orders served by the police on journalists, then the appropriate reform would be to the Police and Criminal Evidence Act 1984, which provides the police with the power to apply for these orders.[189]

101. We also note that the Government has recently consulted on reform of the Official Secrets Act following a Law Commission review on the Protection of Official Data.[190] That consultation includes proposals to increase sentences for publication of leaked information. However, the Home Office is not taking forward the Law Commission's proposal for a specific public interest defence.[191] If the Government is concerned about protecting journalists and their sources, this would likely have a much greater impact.

Question 7: Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?

102. As set out above in response to Questions 4 to 6, we do not consider that there is a compelling case for changing the approach to freedom of expression through a human rights framework.

103. We also note that the Consultation, while stating that it is seeking to strengthen freedom of expression, also criticises developments in case law in relation to the rights of protesters pursuant to Articles 10 and 11 ECHR.[192] Protest is a fundamental element of freedom of expression,[193] yet the Government is seeking to limit it through the Police,

[189] Schedule 1, Police and Criminal Evidence Act 1984.

[190] Home Office, 'Legislation to Counter State Threats (Hostile State Activity) – Government Consultation' (May 2021).

[191] *ibid*.

[192] Consultation, see n.7 above, para. 135.

[193] If the Government wishes to draw comparisons to protection of freedom of speech in the US, there the right to protest and assembly is a core element of the First Amendment. The US Supreme Court has been clear that "*a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger*": *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); Cox v. Louisiana, 379 U.S. 536 (1965).

Crime, Sentencing and Courts Bill ("**PCSC Bill**") which is currently making its way through Parliament. The PCSC Bill contains many measures that would severely limit freedom of expression, including a proposal to allow the Police to restrict protests on the grounds of their noisiness.[194] Similarly, the Government attempted to include, at a late stage, a range of amendments targeting protesters, such as Protest Banning Orders[195] and a new offence of 'locking on'.[196] Protest Banning Orders would have been a new type of 'hybrid order' that can impose broad and severely intrusive requirements on individuals who have taken part in, or contributed to another person taking part in, more than one protest within a five-year period. By comparison, measures banning people who have organised two or more protests in the previous 12 months from organising further protests and measures subjecting individuals who take part in more than one unauthorised protest to up to three years in prison have been passed in Russia[197] and Belarus[198] respectively. While the House of Lords stripped these amendments from the Bill, they remain indicative of the Government's contradictory approach to freedom of expression. As with any human right, freedom of expression is a right that applies to all: seeking to enhance it for some while limiting it for others is very concerning.

[194] For more information on the Bill and its measures, see JUSTICE's briefings here.

[195] Protest Banning Orders would have been civil orders, but breach of the conditions could result in a prison sentence of up to 51 weeks or an unlimited fine, or both. Protest Banning Orders could have been imposed on an individual either on conviction of a "protest-related" offence, or without conviction.

[196] The offence was incredibly broad, and included where a person intentionally attaches (i) themselves to another person, to an object, or to land, (ii) a person to another, to an object, or to land, or (iii) an object to another object or to land. The individual must intend for the act to cause serious disruption to two or more individuals or an organisation, or be reckless as to such consequence.

[197] Amnesty International, 'Russia: No place for protest,' (August 2021), p.6.

[198] 'Belarus toughens laws against protesters and 'extremism'', Euronews (June 2021); 'Belarus Strongman Toughens Protest Laws', The Moscow Times (June 2021).

II. Restoring a sharper focus on protecting fundamental rights

A permission stage for human rights claims

Question 8: Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters? Please provide reasons.

Question 9: Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

104. We are strongly opposed to the introduction of any permission stage. This would add an additional barrier to rights claims, risks further cases going to Strasbourg, is unnecessary for dealing with unmeritorious claims, and will introduce significant uncertainty and confusion in the justice system. We address both questions 8 and 9 on a permission stage for claims under the new Bill of Rights together below.

The concept of "genuine human rights matters"

105. The Consultation conflates spurious or unmeritorious claims i.e. claims in which a breach of the individual's rights has not occurred, with claims where a breach of an individual's rights has occurred but the breach in the Government's view is not significantly serious. The Consultation refers to a number of HRA claims which were ultimately unsuccessful as the sort of claims the permission stage would aim to deal with.[199] However, as the Chair of the JCHR has pointed out these are not examples of "*trivial*" breaches but examples of cases that failed – the public body was not found to have acted unlawfully.[200] By conflating these two things, the Government is suggesting that breaches of rights are only "*genuine*" if the individual has suffered a "*significant disadvantage*". Where a 'lesser' disadvantage has been suffered this is, in the Consultation's view, to be treated the same as cases where there has been no breach.

106. We fundamentally disagree with this concept. Human rights are universal – they exist for everyone.[201] To suggest that some unlawful human rights breaches are less deserving of redress than others drives a coach and horses through this fundamental concept. It should not matter what the impact on an individual is of the breach of their right or if the breach raises questions of "overriding public importance" – the purpose of human rights claims is to protect individuals from the unlawful abuses of state power and ensure state accountability, whatever that unlawful abuse may be, regardless of the view of the majority

[199] Consultation, see n.7 above and, for instance, para. 127.

[200] Joint Committee on Human Rights, HC 1033, see n.110 above, page 17.

[201] As Lady Hale has said "*The purpose of any human rights protection is to protect the rights of those whom the majority are unwilling to protect: democracy values everyone equally even if the majority do not*." *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [103].

of that abuse. This concept underpinned the post-World War Two origin of the ECHR[202], and is particularly important for individuals who are already minoritised and marginalised in society, for whom protection against the majority or mainstream is particularly important.[203]

107. A human right can also be harmed in a way that is serious, but where this may not be seen as one that gives rise to a significant disadvantage or creates large costs. For example the breach of the Article 10 right of a protestor if they are not able to demonstrate before the Houses of Parliament may not result in a "significant disadvantage" if they can still protest elsewhere, but on the other hand the protester can no longer directly address their audience.[204]

108. Although under the option proposed in Question 9 claims which fail to meet the significant disadvantage threshold will be able to proceed if there was an issue of "*overriding public importance*" this is not a sufficient safeguard - the purpose of human rights is to protect individuals from abuses of state power.

109. It is also worth reiterating the key principle of the Convention first articulated in *Airey*,[205] that the rights protected must be "*practical and effective*" rather than "*theoretical or illusory*". This, along with the Article 13 right to "*an effective remedy before a national authority*" for a violation of Convention rights, will be lost by the introduction of a permission stage, which would deprive those considered to have "trivial" claims of protection and redress.

"Frivolous", "spurious" or "unmeritorious" claims

110. The fact that a public body must defend claims against them, which may not be successful, cannot be framed as objectionable in itself – it is the very nature of having a democratic society where all, including public bodies, are governed by law. The Consultation provides no evidence that the UK courts are having to address excessive "*trivial and unmeritorious*" human rights claims. Nor does it provide any analysis and evidence as to the impact it thinks that the permission stage will have on unmeritorious claims or, importantly, meritorious claims which may be deterred as a result.

111. There are already several barriers to bringing a HRA claim and tools the courts can use to dispose of unmeritorious claims:

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[202] Winston Churchill, Addressing The Congress of Europe, (1948): "*The Movement for European Unity must be a positive force, deriving its strength from our sense of common spiritual values. It is a dynamic expression of democratic faith based upon moral conceptions and inspired by a sense of mission. In the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law*."

[203] Lord Irvine, the Lord Chancellor at the time, described the HRA as a "*modern reconciliation of the inevitable tension between the democratic right of the majority to exercise political power and the democratic need of individuals and minorities to have their rights secured"* (Lord Irvine, 'Government's Programme of Constitutional Reform', (1998)). The suggestion of a permission stage would completely upset this balance.

[204] See Alison Young, 'Human Rights Act Review: Rights and Responsibilities', *Constitutional Law Matters*, referring also to the example of an individual's Article 8 right being harmed when their house lies under the flight path of a nearby airport.

[205] *Airey v Ireland* (1979) App. No. 6289/73 (9 October 1979).

a) The defendant must be a public authority within the definition at s.6 HRA. And claimant must also be a "victim" under s.7 HRA to bring a claim against a public authority. This already limits the type and number of claimants, including often preventing non-governmental organisations and other entities being able to bring a claim.[206] It is also not clear how the permission stage would interact with the victim test.[207] Introducing an additional permission stage will reduce further the narrow category of persons who can bring an HRA claim and bring the UK's protection of rights in disjunct with the Convention.

b) The normal rules on standing apply in claims for judicial review, where the applicant must show that they have "*a sufficient interest in the matter to which the application relates*."[208]

c) In the judicial review context there already exists a rigorous permission (or 'leave') stage, where along with standing claimants must show that they have an arguable case. The court can also refuse to grant permission if "*the outcome for the applicant would not have been substantially different*" if the conduct complained of had not occurred.[209] The Court must consider this question if the defendant asks it to do so and may also consider it of its own motion. An additional permission stage is not necessary and risks confusion. Not least because a permission stage for HRA claims would cause considerable uncertainty as to how it could interact with judicial review permission and require courts to consider additional steps and arguments.[210]

d) There also already exists a general minimum "*threshold of seriousness*" requirement in many aspects of UK law. For instance, in the context of defamation, damage to reputation must pass a minimum threshold of seriousness.[211] Further, under the ECHR, the Strasbourg Court will apply a minimum "*threshold of seriousness*" or "*severity*" in order for acts to fall within the scope of an article. In

[206] See, for example, the recent decision in *R (Reprieve) v Prime Minister* [2020] EWHC 1695 at [41], where Reprieve were not considered to be "victims" for the purpose of the applicability of Article 6 arising out of proceedings concerning extradition and ill-treatment of individuals not party to the case.

[207] As the chair of the JCHR has pointed out, Joint Committee on Human Rights, HC 1033, see n.110 above, p.16.

[208] S.31(3) Senior Courts Act 1981.

[209] S.31(3C) Senior Courts Act 1981.

[210] Lord Carnwath in responding to a question from the Justice Committee on the proposed permission stage has said "*To the extent that most of the human rights cases are brought by judicial review, I do not see that making much of a change*." Justice Committee, HC 1087, see n.107 above, p.7.

[211] *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27 at [7]; *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75; *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB).

particular in respect of Article 8[212] and Article 3.[213] It is not clear why any additional threshold of severity or disadvantage is required, or how it would interact with the existing tests.

e) A defendant in the High Court and the County Court facing a claim brought under Part 7 of the Civil Procedure Rules (CPRs) can ask for a claim to be **struck out** if the claim "*discloses no reasonable grounds*", "*is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings*" or if "*there has been a failure to comply*" with court procedure.[214] A defendant can also always apply for summary judgment where the court considers that a claim has no real prospect of success and there is no other compelling reason for a trial.[215]

f) We recognise that the responsibility to apply for strike out or summary judgment is on the defendant public body, however there will likely only be a minority of cases where the defendant considers that there are merits in either application. If a permission stage was introduced the defendant public body would likely resist the permission application in most if not every case. Increasing rather than decreasing their workload.

Ability of individuals to enforce rights

112. It is entirely inappropriate to introduce a permission stage in human rights claims, which will shift responsibility further onto claimants and adds an additional barrier to obtaining redress. Claimants already face several obstacles – legal[216], process based, and practical[217] – to bringing a claim under the HRA. Further, often those who rely on and need the HRA[218] already experience significant barriers to accessing justice. Claimants will often have significant support needs, have protected characteristics, face institutional

[212] For instance, in the context of Article 8 and nuisance impacting a claimant's home environment, the mere fact that the activity causing the alleged nuisance is unlawful is insufficient in itself to bring it within the scope of Article 8. The Court must decide whether the nuisance reached the requisite threat of severity (see *Furlepa v Poland* (2008) App. No. 62101/00 (18 March 2008)). This has meant that the ECtHR has found that "*the requisite threshold of severity is not reached where a pulsating noise from wind turbines (Fägerskiöld v. Sweden* (2008) App. No. 37664/04 (25 March 2008)) *or the noise emanating from a dentist's surgery (Galev and Others v. Bulgaria* App No. 18324/04 (29 September 2009)) *are insufficient to cause serious harm to residents and prevent them from enjoying the amenities of their home*": ECHR, 'Guide on Article 8 of the Convention – Right to respect for private and family life' 2021, para. 495.

See also in respect of Article 8 where the ECtHR found that the "threshold of seriousness" was not met: *Denisov v. Ukraine* (2018) App. No. 76639/11 (25 September 2018) at [133]; *Gražulevičiūtė v. Lithuania* (2021) App. No. 53176/17 (14 December 2021) at [110].

[213] *Jalloh v. Germany* (2006) App. No. 54810/00 (11 July 2006) at [67]; *Gäfgen v. Germany* (2010) App. No. 22978/05 (1 June 2010) at [88]; and *Bouyid v. Belgium* (2015) App. No. 23380/09 (28 September 2015) at [86].

[214] CPR 3.4(2).

[215] CPR 24.2.

[216] Such as, the victims test (s.7 HRA) and the need for there to be a public authority breaching the right (s.6(1) HRA) and the need to show a substantive breach of rights.

[217] Such as costs, resources and difficulties obtaining legal representation.

[218] For instance, Article 3 directly requires public authorities to take steps to prevent torture and ill-treatment. This requires laws in place to adequately protect vulnerable groups from ill-treatment and for public officials to act to protect vulnerable people from harm inflicted on them by others.

barriers and may be highly vulnerable, such as victims of trafficking and modern slavery, or survivors of domestic abuse.

113. It is very unclear how claimants will be able to surmount the additional barrier placed by a permission stage. A "*significant disadvantage*" is a much higher threshold to meet than the existence of "*reasonable grounds*" or a "*real prospect of success*" which apply in strike out and summary judgments, and one that does not exist in any other area of the law.

114. It will be particularly difficult to demonstrate "*significant disadvantage"* as it will require claimants to demonstrate the merits of their claim at a very early stage of their case, before it has been litigated at all or they have received any disclosure from the defendant public body.[219] The duty of candour that applies to defendants in judicial review claims[220] does not apply in other civil or public law claims, therefore there would be no obligation on the defendant public body facing a HRA claim outside of judicial review to put "all the cards face up on the table."[221] This will make it even more difficult for claimants, since, as the courts have previously noted "*the vast majority of the cards will start in the authority's hands*."[222] These difficulties will also apply to the court faced with the unenviable task of having to consider a permission stage for substantive human rights claims without having access to any disclosure or full arguments. The Consultation refers to the Strasbourg Court's case management requirements, but these are not comparable, since by the time a case gets to Strasbourg it will first have been litigated domestically and the impact of the human rights breach will have been likely previously considered.

115. These concerns are worsened by the fact that many claimants will likely not have legal representation at the permission stage, possibly having issued their case as litigants in person and/or not qualifying for publicly funded legal advice and representation. In the judicial review context, the Legal Aid Agency in certain circumstances will refuse payment for work done on an application for permission for judicial review where permission is not granted.[223] These limits already cause significant issues in judicial review, discouraging many from bringing proceedings as time-consuming work is done 'at risk' if permission is not obtained.[224] It would be incredibly concerning if the same were to apply for all claims relying on human rights.

Government and public body accountability

116. Introducing a permission stage with a condition that individuals must have suffered a "*significant disadvantage*" will reduce the accountability of public bodies, and in turn the

[219] Further, in cases involving parallel criminal investigation or an inquest, it may be years after the claim is issued that full disclosure is revealed.

[220] *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 at [31] and [54].

[221] *R v Lancashire CC, ex p Huddleston* [1986] 2 All ER 941 at [945].

[222] *ibid.*

[223] Civil Legal Aid (Remuneration) (Amendment) Regulations 2015, Regulation 5A.

[224] The Westminster Commission on Legal Aid, 'Inquiry into the sustainability and recovery of the Legal Aid sector' October 2021, page 29.

quality of public bodies' decision-making and respect of human rights.[225] The possibility of legal action provides a crucial role in improving public body decision-making[226] and the HRA was introduced to help "*bring about the creation of a human rights culture in Britain*."[227] However, if in practice public bodies will only have to follow the HRA if not doing so will have a "*significant disadvantage*" on someone or raise an issue of "*overriding public importance*", what motivation will public bodies have to incorporate a human rights approach into their everyday decision-making? Public body decision-making that is compatible with individuals' human rights helps ensure better and fairer decision-making – it should be encouraged.

117. The permission stage will introduce a new hierarchy of human rights norms where only some are entitled to an effective remedy. What, if anything could this achieve in terms of efficiencies – this will just mean that contrary to the original idea of "*bringing rights home*", parties will be more likely to take their case to Strasbourg if they do not meet the permission stage test in the UK, including arguing that their Article 13 right to an effective remedy has been breached. This will deprive UK courts of the opportunity of interpreting Convention rights in a UK context.

Incompatibility with the ECHR

118. There is a risk that the proposed permission stage would be incompatible with Article 34 of the ECHR by excluding potential victims from bringing a claim. The Strasbourg Court in the context of Article 34 has recognised the status of "*potential victim*," such as where a law punishing homosexual acts was likely to be applied to a certain category of the population, to which the applicant belonged;[228] where a claimant was not able to establish that the legislation they complained of had actually been applied to them on account of the secret nature of the measures it authorised;[229] or when an individual's removal from a country had been ordered, but not enforced.[230] By virtue of s.7(7) HRA the victim test is given the same meaning as under Article 34[231] and the UK courts have recognised that claimants can claim the status of victim if they can establish that they "*run the risk of being directly affected by the measure of which complaint is made*."[232] However, it is unclear

[225] Lord Wolfson of Tredegar has expressly recognised that "*legal systems can have an effect on the conduct of public authorities even without claims being brought*", but counterintuitively suggests that limiting the claims that go to court will "*underline the fact that human rights are serious"* rather than actually simply sending the message that only certain human rights and certain claimants' human rights are worthy of respect: Oral Evidence: Human Rights Act reform, see n.110 above, p.17

[226] See The British Institute of Human Rights, 'The Human Rights Act: A powerful tool for ensuring rights are made real in the UK BIHR's response to the Independent Human Rights Act Review calling for less review and more human rights leadership', March 2021.

[227] Jack Straw MP, Home Secretary, Hansard, 21 October 1998, Vol. 317, col 1357.

[228] *Dudgeon* see n.60 above.

[229] *Klass and Others v. Germany* (1978) App. No. 5029/71 (6 September 1978)

[230] *Spering v United Kingdom* (1989) App. No. 14038/88) (7 July 1989).

[231] *Al Hassan-Daniel v HMRC* [2010] EWCA Civ 1443 at [23]: "*the word 'victim' in section 7(1) … is given its autonomous Convention meaning by section 7(7*)".

[232] *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 at [60]; *Lancashire County Council v Taylor* [2005] EWCA Civ 284 at [39]. In *R (Fox*) the court held that school children could be victims in bringing a claim about the Religious Studies GCSE, despite the agreed syllabus content not having been fully agreed, finding that

how such a potential victim could pass the "*significant disadvantage*" test. There is also no guarantee that their claim would also be classed as having "*overriding public importance*." Likewise, there is no clarity as to whether the "*significant disadvantage*" concept would cover other forms of "*victims*" than the person directly impacted by the rights breach, such as family members where there had been a breach of Article 2 (the right to life).[233]

Practical implications

119. Claims under the HRA, as they would under a Bill of Rights, arise in many different situations, from judicial reviews and statutory tribunal appeals to civil claims for damages. These claims arise across the justice system in courts that have completely different procedures and processes – most of which do not involve or have time for a permission stage.[234] The proposal would require incorporating a separate permission stage to address the merits of a claim each time the HRA is raised – resulting in a serious drain on court and tribunal resources and time.

120. Claims often include both HRA grounds as well as other public and civil law grounds. For example, a claim could raise Article 5 and damages under the HRA, the tort of false imprisonment, wrongful arrest, a breach of statutory duty claim and a claim for misfeasance in the public office.[235] It is going to cause significant confusion and practical difficulties if the court has to address an initial permission stage for the human rights elements of the claim. This is especially so as often a claim may involve common law rights, or common law or statute based claims which cover some of the same grounds as Convention rights.[236] The different grounds will also rely on shared facts, it would not make any sense to split the claims up at such an early stage, but result in the court expending additional time and resources considering only one element of the claim. Alternatively, if the court would be first required to consider and address the other grounds of a claim, the court would still then need to go back and address the human rights element. The upshot is that the proposal would result in additional submissions and hearings, where all elements of a claim could be dealt with more efficiently in one go.

121. The Consultation refers to the proposed permission stage applying to "*claimants*". We note however, that often human rights can be raised as a defence, for instance as part of a defence in criminal proceedings.[237] It would be wholly inappropriate in principle and

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there was sufficient evidence to show that the Claimants were at risk of being directly affected by the measure under challenge.

[233] For example in *Rabone,* see n.25 above, family members were "victims" in relation to a substantive violation of Article 2.

[234] For instance, it is unclear how a permission stage could be incorporated into the immigration tribunal, or how it would work for the fast or small claims track.

[235] The Consultation at Appendix 1, for example, sets out seven different pieces of legislation, as well as several common law causes of action, which cover some of the same ground as Article 5. All of these grounds could hypothetically be raised in the same claim arising from a particular set of facts. Consultation, see n.7 above.

[236] *ibid.* As set out in the Consultation at Appendix 1, domestic legislation and common law principles do in some circumstances cover some of the same ground as the Convention rights.

[237] *Connolly v DPP* [2007] EWHC 237 (Admin). In respect of guidance courts should ask when determining whether a prosecution had interfered with the ECHR to the extent that it should be stayed. See, for instance, *R v. H (Assault*

result in considerable confusion in practice, if defendants in a criminal trial had to go through a permission stage in order to be able to raise a 'human rights' defence.

Application to Wales, Scotland and Northern Ireland

122. Like jury trials, court procedure is a devolved issue in Scotland and Northern Ireland, yet there is no discussion of the impact of these proposals on the devolved nations, or mention of legislative consent conventions.

123. It is therefore unclear what this proposal would mean for cases in which the exercise of a reserved power is scrutinised by the Scottish courts. There are several policy areas where that happens, with immigration being an obvious example. Moreover, the supervisory jurisdiction of the Court of Session can be exercised where there is sufficient connection with Scotland, even though there is a concurrent jurisdiction which may be exercised in England and Wales.[238] The Court of Session is well accustomed to exercising this jurisdiction in relation to the UK Government, which is regularly a respondent in judicial proceedings in the Court, and where Scottish procedural rules obviously apply. If procedural changes were to be enacted in England and Wales but not in Scotland, this could lead to cases where the same decision is subject to review in one jurisdiction but not the other. For example, if the permission threshold was only raised in England and Wales then the same decision of the Secretary of State for the Home Department might be subject to review in Scotland but not in England and Wales. We consider that such a change requires consideration, and we are disappointed at the lack of explanation offered by the Consultation.

124. Not only that, but the rules around permission requirements in judicial review in Scotland are already susceptible to confusion and challenge before the domestic courts on human rights grounds including fairness. We are aware of current cases coming before the Supreme Court in this regard.[239] We consider that introducing a new permission stage or

of Child: Reasonable Chastisement) EWCA Crim 1024, where the defendant's defence of to a charge of assault occasioning bodily harm was one of reasonable chastisement of his son, the defendant's right to a fair trial under Article 6 and right not to be punished for an act that did not constitute a criminal offence under Article 6, had to be balanced against the rights of the son under Article 3.

See also, *R v L*, [2013] EWCA Crim 991, where four unconnected individuals, who, at different stages after conviction, had been found to be victims of trafficking in human beings and to have been coerced to commit their offences, some of which included cultivation of cannabis and prostitution, the Court of Appeal gave guidance to future courts to consider trafficking issues before conviction.

The Article 6 fair trial rights of defendants also have a crucial role in the criminal context. For instance, the decision of the Supreme Court in *R v. Horncastle* see n.13 above in relation to hearsay evidence.

Criminal law provisions must be interpreted in line with the ECHR, as far as possible. See, for instance in *Scottow v CPS* [2020] EWHC 3421 (Admin) in respect of s. 127(2)(c) Communications Act 2003 and freedom of expression (Article 10).

Human rights may also be raised as a defence in other proceedings. For example, Article 8 in a defence to possession or eviction proceedings (see *Manchester CC v Pinnock* see n.15 above).

[238] *Tehrani v Secretary of State for the Home Department* [2007] 1 AC 521 (HL).

[239] See *Prior v Scottish Ministers [2020] CSIH 36* which will consider whether the rules under ss7B – 27D of the Court of Session Act 1998 for oral hearings at the permission stage, are incompatible with Article 6 of the ECHR. Application for leave to appeal to the Supreme Court is waiting determination.

altering existing stages, is likely to only result in more confusion and domestic litigation, including the possibility of Article 6 challenges.

125. It is also unclear what such proposals would mean for Northern Ireland and the Consultation provides no explanation as to how the reforms are intended to be introduced. As noted above, reform of the judicial review procedure is a devolved matter. If significant procedural reforms were introduced in England and Wales, but not in Northern Ireland, this would cause difficulties for the exchange of case law between the jurisdictions which currently share many commonalities including in terms of procedural aspects. We therefore consider that the proposals are unnecessary, and will create more confusion than clarity.

126. We are most concerned that the 'serious disadvantage' test, which we consider to be arbitrary, will undermine commitments in the GFA to guarantee "*direct access to the courts, and remedies for breach of the Convention"*. The direct access guaranteed under the GFA is not subject to any threshold relating to the severity of the disadvantage suffered by an individual who has had their rights breached. Neither should the HRA. Introducing this test would not only risk the UK being in breach of an International Treaty but it would undermine confidence in the UK's commitment to the peace settlement generally, and the principle of respect for human rights and access to justice which underpins it.

Comparisons to apex courts don't make sense

127. The Consultation document refers to the case management conditions similar to the significant disadvantage test that exist for the Strasbourg Court and German Federal Constitutional Court.[240] However, we consider such comparisons are misplaced.

128. In respect of the **Strasbourg Court**: a permission stage to bring a claim to an international court, which also requires all domestic remedies to be exhausted, is not comparable to introducing a permission stage for all claims relying on human rights, in whatever context and at whatever stage in the domestic legal system. The Consultation's proposal is much more restrictive and would have a significantly greater chilling effect on individuals' access to redress.

129. The introduction of further case management conditions for the ECtHR by Protocol 14 was to tackle the serious backlog of cases facing the ECtHR, simplify and speed up the processing of individual applications, and ensure that it could find some form of filtering mechanism to address the most serious cases.[241] However, JUSTICE is not aware that the same issues apply to the UK courts as a whole, and the Consultation document provides no evidence of this either (see paragraph 110 above).[242] Further, it has also been questioned whether or not the "*significant disadvantage*" admissibility criterion for the

[240] Consultation, see n.7 above, para 222.

[241] E.g. Joint Committee on Human Rights, 'Protocol No. 14 to the European Convention on Human Rights,' HL 8/HC 106, 2004.

[242] Alan Greene, 'Culture Wars and Constitutional Statutes: The Government's Proposed Human Rights Act Reforms' *Oxford Human Rights Hub*

Strasbourg Court has in fact reduced the court's backlog and workload. Concerns have been raised that the introduction of the criterion and the necessary interpretation of the notion, at least in the first two years, actually required more of the court's time and may not have enhanced efficiency.[243]

130. The Strasbourg Court has not applied the "*significant disadvantage*" test stringently. It has not been applied to cases concerning Articles 2[244], 3[245] or 5.[246] In relation to cases concerning Articles 9[247], 10[248] and 11[249], the Court must also take due account of the importance of the freedoms and engage in careful scrutiny before declaring a case inadmissible.[250] Further, for important questions of principle the Strasbourg Court has recognised that there may be a "*significant disadvantage*" regardless of the financial amount at stake for the applicant.[251] It is not clear at all if the UK courts would be expected to take the same, more stringent or more lenient approach as the Strasbourg Court.

131. The "*significant disadvantage*" test within Article 35 of the ECHR also has a specific exception for where "*respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits.*"[252] The Consultation however makes no mention of including such a provision in a permission stage in the domestic context. This 'safeguard' clause at Article 35 has allowed the Strasbourg Court to find cases admissible where, for instance, there is a structural deficiency affecting others in the same position as the applicant,[253] or where a decision in principle is required.[254] The Strasbourg Court has also found cases admissible under this 'safeguard' where the national court had failed to 'duly consider' the matter. The purpose of this safeguard is "*to ensure that every case receives a judicial examination, either at*

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[243] Antoine Buyse 'Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35 § 3 (b) ECHR' (2013) p.12.

[244] *Makuchyan and Minasyan v Azerbaijan and Hungary* (2020) App. No. 17247/13 (26 May 2020) at [72]-[73]

[245] *Y v Latvia* (2014) App. No. 61183/08 (21 October 2014) at [44].

[246] *Zelčs v Latvia* (2020) App. No: 65367/16 (20 February 2020) at [44].

[247] *Stavropoulos v Greece* (2020) App. No. 52484/18 (25 June 2020) at [29]-[30].

[248] *Margulev v Russia* (2019) App. No. 15549/09 (8 October 2019) at [41]-[42]; *Sylka v Poland* (2021) App. No. 19219/07 (6 April 2021) at [28]; *Panioglu v Romania* (2020) App. No. 33794/14 (8 December 2020) at [72]-[76]

[249] *Obote v Russia* (2019) App. No. 58954/09 (19 November 2019) at [31]; *Yordanovi v Bulgaria* (2020) App. No. 11157/11(3 September 2020) at [49]-[52].

[250] Richard Clayton QC, 'The Government's New Proposals for the Human Rights Act Part 2: An Assessment' *UK Constitutional Law Association*.

[251] *Korolev v. Russia* (2010) App. No. 25551/05 (1 July 2010).

[252] Article 35(3)(b) ECHR.

[253] *Korolev v. Russia* see n.251 above. For instance, in in *Finger v. Bulgaria* (2011) App. No. 37346/05 (10 May 2011), the Strasbourg Court considered it unnecessary to determine whether the applicant had suffered a significant disadvantage because respect for human rights required an examination of the case on the merits (concerning a potential systemic problem of unreasonable length of civil proceedings and the alleged lack of an effective remedy).

[254] *Živić v. Serbia* (2011) App. No. 37204/08 (13 September 2011), where, in a case concerning disputed employment rights with the claim being approximately EUR 1,800, the Strasbourg Court held that even assuming that the applicant had not suffered a significant disadvantage the case raised issues of general interest which required examination. See also Open Society Justice Initiative, 'The Application of the Significant Disadvantage Criterion by the European Court of Human Rights' 2015, p.2.

the national or at the European level"[255] and links to the principle of subsidiarity and the need for an effective remedy (Article 13) at national level.[256] It is not at all clear if such an approach would be translated into the UK courts' application of any permission stage, and whether, given the permission stage would apply at first instance, it could ever be said that any court has "duly considered" a matter.

132. In respect of the **German Federal Constitutional Court**: the German Federal Constitutional Court is the supreme constitutional court for the Federal Republic of Germany. It is therefore most analogous to the UK's Supreme Court, which also has a test for permission to appeal. As with the Supreme Court, it is appropriate for it have a permission stage for an apex court. It is not comparable to introducing a permission stage for all claims relying on human rights, in whatever context and at whatever stage in the domestic legal system. In general, in Germany all remedies available before the ordinary courts must have been unsuccessful before a constitutional complaint can be lodged.[257] The effect of this is that complaints reaching the German Federal Constitutional Court will already have undergone judicial scrutiny in the lower courts before reaching the permission stage.[258] This sits in contrast with the proposals in the Consultation, which would make the permission stage the first time the human rights claims come before a judge.

133. The criteria for admission to the German Constitutional Court are (a) the complaint must be of fundamental constitutional significance; or (b) if the asserted violation of fundamental rights is either (i) of particular weight or (ii) affects the complainant in an "*existential manner*".[259] We assume that the Government is referring to (b)(ii) when it states that a similar test to the significant disadvantage test exists in the German Federal Constitutional Court. However, there are two other criteria by which admission may be granted. In relation to the "*particular weight*" criteria, this will be fulfilled if the complaint: indicates a general neglect of fundamental rights; is likely to discourage the exercise of fundamental rights; is based on a gross misjudgement of the protection granted by a fundamental right; results from a careless handling of positions protected by fundamental rights; or if it blatantly violates principles of the rule of law.[260] The test for admission to the German Federal Constitutional Court is therefore much broader than "*significant disadvantage*" and includes a number of circumstances in which an applicant may not have suffered a "*significant disadvantage*".

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[255] European Court of Human Rights, *'The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on'*, (2012), p.9. For example, see *Dudek v. Germany* (2010) App. No. 12977/09 (23 November 2010).

[256] The notion of "duly examined" does not however require the State to examine the merits of any claim brought before the national courts, however frivolous it may be. In *Ladygin v. Russia* (2011) App. No. 35365/05, (30 August 2011), the Strasbourg Court held that where an applicant attempts to bring a claim which clearly has no basis in national law, the last criterion under Article 35(3)(b) will nonetheless be satisfied.

[257] Sec. 93 (2) s.1 of the Federal Constitutional Court Act.

[258] Cp. German Federal Constitutional Court, Order of 10 October 1978 - 1 BvR 475/78.

[259] German Federal Constitutional Court, Order of 8 February 1994 - 1 BvR 1693/92 and Sec. 93a (2), 90 (1) of the Federal Constitutional Court Act.

[260] Cp. Schmidt-Bleibtreu/Klein/Bethge/Graßhof, 61st ed. July 2021, BVerfGG § 93a recital 109 et seqq.

Judicial Remedies: section 8 of the Human Rights Act

Para 226: One step towards achieving this is to strengthen the rule in section 8(3) of the Human Rights Act requiring other claims to be considered when awarding damages. We believe that the existing rule does not go far enough, and our proposals would require applicants to pursue any other claims they may have first, either so that rights-based claims would not generally be available where other claims can be made, or in advance of any rights argument being considered, to allow the courts to decide whether the private law claims already provide adequate redress

134. Section 8(3) HRA currently only requires consideration of any relief or remedy that has already been granted or order made. This does not require the court to consider potential and not yet determined claims. Though, the courts may have regard to the availability of alternative remedies in considering whether to grant damages.[261]

135. There is a significant and fundamental difference between having regard to the availability of alternative remedies at the damages stage and preventing a claimant bringing a rights-based claim **at all** on the basis that they **may** have other claims. The fact that an individual may have other claims that they could pursue, whether in private law or public law, does not make the potential human rights breach any less severe or important. It is uncertain what other claims a claimant may have until they bring them.

The proposal is completely impractical and unrealistic

136. This proposal is also completely unworkable and raises many more questions than it answers:

    a) Will courts have to refuse to hear a rights-based claim because of the mere possibility of some other claim that the claimant has not already brought? If so, it is going to be a big drain on public resources – the courts and the defendant, along with the claimant, will first have to address the HRA claim, consider whether any other claims could be made, and then make a decision on whether the HRA based claim can proceed. This is going to require extra stages which public body defendants will presumably wish to engage in and therefore additional resource expenditure. Further, even if the HRA claim cannot proceed, the public body defendant is still going to be faced with all the other non-rights claims, possibly as new claims, that they will have to defend. Then if those fail, they will then have to go back to court and defend the HRA / Bill of Rights claim. It is much simpler to deal with different grounds arising from the same set of facts together rather than separately as would normally happen.

    b) Who will argue to the court that there are other claims? The court is only going to consider this if the defendant argues it, it is unrealistic to expect courts on their own volition for each HRA claim to have to engage in considering whether other claims may or may not exist. It is also not clear that a defendant is necessarily going to want to argue to a court (and therefore also to the claimant) that they consider that

[261] *Dobson v Thames Water Utilities* [2009] EWCA Civ 28 at [52]

the claimant has other private law claims against them that the claimant should pursue against them first.

c) The claims that courts consider are wholly dependent on the claimants' statements of case – if the claimant does not also bring other grounds of claims, the court isn't going to consider them.

d) It is also unclear how any other claims would be determined. Presumably the court, which may not have any expertise in the other non-rights claims, will have to undergo some form of exercise of considering whether the claims could exist or not.

e) What happens if the claimant is not able to pursue other claims first, for example, due to financial constraints and where Legal Aid may not be available?

f) What if the time limit for the rights-based claim expires while the claimant is required to pursue other non-rights based claims?[262]

g) What if the other non-rights-based claims have less chance of success than the rights based claim? Do they first need to be pursued, potentially wasting court time and resources, as well as the defendant's time and resources defending them? Even in the judicial review context where permission will often be refused where a claimant has failed to exhaust other possible remedies, a claimant will not be required to resort to some other procedure if that other procedure is "*less satisfactory*" or otherwise inappropriate.[263]

Question 10: How else could the government best ensure that courts can focus on genuine human rights abuses?

137. See responses to Questions 8 and 9 above.

Positive obligations

Question 11: How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.

138. JUSTICE disagrees with the Government's analysis of positive obligations, and questions the evidential basis offered to justify such significant changes to the UK's domestic human

[262] There is no clear answer as to how a court would deal with an issue of expiring time limits where claimants were required to pursue non-rights claims first, and this will likely lead to further litigation. This can be seen by reference to the decision in *R (Flyde Coast Farms Ltd) v Flyde Borough Council* [2021] UKSC 18 where the Supreme Court held that an applicant could not bring a challenge to an earlier stage of the planning process where the applicant, under the Town and Country Planning Act 1990 s.61N, was outside the time limits that applied to that earlier stage but was within the time limit to challenge the final planning decision. The court saw the statute as regulating the conditions of the exercise of rights which arise from the general law, rather than creating new or replacement rights of public law challenges, and this conclusion turned heavily on the court's interpretation on the aim and purpose of the particular statute (see [42] – [55]).

[263] *R. v Hillingdon LBC Ex p. Royco Homes Ltd* [1974] 2 W.L.R. 805; *R. v Chief Immigration Officer Ex p. Kharrazi* [1980] 1 W.L.R. 1396.

rights architecture. This is because the Consultation incorrectly supposes that (i) requirements for proactive action on the part of the State can be easily defined and distinguished from 'negative' obligations under the Convention; and (ii) that courts have unduly expanded the impact of 'positive' obligations on state bodies, resulting in legal and practical uncertainty.

139. By contrast, JUSTICE finds that courts are in fact conservative when determining the nature and extent of the State's obligation to undertake positive actions when complying with the Convention. Moreover, where such obligations do exist, we consider that they are developed in accordance with common sense and in a way that benefits both the Government as well as the general public. Consequently, any legislative intervention to curtail 'positive' obligations (however these may be defined) would create legal uncertainty and reduce rights protection in the UK, increasing the likelihood of ECHR breaches and consequently the amount (and complexity) of litigation at both a domestic and Strasbourg level.

Positive obligations cannot be easily defined or distinguished from other obligations under the Convention

140. The Consultation defines a positive obligation as a requirement to "*act in certain ways, rather than merely to exercise restraint in interfering with individual liberties"*.[264] This implies that it is a simple exercise to distinguish 'positive' from 'negative' obligations which necessitate "*exercise[ing] restraint in interfering with individual liberties*".[265] However, as Professor Henry Shue explains: "*[i]f one looks concretely at specific rights and the particular arrangements that it takes to defend or fulfil them, it always turns out in concrete cases to involve a mixed bag of actions and omissions...what one cannot find in practice is a right that is fully honoured, or merely even adequately protected, only by negative duties or only by positive duties".*[266] This analysis bears out in the UK's own domestic jurisprudence, with the Supreme Court determining that *"the classification of an obligation as positive rather than negative is not always as easy as in (other cases) [...] The boundaries between them are not susceptible of precise definition"*.[267]

141. The ability of an individual to secure their rights necessarily depends on the State being obligated to do, or to refrain from doing, actions that would result in the violation of the Convention.[268] For example, in the case of *Kurt v Turkey,*[269] the ECtHR identified that, where the State deprives an individual of their liberty, Article 5 ECHR requires its forces to record the date, time, and location of detention, the name of the detainee, the name of the person effecting arrest, and the reasons for detention. In the absence of these basic

[264] Consultation, see n.7 above, para 51.

[265] *Ibid.*

[266] H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, (2nd edn, Princeton University Press 1996), p. 155.

[267] *R (on the application of T and another) v Secretary of State for the Home Department and another* [2014] UKSC 35 at [26].

[268] D. Shelton, *The Oxford Handbook of International Human Rights Law*, (Oxford University Press, 2013), p. 569.

[269] *Kurt v Turkey,* (1998), App. No. 1/1997/799/1002, (2 May 1998).

requirements, there would be inadequate safeguards against arbitrary detention. This would, in turn, render Article 5 ECHR wholly ineffective.[270]

142. The Government refers to a number of uncited cases between 2005 and 2011 in support of its argument against the alleged expansion of positive' obligations, which we clearly cannot assess on their merits. This includes cases involving the Prison Service in England and Wales and its failure to provide those in Prison with treatment for drug addiction. However, the Consultation notes that the Prison Service "*has settled claims alleging a combination of negligence, inhuman and degrading treatment (under Article 3), the violation of the right to a privacy (under Article 8) and discrimination (under Article 14)*", allegedly costing £7million.[271] It is unclear how this relates to the question at hand (especially where the State has opted to settle such claims). JUSTICE suggests that ensuing that public bodies act lawfully would be a more appropriate response to reducing the risk of such costs, rather than trying to immunize the State from such claims in the first place.

143. In the context of protests, the Consultation offers the case of *DPP v. Ziegler & Ors*, in which the UK Supreme Court set aside several protestors' convictions for wilfully obstructing a highway on the basis that they might have a "*lawful excuse*" for such conduct in support of its critique of 'positive' obligations.[272] However, the Government misunderstands, and therefore misrepresents, the case's facts and the court's analysis. Rather, *Ziegler* concerned the proportionality of an interference of protester's rights under Articles 10 and 11 ECHR (i.e., the breach of a negative obligation). It is unclear, therefore, what the Government's concern is with respect to 'positive' obligations, beyond being dissatisfied with its outcome.

144. The Consultation also refers to the case of *R (Ellis) v Chief Constable of the Essex Police*,[273] in which the High Court did not find a breach of Article 8 ECHR where a Police force published the names and photos of individuals who offended as a deterrence measure. Instead, the Government is concerned by "*the potential*" for its engagement.[274] However, *Ellis* neither created nor engaged a 'positive' obligation. Rather, the court assessed whether the Police's actions interfered with the liberties of the claimant. While the Police may subsequently have adapted their practices to mitigate against the risk of liability going forward, it would be incorrect to point to this case as demonstrating "*a real risk of legal challenge*" that emanates from judicial creation or expansion of 'positive' obligations.[275]

145. In sum, for the Convention to have any meaning, the State must both refrain from breaching these rights while also ensuring that it takes steps to facilitate their enjoyment. By limiting the need for any proactive action on the part of the State, the right would be

[270] *Ibid*, para. 125.

[271] Consultation, see n.7 above, p.40.

[272] *ibid*, para 135.

[273] [2003] EWHC 1321 (Admin) 6 WLUK 288.

[274] Consultation, see n.7 above, para. 137.

[275] *ibid.*

rendered meaningless since protection will necessarily involve both refraining from taking action, while also ensuring its proper facilitation. This includes situations where the State must ensure there are appropriate mechanisms in place to prevent breach by the State and its agents, as well as private individuals (i.e., horizontal effect).

Any legislative intervention to curtail positive obligations would risk the UK being in breach of the Convention and create legal uncertainty

146. The requirement for the UK to undertake actions to comply with its obligations is not the result of judicial intervention or interpretation; instead it rest at the heart of the Convention. Every right requires some form of positive action on the part of the state. For example, Article 2(1) ECHR provides plainly that "*Everyone's right to life shall be protected by law*"; Article 3 ECHR prohibits torture, and necessitates action on the part of the State to prevent it; Article 6 ECHR establishes the right to a fair and public hearing within a reasonable time by an independent court. Regardless of how the Government attempts to circumscribe so-called 'positive' obligations, it will remain unlawful for public authorities to act in a way which is incompatible with the ECHR.[276] Any attempt to dilute at a domestic level the obligation of the State to take the steps necessary to proactively guarantee these rights would not only face practical challenges as to its implementation due to the artificial nature of the exercise, but also risk the UK being in breach of the Convention. This would also create a fissure between the jurisprudence of domestic courts, which would be required to apply the restriction on positive obligations, and the jurisprudence of the ECtHR, which would not.

147. This problem would be compounded by the fact that claimants would retain their right to access the ECtHR under Article 34 ECHR,[277] meaning that a claimant who is prevented from claiming that a positive obligation has been breached by the domestic court would nevertheless be able to seek a ruling and just satisfaction from Strasbourg. This would result in the inevitable consequence of the proposed Bill of Rights not effectively implementing Convention rights, and increasing the rate and likelihood of the UK being found in breach of the Convention in Strasbourg. This would no doubt heighten what the Consultation terms "*the risk of costly litigation*"[278] at the Strasbourg level.

148. Finally, we consider that re-framing the HRA along the lines of 'positive' and 'negative' obligations, in order to impose a statutory limitation on the former, would likely result in precisely the legal uncertainty and complexity that the Government claims to be seeking to avoid. Fundamentally, it is not possible to separate and define one from the other since the concepts are highly interdependent (as explained above). Any attempt to do so would undoubtedly result in a significant increase in the number of cases at the Strasbourg level, along with the corresponding financial implications. Circumscribing 'positive' obligations at a domestic level would introduce an unprecedented level of complexity to the UK's

[276] S.6(1) Human Rights Act 1998 and Consultation, see n.7 above, p.110.

[277] "*The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right*".

[278] Consultation, see n.7 above, para. 14.

adherence to the Convention. This is because public authorities themselves would be required to engage in statutory and treaty interpretation to determine the scope of their obligations under the ECHR, rather than follow the decades of guidance and precedents established by the courts.

Courts are in fact conservative with their approach towards positive obligations

149. The Government places heavy emphasis on the case of *Osman*,[279] arguing that it demonstrates how "*courts, in the UK and Strasbourg, have created principles that dictate how such a public authority should discharge its operational duties*".[280] The Consultation states that Threat to Life notifications (previously known as 'Osman warnings'),[281] which arose because of this judgement, have "*added considerable complexity and expense to ongoing policing operations*".[282]

150. However, the evidence of this conclusion is lacking. In fact, the need to afford a margin of appreciation for the police and the difficulty of their operational decisions was clearly at the centre of the judgement. The ECtHR found that:

> "*For the Court, and bearing in mind difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation (to do everything that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge) must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.*"[283]

151. This test, from which the Government notably quotes only in part,[284] affords the State with a significant degree of leeway to determine how to comply best with its obligations under the Convention. This is because the burden rests clearly on the Applicant to demonstrate that the police failed to do all that could reasonably be expected of them to avoid a real and immediate risk to life. As such, the Court is required to afford the State a margin of appreciation when determining the reasonableness of the Police's response.

152. This conservative approach is consistent with previous Strasbourg case law. While there is no clear test for the imposition or expansion of positive obligations, the principles that the ECtHR sets out in *Ilascu*, offer useful context:

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[279] *Osman v United Kingdom* (2000) 29 EHRR 245.

[280] Consultation, see n.7 above, para. 142.

[281] Osman Warnings are warnings of death threat or high risk of murder that are issued by the police to the expected victim if the police become aware of a real and immediate threat to an individual's life.

[282] Consultation, see n.7 above, para. 145.

[283] *Osman*, see n.279 above, para 116.

[284] The Government omits the material wording from the end of paragraph 116: "*This is a question which can only be answered in the light of all the circumstances of any particular case*".

"*In determining the scope of a State's positive obligations, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or disproportionate burden.*"[285]

153. The consistent, and deferential, nature of the test is, therefore, best evidenced by the fact that even *Osman*, despite having "*extreme facts*",[286] failed to satisfy it. Subsequent case law has reiterated that the *Osman* test is "*high*"[287] and "*stringent*"[288] and courts have often found in favour of the Police on the basis that it could not be said that the police knew or ought to have known that there was an immediate risk to life.[289] After reviewing the relevant Strasbourg jurisprudence, Professor Mowbray, who the Consultation quotes extensively and selectively, acknowledges the reluctance of the Court to determine that States have failed to provide adequate police protection, their appreciation of the "*difficult operational challenges facing domestic police forces*", and the "*extreme circumstances necessary before the Court will find a breach of this positive obligation*".[290]

154. Moreover, the *Osman* test is not constantly applied to cases because some cases can be decided without resort to the Convention, merely by the application of ordinary public law principles of fairness, reasonableness and proportionality.[291] Moreover, the Government's claim that *Osman* has resulted in "*considerable complexity and expense to ongoing policing operations*" is difficult to analyse in the absence of an actual financial figure. The Government notes that, in 2019, the four biggest police forces in England received 770 notifications – approximately 16 a month per force. The top four police forces in England, and their number of officers, are as follows: London Metropolitan Police (32,954); West Midlands (7,186); Greater Manchester (7,086); and West Yorkshire (6,957).[292] Given the number of staff (set to increase by 20,000 by 2023),[293] the number of notifications cited by the Consultation alone, in the absence of any concrete financial analysis, is not sufficient to demonstrate that they are especially burdensome to these forces. By contrast, the value of each life potentially saved is incalculable. In addition, we note that the specific requirements for Threat to Life Notifications are not set by the courts but are set out in guidance.[294] Even if the Government's concerns were justified, it would be possible for

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[285] *Ilascu and Others v. Moldova and Russia* (2004) App. No. 48787/99, (8 July 2004), paras 332 and 334.

[286] *Chief Constable of the Hertfordshire Police v Van Colle (administrator of the estate of GC (deceased)) and another; Smith (FC) v Chief Constable of Sussex Police* [2008] UKHL 50, 3 W.L.R. 593 at [115].

[287] *Mitchell v Glasgow City Council* [2009] UKHL 11, 1 A.C. 874 at [31].

[288] *Van Colle*, see n.286 above, at [115].

[289] *ibid* at [118]; *Mitchell* see n.287 above, at [34].

[290] A. Mowbray, *Human Rights Law in Perspective: The Development of the Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) p.221.

[291] *Re Officer L* [2007] UKHL 36, 1 WLR 2135 at [20]; *Van Colle* see n.286 above at [116].

[292] D Clark, 'Number of police officers in the United Kingdom in 2021, by police force', *Statistica.com*. (2022)

[293] Home Office and The Rt Hon Priti Patel MP, 'Government nearly half-way to recruiting 20,000 more officers' (July, 2021)

[294] Association of Chief Police Officers, 'National Threats to Life Guidelines' (2013).

the requirements to be updated or improved by legislation or further guidance without needing to radically alter the entire approach to positive obligations.

155. Moreover, there are numerous examples of courts refusing to expand the scope of 'positive' obligations. For example, in *R. (on the application of Collins) v Secretary of State for Justice*,[295] the High Court decided that the so-called 'house holder's defence'[296] was compatible with the positive obligation to protect life under Article 2 ECHR. The Act provides that the use of force for self-defence where an individual breaks into the victim's house is unreasonable only if the force used is grossly disproportionate.[297] Equally, in *Dove v HM Assistant Coroner for Teesside and Hartlepool*,[298] the High Court held that the Department for Work and Pensions (the "**DWP**") had not assumed responsibility for preventing the death of the claimant who died by suicide two weeks after her employment support allowance was stopped. In doing so, the High Court determined that a positive obligation under Article 2 ECHR was not engaged because the DWP's decision to allocate benefits was solely based on the eligibility criteria, not protecting applicants' right to life.[299] The DWP guidance, which referred to visiting applicants who did not attend a mandatory interview, was merely practical guidance and was therefore insufficient to prove an assumption of responsibility for the individual's welfare.[300]

The benefit of positive obligations

156. The Consultation fails to consider the many circumstances in which positive obligations have served to benefit and strengthen both individuals' rights and good governance, creating positive changes to policies practices and decision-making of public bodies.

157. In addition to Threat to Life warnings, the Consultation criticises *Rabone & Anor. v Pennine Care NHS Trust*,[301] in which the UK Supreme Court held that there had been a breach of a voluntary psychiatric patient's Article 2 ECHR right in relation to a failure to prevent him from taking his own life. The Government criticises it for going "*further than the Strasbourg court by expanding the 'operational duty' under Article 2 ECHR".*[302]

158. This is inaccurate. First, the decision was clearly in line with Strasbourg case law given that the ECtHR subsequently confirmed the operation of positive obligations to patients

[295] *R. (on the application of Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin), Q.B. 682.

[296] S. 76(5A) of the Criminal Justice and Immigration Act 2008.

[297] *Collins* n.295295 at paras [63]- [64]: In reaching its decision, the court held that the ECtHR has consistently held that the reasonableness limb of self-defence as applied in state actor cases under English law is compatible with the Article 2(2) ECHR requirement of "*absolute necessity*". On any view, therefore, the Court considered that test of "reasonableness" in householder cases would not breach the positive obligation in Article 2(1) ECHR as there were reasonable safeguards against the commission of offences against the person in householder cases; Referring to *McCann v United Kingdom* (A/324) (1996) 21 E.H.R.R. 97, [1995] 9 WLUK 163, *Bubbins v United Kingdom* (50196/99) (2005) 41 E.H.R.R. 24, [2005] 3 WLUK 564 and *Bennett v United Kingdom* (5527/08) [2011] Inquest L.R. 218, [2010] 12 WLUK 193.

[298] [2021] EWHC 2511 (Admin)

[299] *ibid* [80].

[300] *ibid* [81].

[301] *Rabone* see n.25 above; see also Consultation, n.7 above, para 134.

[302] *ibid*.

hospitalised on a voluntary basis in *Fernandes de Oliveira v Portugal.*[303] Second, rather than making the law "*uncertain*" and creating "*operational difficulties*", the UK Supreme Court's judgment filled a lacuna in the law regarding a trust's obligations to voluntary psychiatric patients. Given the power of medical professionals to detain voluntary patients in appropriate cases under section 5 of the Mental Health Act 1983, it determined that the difference between voluntary and involuntary patients was immaterial. This appears to be precisely the type of "*common sense*" application of the law, by domestic courts, which the Government says it wants to restore.[304]

159. There are numerous further examples which demonstrate the value of requiring the State to undertake certain (positive) actions to uphold the Convention, for both the Government and the general public. These obligations to:

a) protect life under Article 2 ECHR to require that proper operational and security systems were in place to prevent the murder of PC Keith Palmer during the 2017 Westminster terrorist attack;[305]

b) require the Police to conduct an effective investigation pursuant to Article 3 ECHR into an individual who committed a series of sexual offences;[306]

c) prohibit corporal punishment against a child which amounts to actual bodily harm pursuant to Article 3 ECHR;[307]

d) require a local authority to protect a child from serious neglect or abuse of which it is (or should be) aware pursuant to Article 3 ECHR;[308] and

e) secure adequate and effective arrangements, as far as was reasonably practicable, to protect female prisoners at contracted-out prisons from systemic non-compliant strip searches pursuant to Articles 3 and 8 ECHR.[309]

Application in Scotland and Northern Ireland

160. We also consider that these proposals need to be concerned in the context of their relevancy to, and application in, the devolved nations. In both Northern Ireland and Scotland in particular, there is little evidence that the concerns being raised in this part of

[303] *Fernandes de Oliveira v Portugal* see n.28 above at para 115: "*Concerning suicide risks in particular, the Court has previously had regard to a variety of factors where a person is detained by the authorities (mostly in police custody or detention), in order to establish whether the authorities knew or ought to have known that the life of a particular individual was subject to a real and immediate risk, triggering the duty to take appropriate preventive measures*".

[304] Consultation, n.77 above, para. 3.

[305] Chief Coroner, 'Inquests arising from the deaths in the Westminster terror attack of 22 march 2017: Ruling on Article 2 ECHR', 2018.

[306] *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, A.C. 196.

[307] *A v United Kingdom* (1998), App. No. 100/1997/884/1096, (23 September 1998).

[308] *Z & Ors. v the United Kingdom* (2001), App. No. 29392/95, (10 May 2001).

[309] *R (LW) v Sodexo Ltd* [2019] EWHC 367 (Admin), 1 W.L.R. 5654.

the Consultation exist in those jurisdictions. Indeed, they appear to conflict with the current direction of travel in Scotland with regard to the decision-making and functions of public bodies.

161. Human rights have been actively embedded in the development, implementation, operation and enforcement of law and policy in Scotland, with an express intention of placing human rights concerns at the heart of public service decision-making.[310] Far from interfering with how public services are delivered, such an approach has led to improvements in the way in which public services are delivered.[311]

162. This approach to putting human rights at the heart of public service decision-making and increasing the scope of positive obligations is evidenced by several recent legislative developments in Scotland. For example, the Social Security (Scotland) Act 2018 recognises that social security is a human right and imposes positive obligations on public authorities and Ministers to facilitate access to social security.[312] The Act passed with unanimous consent. We also note the cross-party consent for the measures introduced via the UNCRC Bill and, the work of Scotland's National Action Plan for Human Rights Leadership (see further response to Question 19 below), highlights how the Scottish Government and public sector have embraced positive obligations in Scotland. Far from leading to costly human rights litigation, the view in Scotland is that embedding human rights in this way has led to positive changes in policies, practices, and inspired consistent and quality decision-making. It prevents against individuals having to take costly legal action further down the line and creates better opportunities for public bodies to 'get it right', first time round. The concerns raised by this Consultation about the extension of positive obligations is therefore not shared in other parts of the UK.

163. As explained in response to Question 19, due to the interaction between the HRA, Northern Ireland Act and GFA, positive obligations have played a fundamental role in cementing the peace process in Northern Ireland. The development of positive obligations in Northern Ireland has therefore been driven by the objectives of peace and stability, not financial considerations. It is critical that any amendments to the scope of positive obligations under the HRA are understood in this context.

164. For example, both the Convention and the HRA have played a fundamental role in holding state actors to account and for providing justice to the families of victims. This is best demonstrated by the positive obligation relating to the duty to investigate and conduct inquests into legacy killings under Article 2. That the proposals do not adequately explain the impact of these proposals on Northern Ireland and the peace settlement is particularly

[310] In 2009, Scottish Human Rights Commission describes a human rights based approach as "about using international human rights standards to ensure that people's human rights are put at the very centre of policies and practice".

[311] N. Busby, 'Human Rights and Devolution: The Independent Review of the Human Rights Act: Implications for Scotland', 2021.

[312] Social Security (Scotland) Act 2018, s1.

concerning in the light of ECtHR judgement against the UK in the *McKerr* cases of 2001 – 2003.[313]

165. We also agree with authors of the joint report by KRW Law and Doughty Street Chambers, that to interfere with the positive obligations' regime set out under the HRA, especially in the context of Article 2 ECHR, would be detrimental to confidence in policing in Northern Ireland.[314] One of the key functions of the Northern Ireland Policing Board, as set out in s3(3)(b)(ii) of the Policing (Northern Ireland) Act 1998, is to monitor compliance with the Human Rights Act 1998. The PSNI Code of Ethics, also provided for under the Policing (Northern Ireland Act) 1998, is also designed around the framework of the ECHR as provided for by the HRA 1998.[315] Public trust in the new policing structures and therefore in the peace settlement, has been strengthened by putting human rights at the centre of policing and imposing positive obligations in that regard. We are therefore concerned about the impact that restricting the scope of positive requirements might have in Northern Ireland.

Conclusion

166. Overall, and for the reasons provided above, JUSTICE considers that the HRA finely balances the need to hold the State to account and the rights of individuals as provisioned in the ECHR, all the while providing public authorities with a wide margin of appreciation. Where the State is obliged to act, such obligations have developed in a way that has offered innumerable benefits to ordinary citizens as well as the principle of good governance. Ultimately, any attempt to restrict or dilute the requirement for the State to proactively uphold the Convention would undoubtedly result in both legal uncertainty and the risk of increased litigation both domestically and in Strasbourg. Not only that, but we consider that the current framework for positive obligations also respects the different attitudes and histories within the devolved nations. We consider that any attempts to interfere with this could seriously undermine public confidence and the public will in both Scotland and Northern Ireland.

[313] See *In Re McKerr* (AP) [2004] UKHL12 where the ECtHR found that the UK was in breach of its obligations under Article 2 for failing to properly investigate a series of killings which may have been linked to the actions of state agents.

[314] KRW Law and Doughty Street Chambers, *Report on the potential effects of repeal of the Human Rights Act 1998 by the British Government*, (GUE/NGL Group of the European Parliament, 2016).

[315] Independent Commission on Policing for Northern Ireland, *Report of the Independent Commission on Policing For Northern Ireland, A New Beginning Policing In Northern Ireland: "the Patten Report",* (1999); Police Service of Northern Ireland, 'Human Rights'

III. Preventing the incremental expansion of rights without proper democratic oversight

Respecting the will of Parliament: section 3 of the Human Rights Act

Question 12: We would welcome your views on the options for section 3.

167. The changes that the Consultation proposes to s.3 HRA are premised on the Government's view that the HRA "*as it has been applied in practice, has moved too far towards judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament*"[316] and that "*section 3 has resulted in an expansive approach with courts adapting legislation*," undermining legal certainty and the separation of powers.[317] JUSTICE disagrees with this assessment of the application of s.3 HRA by the Courts over the past 20 years and does not consider that there is a case or evidence for amendment. We set out our view of the case law to this effect in our response to IHRAR[318], and repeat below certain key points.

168. This was overall the conclusion of the IHRAR Panel following a very detailed and considered review of the application of s.3 HRA, concluding that:

> "*notwithstanding the degree of feeling sometimes injected into the debate, there is no substantive case that UK Courts have misused section 3 or 4, certainly once there had been an opportunity for the application of the HRA to settle down in practice. There is a telling gulf between the extent of the mischief suggested by some and the reality of the application of sections 3 and 4*".[319]

169. It is a shame that this analysis by IHRAR appears to have been disregarded by the Consultation.

Section 3 is not used radically and can being useful in supporting the will of parliament

170. Section 3 HRA requires the courts to "*read and give effect*" to legislation "*in a way which is compatible*" with Convention rights, "*so far as it is possible to do so*". Section 3 is most relevant in the limited circumstances where the ordinary, unambiguous meaning of a statute would result in a Convention breach.[320] In these circumstances, the courts may

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[316] See Consultation, see n.7 above, para. 233.

[317] *ibid*, para. 236.

[318] JUSTICE, 'Independent Human Rights Act Review Call for Evidence: Response', see n.3 above, paras. 35 – 57.

[319] The Independent Human Rights Act Review, see n.5 above, ch. 5, para. 182.

[320] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, 2 A.C. 557 per Lord Millett at [60]: "the [section 3] obligation arises (or at least has significance) only where the legislation in its natural and ordinary meaning, that is to say as construed in accordance with normal principles, is incompatible with the Convention." See also *S v L* 2013 SC (UKSC) at [15] per Lord Reed: '*the special interpretative duty imposed by section 3 arises only where the legislation, if read and given effect according to ordinary principles, would result in a breach of the Convention rights*'.

use s.3 to adopt a Convention-compliant interpretation.[321] However, the degree of departure from the ordinary meaning of the words in the legislation is constrained by reference to what is "*possible*." This wording, along with how it has been interpreted by the courts, has meant s.3 HRA has overall not been used to "*alter substantially the meaning of primary legislation".* From the leading case on the application of s.3, *Ghaidan*[322]*,* several principles can be discerned on how s.3 should be used, including that the interpretation must not undermine a "*fundamental feature*" of the legislation[323] and that the courts should not make decisions for which they are not equipped.[324] This approach, as IHRAR concluded following detailed analysis of the case law[325], has meant that s.3 has been used cautiously and in limited circumstances by the courts, in a way that allows the effectiveness of the legislation in question to be upheld and remains consistent with, and in fact supports, Parliament's intention.

171. It may be that the approach of the courts in some specific case and older cases can be criticised,[326] however, there is no evidence that the application of these principles has resulted in interpretations which are inconsistent with Parliament's intention. In responding to the IHRAR we reviewed reported cases relating to s.3 from 2013 to 2021, finding that: (i) there have been very few cases in which the courts have used section 3 - we have found only 24 cases in which section 3 was used to interpret legislation that would otherwise have been incompatible with Convention rights; and (ii) when it has been used this has not been done in a radical way.[327]

172. In cases where the proposed interpretation would undermine a fundamental feature of the legislation – in other words, where the interpretation would conflict with the enacting

[321] *Ghaidan* at [29]; *R v A (No 2)* [2001] UKHL 25, [2001] 1 AC 45, at [108] (Lord Hope: 'There is no need to identify an ambiguity or absurdity'); *Re S (Children) (Care Order: Implementation of Care Plan), Re W ((Children) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10, [2003] 2 AC 291 at [37] (Lord Nicholls: 'Nor is its use dependent on the existence of ambiguity.')

[322] *Ghaidan* see n.201 above.

[323] *ibid* at [19], [33] (Lord Nicholls); [67]-[68], [101] (Lord Millett, dissenting on the basis that 'these questions are essentially question of social policy which should be left to Parliament.') See also *Re S* n.136321 at [40] (Lord Nicholls: 'a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment.')

[324] *ibid* at [33] (Lord Nicholls); at [115] (Lord Rodger). See also *Re S* n.136321 at [40] (Lord Nicholls).

[325] The Independent Human Rights Act Review, see n.5 above, ch. 5, paras. 34 – 80.

[326] R. Ekins and G. Gee identify the case of *R v A (No. 2)* [2001] UKHL 25, [2002] 1 A.C. 45 as the 'highpoint of [section 3's] misuse'. See R. Ekins and G. Gee, 'Submission to the Joint Committee on Human Rights', 2018, para 18. That case was decided in 2001, shortly after the HRA came into effect and before *Ghaidan* was decided.

[327] We analysed 593 cases where judgment was given between 1 January 2013 and 31 December 2020, which Westlaw identified as mentioning section 3 of the HRA. In addition to the 24 cases in which section 3 was used to interpret legislation that would otherwise have been incompatible with Convention rights, there were 30 cases where section 3 was used to support, or as an alternative to, an interpretation that was reached using normal principles of statutory interpretation. We also identified a handful of cases where there was no question of a prima facie breach of the HRA as a result of the statute, but section 3 was used to interpret the terms used in a statute in line with the Convention and to justify the application of ECtHR jurisprudence when applying the statute to the facts of the case. The majority of these cases related to the interpretation of the Equality Act 2010.

F. Powell and S. Needleman, 'How radical an instrument is Section 3 of the Human Rights Act 1998?', *U.K. Const. L. Blog* (March 2021).

Parliament's fundamental intention – the proposed interpretation is rejected.[328] The courts will also decline to make use of s.3 in circumstances where to do so would go beyond their institutional competence. For example, in *Bellinger v Bellinger*,[329] the House of Lords did not find it "*possible*" under section 3 to interpret 'male' and 'female' to include transgender persons who identified as the sex opposite to that which they were assigned at birth.[330] By way of further example, in *AR*[331] the Upper Tribunal held that the Social Security Contributions and Benefits Act 1992 could not be interpreted so as to grant widowed parent's allowance to an unmarried parent whose partner had died, where such a benefit could only be paid to a 'spouse' married under English law.

173. In instances where s.3 is used, its use will be, following the principles expounded in *Ghaidain,* consistent with the intention of Parliament and the purpose of the legislation. In fact, in some instances the courts have felt compelled to use s.3 to give effect to Parliament's intention, since not doing so would "*be contrary to the "grain of the legislation"* in a much more fundamental way.[332] We recognise that s.3 may be used to adopt interpretations that the enacting Parliament did not consider or foresee,[333] however, this is not the same as interpreting statutes in a manner inconsistent with Parliament's intention and can in fact ensure that Parliament's overarching intention is realised. In our review of the case law relating to s.3, we found that s.3 was often used to address unforeseen drafting issues or factual situations that clearly fell within the overall intention of the legislative scheme. For instance, in *Warren v Care Facility,* s.3 meant that an error in documentation provided by a clinic was not fatal to a consenting deceased man's sperm being stored and used by his widow, which was the purpose of the relevant regulations.[334] Similarly, s.3 has been used to address technicalities with legislative wording. In one case, for instance, a "*reasonable excuse*" for not paying tax was held to include not having any tax liability.[335] Section 3 has also been used to interpret legislation in accordance with

[328] See, for example, *AR v Secretary of State for Work and Pensions* [2020] UKUT 165 (AAC); *Steer v Stormsure Ltd* [2020] 12 WLUK 427; *FS v RS* [2020] EWFC 63; *WB (a protected party through her litigation friend the Official Solicitor) v W District Council v Equality & Human Rights Commission* [2018] EWCA Civ 928; *R. (on the application of K (A Child)) v Secretary of State for the Home Department* [2018] EWHC 1834 (Admin); *Re K (Children) (Unrepresented Father: Cross-Examination of Child)* [2015] EWCA Civ 543; *Re Z (A Child) (Surrogate Father: Parental Order)* [2015] EWFC 73; *R (on the application of Boots Management Services Ltd) v Central Arbitration Committee* [2014] EWHC 65 (Admin).

[329] *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467.

[330] *ibid.* A transgender woman argued that she should be recognised as female, and as such that her marriage to her husband should be deemed valid in law. Marriages between persons of the same sex were not valid at that time the Matrimonial Causes Act 1973 s 11(c) was passed.

[331] *AR v Secretary of State for Work and Pensions* [2020] UKUT 165 (AAC).

[332] *Fessal v Revenue and Customs* TC/2013/06524 at [56].

[333] See, for example, *Gilham v Ministry of Justice* [2019] UKSC 44 at [42]-[43]; *Re X* (*Parental Order: Death of Intended Parent Prior to Birth)* [2020] EWFC 39 at [93]; *Wandsworth* LBC v Vining [2017] EWCA Civ 109 at [75]; *Re A (Surrogacy: s.54 Criteria)* [2020] EWHC 1426 (Fam) at, [31]-[32].

[334] A further example is *Re X* see n.333 above, where a parental order in respect of a child born following a surrogacy agreement was overwhelmingly in the child's best interests. However, the biological father had died unexpectedly meaning that the criteria for the making of the parental order as set out in the Human Fertilisation and Embryology Act 2008 ("**HFEA**"), s.54 would not have been met without the use of s.3. The reading down met the policy and legislative aims of the HFEA which "*sought to provide a comprehensive legal framework for those undertaking assisted conception, with the aim of securing the rights of any child born as a result*" [95].

[335] *O'Kane v Revenue and Customs Commissioners* [2013] UKFTT 307 (TC).

other equivalent legislative provisions[336] and the Northern Irish courts have also used s.3 to bring legislation in line with the equivalent provisions for England & Wales.[337]

What is meant by "express will of Parliament"

174. The proposals in the Consultation regarding s.3 HRA are premised on a view that *"the Act… has moved too far towards judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament*." However, Parliament is not a sentient being, and the concept of the "*will of Parliament*" cannot be a fixed concept that clearly provides an answer to any case or facts that come before the courts.[338] Nor can it be determined from the clear words of the statute alone, which will in themselves not address the context and purpose of the legislation or, often, the specific facts before the court.

175. Under long-established common law rules for interpreting statutes, the "*will of Parliament*" is not to be viewed as the actual subjective intention of a particular group of politicians. It is the intention that must be imputed to the legislature by reference to the words used and the context in which they are used,[339] acting on behalf of the public. The "*will of Parliament*" is the legal meaning of an enactment, which the "*the court reasonably imputes to Parliament in respect of the language used*." [340] The legal meaning may or may not correspond to the grammatical or literal meaning. The function of determining the legal meaning of legislation is exclusively the function of the court. In doing this the court applies to the enactment an established set of rules, principles, presumptions and canons which govern statutory interpretation.[341] It is an inevitable consequence of these rules on the interpretation of statutes that the legal meaning as found by the court will, on some occasions, be different from the "*will of Parliament*" as ascertained by those who do not apply the same principles. Parliament is not misled: it is taken to know the laws on statutory interpretation.[342]

See also, *Westfoot Investments Ltd v European Property Holdings Inc* B987/14 where the phrase "in personal occupation" was read down to "in occupation", so that the Heritable Securities (Scotland) Act 1894, s.5(1) could be used to evict legal persons as well as natural persons.

[336] *Gilham v Ministry of Justice* see n.333 above, involved the courts using s.3 to bring the relevant legislation in line with the Equality Act 2010 and EU derived law.

[337] *Re HM's Application for Judicial Review* [2014] NIQB 43 and *R. v McGreechan (Ryan)* [2014] NICA 5.

[338] See also the recent CoA decision of Singh LJ in *R (Kaitey) v Secretary of State for the Home Department* [2020] EWHC 1861 (Admin), [2021] Q.B. 185, regarding "ordinary" statutory interpretation and s.3 style interpretation, at [119]: "*The modern approach to statutory interpretation is to give the words used by Parliament their true meaning in the light of their context and their purpose. In my view, therefore, it is preferable to speak of the purpose of the legislation rather than the intention of Parliament, a phrase which is sometimes apt to mislead*."

[339] See *R (Black) v Secretary of State for Justice* [2017] UKSC 81, [2018] A.C. 215, per Lady Hale at [36]: "the goal of all statutory interpretation is to discover the intention of the legislation… That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose."

[340] *R v. Secretary of State for the Environment, Transport and the Regions and Another, Ex Parte Spath Holme Limited* [2000] UKHL 61, [2001] 1 All ER 195 per Lord Nicholls at [396]. See also, *R (on the application of The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, 2 W.L.R 343 On appeal from: [2021] EWCA Civ 193, 1 W.L.R. 3049 at [29] to [31].

[341] *Halsbury's Laws of England: Volume 96,* (2018) paras 694 697-8, 708 and ff.

[342] These are well-known to the Office of the Parliamentary Council who draft legislation.

176. It is important to remember that for the vast majority of post-HRA legislation, the assumption that the legislation will be interpreted to be compatible with Convention rights is made explicit by the s.19 statement issued by the Minister. In the rare case where the Minister has declined to make a statement of compatibility in relation to a piece of legislation, the courts have been deferential in their use of section 3.[343] In respect of pre-HRA legislation, the intention of Parliament in enacting section 3 of the HRA was that such legislation should, as far as possible, be read in a way that renders it compatible with Convention rights.[344] As the IHRAR Panel concluded "*(t)he enactment of the HRA serves to underline Parliament's intention that all legislation is to be interpreted, so far as possible, compatibly with Convention rights."*[345]

177. In addition, the Government often accepts that s.3 is the appropriate remedy if a breach is found,[346] or may in fact actively ask the court to use s.3 rather than issue a declaration of incompatibility under s.4.[347] To state that s.3 requires the courts to go beyond the will of Parliament (or even the Government) is to overlook this.

178. Parliament of course is always free to legislate to overturn or modify a court's decision on the interpretation of legislation, whether under s.3 or otherwise. Parliament has from time to time legislated to reverse interpretations by courts which applied conventional common law principles of statutory interpretation.[348] As IHRAR concluded[349], s.3 should not be

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[343] See, for example, *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15. See s.19(1)(b) of the Human Rights Act 1998.

[344] *Ghaidan* see n.201 at [40] per Lord Steyn: '*there is the constant refrain that a judicial reading down, or reading in, under section 3 would flout the will of Parliament as expressed in the statute under examination. This question cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the 1998 Act*.'

[345] See Independent Human Rights Act Review, n.55 above, Ch. 5, para. 59.

[346] See for example *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 A.C. 269, per Lord Phillips at [67] 'It is perhaps open to question whether the House would have been prepared to read down the statute had this been anticipated. No party has suggested, however, that the reading down should be replaced with a declaration of incompatibility and I believe that there is good reason to let the reading down stand.' and per Lord Scott at [95] 'I am not sure that, if the point had been taken on these appeals, I would have agreed with my noble and learned friend's reading-down of the statutory power to make control orders… But the Secretary of State has accepted that the relevant statutory provisions should be construed with the words proposed by my noble and learned friend read into paragraph 4(3)(d) of the Schedule... So be it.' See also Lord Phillips, 'First Lord Alexander of Weedon Lecture', (2010).

[347] For instance, Lord Mance told the JCHR that: "*In my experience, it is in no way uncommon that, in this situation, where a question of incompatibility arises, the government lawyers on instruction invite the court to use Section 3 rather than make a declaration of incompatibility. It avoids Ministers getting a degree of egg on their face through having stood up in Parliament and certified compatibility. It means that the legislation is compatible, and courts, not surprisingly, give some attention to that sort of request*." Joint Committee on Human Rights see n.110 above.

The IHRAR Panel also noted that the use of s.3 was not resisted by counsel for the Government in *Ghaidan* and that "In circumstances where the UK Courts would otherwise find legislation not to be compatible with Convention rights reliance on section 3 by the Government is not unusual. Lady Hale in her evidence to the JCHR made that clear. On the contrary, it is usual for the Government to submit that UK Courts should interpret legislation compatibly with Convention rights using the section 3 interpretative power. It is also usual for UK Courts to accede to the Government's view on the approach to be taken." (See IHRAR n.55 above, ch. 5, para. 61).

[348] As Lord Goss has said "as all of this is domestic law, if the Government do not like a decision they can go to Parliament and reverse it", Joint Committee on Human Rights n110, p.18.

[349] Though, as IHRAR noted, despite criticism of earlier decisions relying on s.3, such as *R v A* [2001] UKHL 25, [2002] 1 A.C. 45, although Parliament did not legislate to reverse the effect of the decisions, despite being able to properly do so, (See IHRAR n.55, Ch 5, para. 48).

repealed, or amended, simply because the courts have on occasion adopted interpretations which the Government does not agree with.

The difficulties that would arise if s.3 were repealed or amended

179. Section 3 has been crucial in protecting Convention rights and realising Parliament's overarching intention. Repealing or amending s.3 will significantly undermine the effectiveness of rights protection in the UK. Many cases we identified where s.3 had been used were not a 'radical' use of the courts' interpretative power, but they are arguably depended on s.3 to protect important and fundamental rights. Under the common law principle of legality, a rights-compatible interpretation is generally not possible in the face of clear unambiguous language.[350] Indeed it was the failure of the common law to sufficiently protect Convention rights that led to the HRA being enacted in the first place.[351] However, s.3 has allowed courts to interpret such language, the Convention-breaching consequences of which Parliament could not have intended, in a rights-compatible manner.[352] In addition, under section 3 courts may 'read in' language to a statute and are not limited to 'reading down' legislation.[353] The value of the s.3 can be seen by the recent approaches in New Zealand to section 6 of the New Zealand Bill of Rights Act 1990 (a similar provision to s.3), where the New Zealand courts have taken an approach more akin to that of the UK courts.[354]

180. The use of s.3 has allowed the courts to avoid using declarations of incompatibility, something which the Government also often wishes to avoid (see paragraph 177 above) . If s.3 were repealed or weakened by amendment it is highly likely that declarations of incompatibility would be issued more frequently. Such a declaration does not provide an individual whose rights have been breached with access to a domestic remedy – they do not secure the rights of the applicant or provide them with effective redress.[355] Further, if rights are not enforceable domestically because the courts are constrained in their interpretation of legislation, individuals will likely seek to enforce them at Strasbourg, with more cases ending up in Strasbourg.[356] An increase in declarations of incompatibility, as a former Lord Chancellor has said "*would tend to bring the statute book into unnecessary*

[350] *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 per Lord Diplock at [157].

[351] For example, *Golder v. United Kingdom* n.5353 in which a UK' court's literal interpretation of the Prison Rules resulted in the infringement of a prisoner's rights under Articles 6 and 8. As with many of the pre-HRA cases which the UK lost in Strasbourg, the UK court probably should have decided this case differently at the time, applying the principle of legality (i.e., in this case, the common law right of access to justice).

[352] F. Powell and S. Needleman see n.327 above.

[353] Sir Phillip Sales, 'A comparison of the principle of legality and section 3 of the Human Rights Act 1998', *Statute Law Society Conference* (Belfast, October 2008), p.12.

[354] A. Geddis and S. Jocelyn, 'Is the NZ Supreme Court Aligning the NZBORA with the HRA?', *UK Const. L. Blog,* (December 2021).

[355] A declaration under section 4 has been held not to constitute an effective remedy for the purposes of the ECHR, *Burden v UK* (2008) 47 EHRR 38 [40]–[44].

[356] During a debate on a proposal to weaken section 3, the Home Secretary made the following comment: I cannot see what could be gained by that… apart from the prospect of more cases ending up in Strasbourg because fewer people would be satisfied with the interpretation of the United Kingdom courts" House of Commons Debates, 3 June 1998, vol. 313, cols. 421–2.

disrepute," [357] and would increase the time that has to be spent by Government and Parliament in addressing the incompatibility (if addressed at all). This time will not be well spent, if the legislation's incompatibility was due to an oversight by Parliament or Parliament having not turned their mind to a particular factual scenario and an interpretation under former s.3 could easily have remedied the issue while respecting Parliament's intention for the legislation's purpose.

181. The Consultation cites several cases in which it considers s.3 was used to alter the meaning of legislation such as to undermine Parliament's intention. However, there is no explanation as to why the outcomes in these cases were objectionable. For instance, the Consultation cites *Gilham*[358] as an example of such a case. In *Gilham* a district judge was afforded whistleblowing protections, by finding that the position qualified as a "*worker*" under the Employment Rights Act 1996. In doing so, the court interpreted the legislation in the same way that similar EU law and the Equality Act 2010 had been interpreted, and there was "*no evidence at all that either the executive or Parliament addressed their minds to the exclusion of the judiciary from the protection*"[359] and "*no legitimate aim*" that had been put forward for the exclusion.[360] As Lord Carnwath has since said:

> *"Our decision in Gilham gave effect to Parliament's enacted intentions: first, as expressed in the 1996 Act, that workers should have the benefit of whistleblower protection; and secondly, as expressed in the HRA, that categories of worker should not be discriminated against in the exercise of their Convention rights for no reason. The [Consultation] does not indicate why the outcome is thought objectionable, nor what purpose would have been served by requiring the parties to incur the expense and delay of a trip to Strasbourg to achieve the same result. I remain unrepentant*."[361]

Amendment or repeal of section 3 will result in legal uncertainty

182. Amending or repealing s.3 HRA, will likely also result in considerable uncertainty. First, the courts would still be able to use the common law principle of legality as an interpretative tool. This provides that rights and constitutional principles recognised by the common law will not be treated as overridden by statute unless by express language or clear and necessary implication.[362] However, as set out at paragraph 29.d) the scope of rights protected by the principle of legality is uncertain. Further, it is possible that the

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[357] House of Lords Debates,18 November 1997, vol 583, col 536.

[358] *Gilham v Ministry of Justice* see n.333 above.

Another such case cited in the Consultation is *Director of Public Prosecutions v Ziegler and others* [2021] UKSC 23, 3 W.L.R. 179. This case involved the court finding that if a defendant had been lawfully exercising their Convention rights (Articles 10 and 11), in the sense that an interference with their rights would be disproportionate and unlawful under s.6(1) HRA, they were acting with a lawful excuse and therefore not committing the offence of wilfully obstructing a highway without lawful excuse under s.137. Highways Act 1980. However, this case involved the Supreme Court recognising that legislation enacted prior to the HRA might need to be read in line with developments since the enactment of the HRA.

[359] *Gilham* at [35].

[360] *Gilham* at [36].

[361] Lord Carnwath, see n.4 above.

[362] See *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

courts would develop the principle of legality further, possibly applying it to unambiguous wording as has been previously suggested by the courts,[363] or even using the principle of legality to go beyond what s.3 HRA currently allows.

183. Second, there is real uncertainty as to what the impact of any amendment or repeal of s.3 would have on the interpretation of legislation, both retrospectively and prospectively. We note that the IHRAR Panel was clear that any amendment to s.3 should be prospective only, retrospective change "being a recipe for uncertainty and potential unfairness".[364] However, even if changes to s.3 were prospective only and had a limited temporal scope, such that it only applied to legislation enacted after the change came into effect, this would give rise to obvious practical difficulties, since two different interpretative regimes would apply to legislation enacted at different times. However, if it had unlimited temporal scope, then its application would be very unclear.[365] For instance, there is no clarity as to how the courts should consider and apply legislation that has previously been interpreted using s.3, and whether they would need to follow their precedent decisions, or would they need to reconsider the interpretation of the legislation in light of the repealed or amended s.3. Further, in some instances the courts have considered the interpretation of regulations, where very similar regulatory provisions have previously been interpreted in accordance with Convention rights using s.3, including where the application of the previous jurisprudence was accepted by both parties[366] or in the authoritative practitioners' texts.[367] Amending or repealing s.3 risks different approaches being taken to different regulations, depending on if they were litigated prior to or after the changes to s.3, even if those regulations have the same wording and purpose.[368] As Sir Peter Gross has said:

> "*The other thing that concerned us was that, if we diluted section 3, we would at once be introducing a period of uncertainty. How is the new section different from the old one? What do the changes mean? That is good for litigation, but not good for much else.*"[369]

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[363] See *R v Secretary of State for the Home Department ex parte Simms* [1999] UKHL 33 per Lord Steyn at 340F-H: '…even in the absence of an ambiguity there comes into play a presumption of general application operating as a constitutional principle... This is called "the principle of legality"'. See also 341F–H per Lord Hoffmann, suggesting that 'the principle of legality will be expressly enacted as a rule of construction in section 3', and Michael Fordham and Thomas de la Mare, 'Anxious Scrutiny, the Principle of Legality and the Human Rights Act' (2000) 5(2) Judicial Review 40, 48, suggesting that 'if Lord Hoffmann is right that the 1998 Act does not make any such change, this is *not* because the 1998 Act is weak, but because under *Simms* (properly understood and applied) it can finally be said that *the common law is strong.*'

[364] IHRAR see n.5 above, ch. 5, para. 129.

[365] See, for example, the difficulty in assessing the differences between the HRA s 3, the New Zealand Bill of Rights Act s 6, and the common law principle of legality. Ekins notes that '[a]mending s.3 to introduce some new formulation… might have the same effect as outright repeal (it would depend on the terms of the new formulation) or it might substitute for s.3 some intermediary, alternative rule. In the latter case, the amendment would change the existing statute book in ways that would be difficult to predict.' R. Ekins 'Rights-consistent interpretation and (reckless) amendment' *UK Const. L. Blo*g (24th January 2013).

[366] *Stevenson v General Optical Council* [2015] EWHC 3099 (Admin), 9 WLUK 557.

[367] *Re JC Druce Settlement* [2019] EWHC 3701 (Ch), 12 WLUK 604.

[368] For instance, the cases involving time limits for appeals against disciplinary decisions by regulatory bodies (*Pomiechowski v The District Court In Legnica Poland* [2012] UKSC 20, 1 W.L.R. 1604; *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818, 1 W.L.R. 3156; *Stevenson v General Optical Council* [2015] EWHC 3099 (Admin), 9 WLUK 557).

[369] Justice Committee, HC 1087, see n.107 above, p.18.

Impact on Scotland, Wales and Northern Ireland

184. The devolution statutes all contain an interpretive obligation to construe Acts, bills and subordinate legislation as within the legislative competence of the Assembly / Parliament where it is possible to do so.[370] Since legislation will exceed the competence of the Assembly / Parliament if it is incompatible with Convention rights these interpretative provisions have a similar effect to s. 3 HRA. Although there are differences between these interpretative provisions and s.3, where the question of competence concerns Convention rights "*the proper starting point is to construe the legislation as directed by section 3(1) of the HRA*."[371] As a result, any changes to the HRA are likely to have consequences for the operation of the devolution statutes. In particular, a weaker s.3 will likely result in courts being able to interpret acts of the devolved legislatures as compatible with Convention rights less frequently. A weaker s.3 may therefore result in a greater likelihood that legislation will be struck down as outside the legislative competence of the Assembly / Parliament. Alternatively, where the courts are dealing with devolution issues that involve Convention rights issues and are faced with what may have become conflicting interpretive obligations (under s.3 on the one hand and under the devolution statutes on the other) the consequence may be inconsistencies in the approach to interpretation depending on whether the legislation being interpreted is the product of the Westminster or devolved legislatures. At present, the HRA ensures a clear line of judicial authority across the UK and we consider that this should be preserved.

<u>Option 1</u>: Repeal section 3 and do not replace it.

185. For the reasons set out above we disagree with the proposal to repeal s.3 HRA. This proposal would severely weaken the effectiveness of the HRA (or the proposed Bill of Rights). It would leave a significant lacuna in human rights protection in the UK, resulting in increased declarations of incompatibility which do not assist claimants and require Parliamentary and Executive time to be addressed.

<u>Option 2</u>: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.

186. JUSTICE is opposed to both proposed clauses that would replace s.3. For the reasons above we do not consider that s.3 should be amended, including weakening its interpretative power.

187. The two proposals would replace s.3 with a significantly weaker power that would enable UK courts to interpret the meaning of legislation only where it is possible to do within the "*ordinary reading of the words*" and "*consistent with the overall purpose of the legislation*". While the later requirement is included in the courts' approach to s.3[372] the former would

[370] Section 83 Northern Ireland Act 1998; s.101 Scotland Act 1998; s.154 Government of Wales Act 2006.

[371] *DS v Her Majesty's Advocate* 2007 SC (PC) 1.

[372] *Ghaidain* no.320 above.

significantly diminish the courts' interpretative powers in respect of the Convention (or the Bill of Rights). It would in effect limit the courts to the ordinary principles of statutory interpretation and the limits of the principle of legality (see paragraph 182 above), and all the benefits of efficiency and protection of rights provided by s.3 would be lost. 373 The result, as with the repeal of s.3, will be a clear weakening of human rights protection in the UK, with the Bill of Rights providing no form of enhanced protection of rights.

188. We are also opposed to any interpretative tool which requires the statutory provision to be ambiguous to apply (Option 2A). This would take rights protection in the UK back to the position before the HRA was enacted and would remove the key benefit of s.3 in that it applies to unambiguous legislative wording.[374] It is also unclear how this could interact with the common law principle of legality which will trigger at both ambiguous and general words,[375] and which has been suggested could apply to unambiguous wording.[376] Further, the concept of "ambiguity" and what it means in practice is not clear. For instance, whether it refers to textual ambiguity in the wording or purposive ambiguity. There are also cases where the courts have considered that s.3 HRA should be used and it might be possible to read something in line with the Convention into the legislation, but there has been disagreement about what exactly should be required.[377] It is very unclear how such cases where there are several different interpretations, more than one of which would be compatible with the rights and freedoms in the Bill of Rights, would be addressed under Option 2A.

Question 13: How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?

189. The proposed changes to Parliament's role are not dependent on the HRA or changing s.3, which does not impact Parliament's legislative power. Parliament already can scrutinise s.3 judgments and reverse their results if it so wishes, as discussed at paragraph 178 above.

190. Increasing Parliament's engagement with and scrutiny of judgments where s.3 HRA has been used would require sufficient time and resource to be effective. This is particularly pertinent given the considerable strain that already exists on Parliament's time and its ability to engage in effective scrutiny in primary and secondary legislation. In our view it is key to ensure that legislation passed by Parliament is compatible with human rights in

[373] We note that the IHRAR panel's rejected the suggestion to "[a]mend section 3 to provide that UK Courts give effect to Convention rights in so far as that is consistent with the intention of Parliament that enacted the legislation subject to interpretation", since the proposal "would, in essence, have the same effect as the repeal of section 3" (IHRAR, see n.5 above, Ch. 5, para. 130).

[374] Lord Millett in *Ghaidan* suggested that 'the [section 3] obligation arises (or at least has significance) only where the legislation in its natural and ordinary meaning, that is to say as construed in accordance with normal principles, is incompatible with the Convention.' *Ghaidan* at [60]. See also *S v L* at [15] per Lord Reed: 'the special interpretative duty imposed by sec 3 arises only where the legislation, if read and given effect according to ordinary principles, would result in a breach of the Convention rights'.

[375] *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157 per Lord Diplock.

[376] See *R v Secretary of State for the Home Department ex parte Simms* see n.363 above per Lord Steyn: '…even in the absence of an ambiguity there comes into play a presumption of general application operating as a constitutional principle... This is called "the principle of legality"'.

[377] For example, *Bellinger v Bellinger,* see n.329 above.

the first instance, to avoid the need for courts to use s.3 or s.4. The JCHR has a vital function in analysing bills to check their compatibility with human rights and monitoring issues relating to important human rights judgments, including in respect of s.4 declarations of incompatibility. We would welcome an enhanced role for the JCHR to continue this vital work and ensure that it is able to perform its vital function of scrutinising every Government bill for its compatibility with human rights, but this crucially also requires the necessary resourcing of the JCHR.

Question 14: Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?

191. We agree that a database proposed by the IHRAR Panel of judgments where the courts have relied on s.3 HRA to interpret legislation in a way which makes it compatible with Convention rights[378] could help ensure transparency as to the extent of the use of s.3. The current lack of such a database makes it more difficult to understand, evaluate and monitor the impact of s.3, and thus also the impact of amending or repealing it. A database would ensure that where s.3 is used the Government and Parliament are fully aware and can legislate to modify any such interpretations if they so wish, and, as the IHRAR Panel said, would provide an evidential base for any need for reform.[379] Given the concerns stated in the Consultation as to the use of s.3, we would expect such a database, and analysis of cases, to have been a precondition to any proposal for reform. To ensure a complete picture, we would suggest that any such database should also include cases where s.4 HRA declarations of incompatibility have been ordered. We recognise that the Government and Parliament publish regular updates on the declarations of incompatibility issued and Parliament's response,[380] but, as the IHRAR Panel recognised, there is no official database.[381] In respect of both s.3 and s.4, the database should also include, where applicable, Parliament's and/or the Government's response to the judgments.

192. We note that, the IHRAR Panel recommended that only judgments where s.3 *"is used to interpret legislation and it has or could have made a difference to the Court's interpretation, should be included in the database*",[382] with courts having clearly indicated that the application of s.3 was the reason for their decision.[383] However, for such a database to work and for the cases to be identifiable, guidance may be required for courts to be clear of the relevance and effect of s.3 in their judgments. In many instances courts will also consider 'normal' principles of statutory interpretation and the principle of legality

[378] IHRAR, see n.5 above, ch. 6, para. 187.

[379] As IHRAR stated: "the absence of transparency and analysis by, for instance, the JCHR, can both lead to inaccurate narratives concerning the use of section 3 and to a failure to properly identify where genuine problems arise, which do or might call for remedy by the exercise of Parliamentary Sovereignty" IHRAR, see n.5 above, ch. 6, Para. 189.

[380] For instance, Ministry of Justice, *'Responding to human rights judgments: 2020 to 2021'* (CP, 2021), Annex A (listing all cases in which a declaration has been made until the end of July 2021).

[381] IHRAR, see n.5 above, ch. 5, para. 188.

[382] *ibid*, ch. 6, para. 192.

[383] *Ibid,* ch. 6, para. 191, referring to Lord Nicholls' statement in *Re S & Re W (Care Orders)* [2002] UKHL 10, 2 A.C. 291.

before[384], or alongside, an interpretation under s.3 HRA, sometimes considering that s.3 and Convention are a supporting factor in their reasoning.[385] Section 3 HRA will have had a role in the court's decision which was primarily under the common law rules and presumptions which govern statutory interpretation, but whether it was decisive is often unclear. We are therefore concerned that, given the complexities and nuances in the courts' interpretation of statute, any database will not necessarily clearly identify cases where s.3 was pertinent – both retrospectively and prospectively – and may not be accessible to the public.

When legislation is incompatible with the Convention rights: sections 4 and 10 of the Human Rights Act

Question 15: Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

193. The Consultation suggests that the government is considering proposals to make declarations of incompatibility ("**DOIs**") "*the only remedy available to courts in relation to certain secondary legislation.*" We understand that this would deprive courts of their ability to quash or strike down secondary legislation that is incompatible with the Convention. JUSTICE is strongly opposed to this. It would undermine the constitutional balance between Parliament, the executive and the courts, deny an effective remedy to individuals whose rights have been breached, and would result in confusion when compared to the position under the common law in respect of non-Convention grounds of unlawfulness of secondary legislation.

194. The IHRAR Panel explicitly rejected this proposal. The reasons for this rejection included: (1) that subordinate legislation cannot be treated as equivalent to primary legislation and doing so would be "*offensive to constitutional norms and the rule of law*"; (2) there is nothing incompatible with the rule of law for secondary legislation to be subject to review or quashing by the courts; (3) the HRA already provides a mechanism to protect primary legislation, namely s.4(3) which specifies that where the incompatibility of secondary legislation with Convention rights is required by an Act of Parliament the courts are limited to issuing a DOI; (4) the proposal would risk the government using the breadth of subordinate legislation "*as a means to side-step the detailed scrutiny of Parliament*"; (5) subordinate legislation is "*rarely subject to the same degree of governmental and parliamentary scrutiny, where Convention rights are concerned*" as primary legislation and thus the quashing power is an important "*means by which the State can give effect to Convention rights domestically*"; and (6) it would produce problems for devolution.[386] We agree with these arguments and expand on specific points below.

Constitutional balance

[384] See for example *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 2 W.L.R. 745.

[385] For instance, in *R. (on the application of Stern) v Horsham DC* [2013] EWHC 1460 (Admin), 3 All E.R. 798, the court's conclusion was "powerfully reinforced" by Article 6 at [52].

[386] IHRAR, see n.5 above, ch. 7, paras. 55 – 64.

195. It is well established that secondary legislation that is not authorised by primary legislation is unlawful and of no effect.[387] This is due to the nature of secondary legislation as fundamentally distinct from primary legislation in the legislative hierarchy. Primary legislation is made by Parliament; secondary legislation is made by the executive, not Parliament. It is subject to much less, if any, scrutiny by Parliament.[388] Further, it cannot be amended by Parliament, leaving Parliament with only an "*all or nothing*" option,[389] which is "*firmly rooted in favour of 'all'*".[390] As the Secondary Legislation Scrutiny Committee has recently stated: "*the more that is left to secondary legislation, the greater the democratic deficit because of the absence of robust procedures enabling effective parliamentary scrutiny of secondary legislation*."[391] In fact, when secondary legislation comes before the court, often it is the first time it has been subject to any real scrutiny.[392]

196. Secondary legislation cannot therefore be considered the 'will of Parliament' in the same way as primary legislation.[393] Secondary legislation is an executive act. It is the constitutional role of the courts, in protecting the sovereignty of Parliament and the separation of powers, to identify unlawful executive acts and provide redress for this. The courts' role is to ensure that the executive only exercises its powers to make secondary legislation in the way in which Parliament intended it to do so. The HRA, as with any Bill of Rights, is primary legislation. If secondary legislation is unlawful by virtue of the HRA, there is nothing controversial about the courts finding that the secondary legislation is unlawful and quashing it. As Lord Carnwath told the Justice Committee: "*we are talking about invalidating secondary legislation, which we have been doing for a long time and is perfectly acceptable.*"[394]

197. Limiting the courts to issuing DOIs in respect of secondary legislation that is incompatible with the Convention would be directly at odds with the division of responsibilities across

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[387] *F Hoffman-La Roche & Co AG v Secretary of State for Trade and* Industry [1975] AC 295; *Boddington v British Transport Commission* [1999] 2 AC 143.

[388] R. Fox, and J. Blackwell, *'The Devil is in the Detail: Parliament and Delegated Legislation'*, (Hansard Society, 2014).

[389] Parliament rejects statutory instruments extremely rarely. As of 2016, only 17 SIs had been rejected in the preceding 65 years (House of Lords Select Committee on the Constitution, *'Delegated Legislation and Parliament: A response to the Strathclyde Review'* (House of Lords, 2016), para 40). Subordinate legislation made under the negative resolution procedure in particular receives minimal scrutiny.

[390] Delegated Powers and Regulatory Reform Committee, *'Democracy Denied? The urgent need to rebalance power between Parliament and the Executive'*, (House of Lords, November 2021) para. 31

[391] Secondary Legislation Scrutiny Committee, *'Government by Diktat: A call to return power to Parliament'* (House of Lords, November 2021), para. 23.

[392] J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', *U.K. Const. L. Blog* (February 2021).

[393] The courts recognise that secondary legislation may have the technical approval of Parliament, meaning that "caution" should be shown when reviewing it (*Hurley v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin) 11 WLUK 725 at [55]). However, they have also recognised that the level of parliamentary involvement in secondary legislation is very limited. This is particularly true in relation to secondary legislation made under the negative resolution procedure, as Lady Hale recognised in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, 1 W.L.R. 3820 at [32]. In a review conducted by the Public Law Project of the challenges to secondary legislation under the HRA, six out of the 14 successful challenges identified were to statutory instruments made via the negative resolution procedure. See J. Tomlinson, L. Graham and A. Sinclair n. 392392 above.

[394] Justice Committee, HC 1087, see n.107 above p.17.

the branches of government. It would shift the balance of power significantly from the courts and tribunals to the executive, to the detriment of the rule of law, the accountability of the executive to the courts and Parliament, and of individuals whose rights have been breached. The increased use, and limited oversight, of secondary legislation is already a real concern. This has been raised recently by the Secondary Legislation Scrutiny Committee (SLSC) and the Delegated Powers and Regulatory Reform Committee (DPRRC), with the DPRRC concluding (with which the SLSC agreed[395]) that:

> *"a critical moment has been reached where action is needed to bring about significant change in the way in which legislation is framed so that it is, first and foremost, founded on the principles of parliamentary democracy, namely parliamentary sovereignty, the rule of law and the accountability of the executive to Parliament*."[396]

198. Reducing further the Government's accountability for secondary legislation is very concerning.

The problem with DOIs

199. The proposal would also undermine the purpose of the HRA by significantly increasing the use of DOIs, which provide significantly less protection for human rights for individuals. Individuals whose rights have been breached would have no effective or meaningful domestic remedy – the breach would not be remedied and nor would damages be available.[397] They would have to wait for a minister to decide what, if any, remedial action to take.[398] This is particularly concerning given that the delays in responding to declarations of incompatibility are significant.[399] While the average time lag for all declarations of incompatibility in the UK is 25 months, the equivalent figures in Canada, France and Germany are four, one, and nine months, respectively.[400] This is despite the relatively low number of incompatibility declarations issued in the UK.[401] In addition, more frequent declarations of incompatibility would put increased pressure on Parliamentary

[395] Secondary Legislation Scrutiny Committee, see n.391 above, Summary, para. 3, "we believe, like the DPRRC and others, that a critical moment has been reached when it is imperative that efforts are made to re-set the relationship between Parliament and the executive."

[396] Delegated Powers and Regulatory Reform Committee, see n.390 above, Summary, para. 1.

[397] Under s.8(1) of the Human Rights Act the courts can award damages where they find that an act (or proposed act) of a public authority is (or would be) unlawful. However, by virtue of s.6(2) of the same act it will not be unlawful for a public authority to act in a way which is incompatible with a Convention right if it could not have acted differently as a result of primary legislation (or subordinate legislation which could not have been made differently).

[398] As Lord Carnwath has said in respect of DOIs, "The disadvantage is that a person does not get a remedy and it has to go back to Parliament or whoever to remake it so that it conforms." Justice Committee, HC 1087, see n.107, p.16.

[399] Jeff King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' in Murray Hunt, Hayley Hooper, and Paul Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015).

[400] *ibid* Figure 8.3. King does note that this figure may be skewed by the cases of *R(M) v Secretary of State for Health* [2003] EWHC 1094 (Admin), 4 WLUK 529 and *Smith v Scott [2007] CSIH 9 (Scotland)*; if these two cases are excluded the average lag time for the UK is approximately 17 months.

[401] *ibid.*

time[402] and may merely result in a higher volume of executive-made remedial orders, rather than any significant Parliamentary debate.[403]

There is no need – courts are careful

200. In our view, the courts' current approach to subordinate legislation under the HRA does not create uncertainty. First, there have been relatively few successful challenges to subordinate legislation under the HRA. In a review of HRA cases heard in the period 2014 to 2020 in the Hight Court and Court of Appeal of England and Wales, and the Supreme Court, the Public Law Project found only 14 successful challenges to subordinate legislation.[404] Second, the courts, as with their consideration of any executive act or primary legislation under the HRA, are careful not to be unduly drawn into matters of policy.[405]

201. Third, the courts are well alive to, and take into account, the difficulties that quashing secondary legislation may have on public bodies and third parties,[406] rarely quashing secondary legislation for a breach of the HRA.407 In general, the courts will only find that legislation, including subordinate legislation, is disproportionate if the measure is "incapable" of being operated in a proportionate way, such that it is "*inherently unjustified in all or nearly all cases*".[408] In other instances, the courts instead recognise that there can be subordinate legislation which does not generally infringe Convention rights but does so in its specific application to a certain individual or an identified category of cases.[409] The courts will recognise that it would be inappropriate to quash the subordinate legislation due to the broader policy impacts, and instead make a formal or informal declaration that the application of the legislation to the claimant is unlawful. Alternatively, where only a specific part of the legislative scheme is incompatible, where possible, the court will be careful to confine any remedy to that part.

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[402] The JCHR has stated that "*The pressure on the Parliamentary timetable is already great. Requiring the legislature to grapple with every instance of legislative incompatibility with the Convention, whether in a recent statute or one passed many years before the HRA came into force, would put a significant additional burden on the Government and Parliament (and the Parliamentary timetable*)." JCHR, 'The Government's Independent Review of the Human Rights Act', (Third Report of Session 2021–22) at [127].

[403] Absence of Parliamentary time has been accepted as a 'compelling reason' for the use of such orders.

[404] See J. Tomlinson, L. Graham and A. Sinclair see n.392 above.

[405] See for example, *Carmichael v Secretary of State for Work and Pensions* [2016] UKSC 58, 1 W.L.R. 4550 at [36], where the Supreme Court was clear that a challenge to the impact of a cap on housing benefit was "*a clear example of a question of economic and social policy, integral to the structure of the welfare benefit scheme, and it would not be appropriate to depart from the court's normal approach*."

[406] *R (Save our Surgery Ltd) v Joint Committee of Primary Care Trusts* [2013] EWHC 1011 (Admin), 3 WLUK 738 per Nichola Davies J at [4].

[407] The courts quashed or otherwise disapplied the incompatible subordinate legislation in only 4 out of the 14 successful HRA challenges to subordinate legislation since 2014 (Tomlinson, Lewis and Sinclair, no. [392] above).

[408] *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68, 1 W.L.R. 5055, at [69]. See also, *R (MM (Lebanon) v Secretary of State for the Home Departmen*t [2017] UKSC 10, 1 W.L.R. 771 at [56] (both cases related to the Immigration Rules, which are subordinate legislation for the purposes of the HRA).

[409] For example, in *R (TP, AR & SXC) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37, 1 WLUK 233 at [198] the Court of Appeal stressed that in "*these appeals we are concerned only with the position of the Respondents and those in a similar position to them. These appeals do not concern the validity of the [Universal Credit] scheme as a whole*."

202. For example, in *Re Gallagher's Application for Judicial Review* Lord Sumption declined to quash a provision of subordinate legislation that breached Article 8 rights because it would introduce a discrepancy between the disclosure required of the Disclosure and Barring Service under the Police Act 1997 and the disclosure required under the Rehabilitation of Offenders Act 1974, he therefore made a declaration instead.[410] Likewise, in *Tigere* Lady Hale ruled that the claimant in the case was "clearly entitled to a declaration" that the application of settlement criteria to obtain student loans to the claimant was "in breach of her rights." However, Lady Hale declined to quash the subordinate legislation in question, which therefore "*[left] it open to the Secretary of State to devise a more carefully tailored criterion which will avoid breaching the Convention rights of other applicants, now and in the future*." [411]

203. Where secondary legislation is quashed by the courts, it continues to remain open to the Government to respond by introducing new legislation to achieve the same policy goal without breaching human rights,[412] including through using the remedial orders mechanism at s.10 HRA.

The confusion and uncertainty

204. Outside of the HRA context, courts may quash subordinate legislation if it is *ultra vires.* There is a common law power to quash subordinate legislation which is "discriminatory; manifestly unjust; made in bad faith or if it "*involved such oppressive or gratuitous interference with the right of those subject to them as could find no justification in the minds of reasonable men*."[413] It has not been suggested that this undermines legal certainty.

205. There is also no clarity as to how the proposal at Question 15 would interact with the existing common law powers to quash subordinate legislation. It would be odd and result in considerable inconsistency to limit the courts' ability to quash or declare unlawful secondary legislation in the human rights context, where arguably the potential impacts of a breach on individuals could be the most severe, whilst courts could continue to quash subordinate legislation in other contexts, including for instance if the secondary legislation breaches fundamental common law rights without clear Parliamentary authority.[414] This could also risk litigants and courts adopting an expansive interpretation of other grounds of review of secondary legislation in situations where the courts consider that quashing the secondary legislation is the most appropriate remedy.

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[410] *Re Gallagher's Application for Judicial Review* [2019] UKSC 3, [2020] A.C. 185.

[411] *Tigere v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 W.L.R. 3820 at [49].

[412] As Jack Straw, quoted by the IHRAR Report at Chapter 7, para. 10 (see n.5 above), acknowledged during the parliamentary debates on the HRA: "*in a sense, that does not affect the sovereignty of Parliament, because it is open to Ministers to try to put the subordinate legislation right by simply introducing further regulations. That happens quite often, as any Minister who has held office in the Department of Social Security can testify*." Jack Straw MP, Home Secretary, Hansard, 24 June 1998, Vol. 314, col. 1129.

[413] *R (MM) v Home Secretary* [2014] EWCA Civ 985, [2015] 1 W.L.R. 1073 at [95].

[414] IHRAR, see n.5 above, ch. 7, para. 57 "*It would be curious if in the human rights sphere alone delegated legislation could not be quashed on well-established judicial review grounds. It would also lead to the odd situation where subordinate legislation could be quashed on the basis of their incompatibility with common law rights but not on the basis of incompatibility with statutory rights set out in the HRA*."

Question 16: Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.

206. It is not clear what is meant by "all proceedings" in this question and whether it is intended to include proceedings where courts and tribunals currently do not have any power to grant a quashing order in respect of secondary legislation. If this is the case, it would introduce considerable inconsistency as to the remedies available to courts and tribunals in the Bill of Rights context. In any event, JUSTICE has several significant concerns with Clause 1 of the Judicial Review and Courts Bill[415] and we do not consider that this clause should be "extended to proceedings under the Bill of Rights where secondary legislation is found to be incompatible with Convention rights."

Prospective only quashing orders

207. JUSTICE is opposed to the introduction of prospective only quashing orders ("**POQOs**"), which would involve the courts denying redress to individuals whose human rights have been breached by public bodies. In issuing a POQO, the courts will be determining that an unlawful measure, should be treated as if it were lawful in the past.[416] This goes directly against the rule of law and risks serious injustice: for both the claimant and others in a similar position. For instance, individuals who had been falsely imprisoned in breach of Article 5 would not be able to claim compensation, and individuals found ineligible for a welfare benefit under regulations that breached Article 8 (or even Article 3) would not receive back payments of the benefit.[417]

208. The Government has acknowledged the use of POQOs "*could lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy*."[418] To introduce such measures, while openly accepting the risk of unjust outcomes, in the context of human rights abuses is very concerning. The ECtHR has also held that certain remedies which have prospective only effect cannot be regarded as an effective remedy under Article 13 ECHR.[419] Further, human rights should be equally

[415] See JUSTICE, 'Judicial Review and Courts Bill briefings', 2021-2022.

[416] Clause 1, subsection (4) and (5) of the Judicial Review and Courts Bill set out the implications of doing this – the decision or act in question is to be treated as valid and unimpaired by the relevant defect for all purposes for the period of time before the prospective effect of the quashing order.

[417] By way of example, in 2018 the High Court declared the decision of the Home Office to cut weekly benefits to asylum seeking victims of trafficking by over 40% - from £65 to £37.75 per week - to be unlawful. The judge also held that the claimants and anyone else subjected to the cut be entitled to backdated payments. However, if the court had ordered a POQO, the claimant, and thousands of other highly vulnerable victims of trafficking who had suffered significant hardship due to the reduced funds, would not be entitled to any backdated payments (*K, AM v Secretary of State for the Home Department* [2018] EWHC 2951 (Admin), [2019] 4 W.L.R. 92.

[418] Ministry of Justice, 'The Government Response to the Independent Review of Administrative Law', 2021, para. 61

[419] *Ramirez Sanchez v. France* (2006), App. No. 59450/00 (4 July 2006) at [165] – [166].

The JCHR explicitly raised the risk of the courts granting the new remedies in situations which do not meet the standard of an effective remedy for a breach of ECHR rights. See JCHR, Legislative Scrutiny: Judicial Review and Courts Bill, Tenth Report of Session 2021-2022, para. 28.

applicable to all. The position that they should only, in effect, apply to those impacted by an unlawful measure after a court judgment undermines this.[420]

209. Where a POQO is made, the Government would simply need to pass new legislation that is rights compatible prospectively, without having to remedy the past incompatibilities. This would weaken the accountability of Government and the motivation to ensure that secondary legislation is rights compatible in the first place.

210. As set out in response to Question 15 above, the courts' approach to reviewing secondary legislation under the HRA is cautious and flexible. To introduce POQOs will result in significant legal and practical uncertainty, as courts and public bodies grapple with the new remedies and how the transition between a measure being valid and then quashed going forward is navigated.

The presumption at Clause 1 of the Judicial Review and Courts Bill

211. Clause 1 of the Judicial Review and Courts Bill introduces a presumption in favour of prospective and suspended quashing orders, fettering the courts' remedial discretion. We are concerned that this presumption would be included in any proposal in the context of human rights (though, the IHRAR Panel did not comment on its inclusion.[421])

212. JUSTICE is opposed to this presumption. It may result in the courts using the new remedies in circumstances where it is not appropriate and not in the best interests of justice. This directly conflicts with the Government's stated aim in respect of the Judicial Review and Courts Bill of increasing the courts' flexibility.[422] The presumption currently at Clause 1 of the Bill is also convoluted and risks increasing the length and cost of litigation for public bodies, claimants and the courts, by inviting further arguments at the remedy stage.

213. The presumption at Clause 1 of the Bill also requires the court to consider in particular any action the public body responsible for the unlawful measure has taken or proposes to undertake. Ordering the new remedies based on public bodies' assurances, such as to planned compensation schemes, risks uncertainty and further denial of redress. For instance, it will be very difficult for claimants, and impossible for third parties in similar positions, to enforce any such Government assurances.

Question 17: Should the Bill of Rights contain a remedial order power? In particular, should it be: a) similar to that contained in section 10 of the Human Rights Act; b) similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself; c) limited to remedial orders made under the 'urgent' procedure; or d) abolished all together?

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[420] *ibid.* para. 26.

[421] The panel simply stated that factors to "*guide the discretion to issue suspended and/or prospective quashing orders*" would need to be considered (IHRAR, see n.5 above, Chapter 7, para. 84).

[422] See for instance, 'Judicial Review and Courts Bill Explanatory Notes', para. 19.

214. We agree that "*As a matter of general constitutional principle, it is desirable for amendments to primary legislation to be made by way of a Bill*.", as this allows for greater Parliamentary scrutiny.[423] We also note than in practice Acts of Parliament are more frequently used to address declarations of incompatibility than remedial orders.[424] However, we would not support the abolition of the remedial order process as there are practical reasons why it is sometimes necessary to use a remedial order rather than a Bill. In particular, insufficient space in the legislative timetable means that in the absence of a remedial order the remedy of the incompatibility would be significantly delayed. Even with the availability of remedial orders, there are already significant delays in responding to declarations of incompatibility.[425] The JCHR has accepted that insufficient Parliamentary time for considering the incompatibility and the absence of a suitable Bill in the legislative timetable for remedying it are 'compelling reasons' for use of the remedial order procedure.[426] Further, there are often cases in which it is useful where there is a breach of a right and there is only one possible solution, with no real options or policy choices to be made.

215. That being said, we are of the view that remedial orders should not be used to amend the HRA itself.[427] We therefore support option b). Section 10 HRA is a 'Henry VIII' power which provides the executive with the ability to amend primary legislation through the use of secondary legislation. The use of Henry VIII powers shifts the balance of power towards the executive. They should generally be narrowly construed so as not to permit amendment of the parent statute.[428] To allow remedial orders to be used to amend the HRA risks the executive upsetting the carefully crafted balance that has been struck by Parliament in its enactment of the HRA. In our view it is preferable that changes to the HRA are subject to debate and authorisation by Parliament. We therefore agree with

[423] Joint Committee on Human Rights, 'Making of Remedial Orders, Seventh Report of 2001-02 Session', para 32.

[424] Ministry of Justice, *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020* (2020 CP 347) 30.

[425] The average time lag for responding to Declarations of Incompatibility in the UK is 25 months. The equivalent figures for Canada, France and Germany are four, one and nine months respectively. This is despite the relatively low number of incompatibility declarations issued in the UK (Jeff King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' in Murray Hunt, Hayley Hooper, and Paul Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015)). King does note that this figure may be skewed by the cases of *R(M) v Secretary of State for Health* [2003] EWHC 1094 and *Smith v Scott* [2007] CSIH 9 (Scotland); if these two cases are excluded the average lag time for the UK is approximately 17 months.

[426] See for example, the JCHR's scrutiny of the Human Fertilisation and Embryology Act 2008 (Remedial Order). Joint Committee on Human Rights, (*Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, Second Report of Session 2017–19*, HC 645, HL Paper 68, para 26) and the British Nationality Act 1981 (Remedial) Order. Despite raising concerns about the use of a remedial order when a topical Bill was imminent, given the pressing need to address Convention incompatibility was satisfied that there were compelling reasons to proceed by remedial order (Joint Committee on Human Rights, *Proposal for a draft British Nationality Act (Remedial) Order 2018, Fifth Report of the 2017-19 Session* (HC 926, HL paper 146) paras 27-33).

[427] As was done following the decision in *Hammerton v UK* [2016] ECHR 272 that the HRA's bar on damages for judicial acts 'done in good faith' (under s.9 HRA) was a violation of the right to an effective remedy under Article 14 ECHR.

[428] See, for example, *McKiernon v Secretary of State for Social Security* [1989] 2 Admin LR 133, approved by the House of Lords in *R v Secretary of State for Social Security, Ex parte Britnell* [1991] 1 WLR 198, 204F: '*a delegation to the Executive of power to modify primary legislation must be an exceptional course and… if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach*. 'JUSTICE has also been cautious about the overuse of Henry VIII clauses in other contexts: see, for example, JUSTICE, 'EU Withdrawal Bill: Second Reading Briefing' 2017, para 12; JUSTICE, 'Public Bodies Bill: Briefing on the Second Reading House of Lords' 2010.

IHRAR that section 10 should be amended to expressly exclude the possibility of ministers using remedial orders to amend the HRA itself.[429]

Statement of compatibility: section 19 of the Human Rights Act

Question 18: We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.

216. Section 19 of the HRA requires the Minister in charge of a Bill in either House of Parliament to make a statement, either to the effect that in their view the provisions of the Bill are compatible with the Convention (s.19(1)(a) HRA); or that, although they are unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed with the Bill (s.19(1)(b) HRA).

217. We do not consider that any change is necessary to s.19 HRA. As the Consultation recognises, the purpose of s.19 is to demonstrate that the relevant minster has considered and come to a view as to the compatibility of the Bill with Convention rights. We understand that in practice this involves members from the responsible Government department obtaining written advice from the departmental legal advisers on the compatibility with the ECHR.[430] If s.19 were to be amended there is a risk that this would be lost.[431]

218. In circumstances where the relevant Minister is not able to make a statement of compatibility, but they wish the bill to proceed anyway, this can help draw attention to the human rights concerns with the issue and ensure that the bill is properly scrutinised. For instance, when the Communications Bill was introduced, the Minister made such a statement under s.19(1)(b)[432] as the Government had decided to maintain an existing ban on political advertising and sponsorship in the broadcast media, despite recognising that the ECtHR had held that a blanket ban violated the right to freedom of expression under Article 10 ECHR.[433] This ensured that the issue was flagged up and the relevant parliamentary committees, including the JCHR was able to begin full scrutiny of the offending clause and the Government's justification for risking an incompatibility with the ECHR. As the JCHR said in considering the issue, "*while we accept that introducing legislation accompanied by a section 19(1)(b) statement is not necessarily unjustifiable, we consider that it requires strong justification as a matter of principle.*"[434]

219. In practice, s.19 operates through the Minister including a short statement on the face of a new bill, which is then often also accompanied by a separate analysis as a human rights

[429] IHRAR, see n.5 above, Chapter 9, paras 45-50.

[430] Cabinet Office, 'Guide to Making Legislation' (2022), para. 3.9.

[431] *ibid,* para 11.24. The Cabinet Office states in its Guide to making legislation that "[*t]here is no legal obligation on the minister to give a view on compatibility other than as required by section 19 nor is there a specific requirement for the minister to reconsider compatibility issues at a later stage*."

[432] Communications Bill, available at: https://publications.parliament.uk/pa/ld200203/ldbills/041/03041.i-viii.html

[433] *Vgt Verein Gegeng Tierfabriken v. Switzerland* (2001) App. No. 24699/94 (28 June 2001).

[434] The Joint Committee on Human Rights, Scrutiny of Bills: Progress Report, First report of Session 2002-2003 (2002), para. 15.

memorandum and/or additional elaboration on what the Minister believes to be the relevant human rights issues and why they consider the bill is compatible with Convention rights (or not) in the explanatory notes to the bill.[435] This separate analysis is not required under the HRA, but it is a positive practice, which encourages transparency and accountability on the part of the Government.

220. Altogether the IHRAR Panel, when rejecting a proposal to amend s.19 stated that:

> *"Section 19 plays an important role both in helping to ensure that Government and Parliament consider the application of Convention rights to new legislation. In that respect, there can be no doubt that it has had a major, transformational and beneficial effect on the practice of Government and Parliament in taking account of human rights issues when preparing and passing legislation*."[436]

We agree – the case has not been made for change.

221. The Consultation states that "*[t]here is a debate as to whether section 19 strikes the right constitutional balance between government and Parliament, particularly in relation to ensuring human rights compatibility whilst also creating the space for innovative policies*."[437] It is not clear how the making of a s.19 statement and the publication of analysis of the human rights implications by the Government could impact the "*constitutional balance between government and Parliament*," as the Consultation suggests. [438] Requiring the Government to consider whether the law it proposes is compatible with Convention rights does not undermine the role of Parliament in passing the legislation, but in fact helps support it. Section 19 reflects the importance of legislation when it is introduced in the first place by the Government not being incompatible, or, if the Government considers that it may be, this being clearly brought to Parliament's intention.

222. To the extent that the Consultation is proposing limiting the application of s.19, including in the context of "*innovative policies*", we would disagree with this proposal. As long as the UK is a signatory to the ECHR, the UK is under an obligation in international law to comply with the Convention rights, including through primary legislation. Ensuring that the compatibility of legislation is clearly considered by the Government helps ensure that the UK does not breach these international legal obligations.

<u>Application to Wales, Scotland and Northern Ireland</u>

Question 19: How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

[435] Cabinet Office see n.430 above, para. 3.9.

[436] IHRAR, see n.5 above, chp. 5, para 159.

[437] Consultation, see n.7 above, para. 261.

[438] *ibid*, para. 261.

223. JUSTICE strongly considers that the different interests, histories and legal traditions of the four constituent parts of the UK, are best served via the current regime set out in the HRA. Enacted as it was against a backdrop of negotiation and debate concerning the devolved powers of Scotland, Wales and Northern Ireland, the HRA was specifically designed with the nuances of each devolved administration in mind.[439]

224. Indeed, in embedding the Convention rights into domestic law, the HRA is an integral part of the UK's constitutional arrangements via the devolution statutes for Scotland, Wales and Northern Ireland.[440] Under these statutes, the devolved institutions cannot act or legislate in any manner that is contrary to the 'Convention rights'.[441] The definition of 'Convention rights' is borrowed from the HRA, namely those rights of the Convention that are set out in s1.

225. The devolved settlements are therefore inter-dependent on the HRA, relying on it to define the competency of the devolved legislatures. As explained above, in many areas, the provisions of the devolution settlements also mirror the provisions and protections contained in the HRA. In the twenty years since the HRA came into force, both it and the ECHR have become entrenched within the common law,[442] legislation and parliamentary decision-making of the devolved nations.

226. In this manner, the HRA regime successfully establishes a consistent baseline for human rights protections across the UK, below which the devolved nations cannot operate but upon which they can build. Whilst the devolved statutes and the HRA are 'protected statues', in other respects the implementation and enforcement of human rights are devolved matters, with Scotland and Northern Ireland having their own human rights commissions in relation to issues falling within devolved competence.[443] In its current format, the HRA regime strikes the appropriate balance taking into account the different interests, histories and legal traditions of the home nations whilst retaining the key principles set out in the ECHR, to guarantee uniform rights protection across the UK.

227. We note with regret that the Consultation provides no substantive detail or explanation as to the impact of the proposed reforms on the legal systems of the devolved nations.

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[439] See C.Gallagher, K.O'Byrne et al, *Report on the potential effects of repeal of the Human Rights Act 1998 by the British Government* (European United Left/Nordic Green Left Group of the European Parliament, 2016). One example of this is the specific treatment of Acts of the devolved nations as secondary legislation for the purposes of the HRA (making it clear that they do not enjoy the protection of being subject only to declarations of incompatibility that applies to primary legislation.

[440] The Scotland Act 1998, The Government of Wales Act 1998, The Northern Ireland Act 1998. It is worth pointing out that Northern Ireland received its devolved powers through GFA, which was negotiated as part of the peace process. The Northern Ireland Act 1998, which implements significant parts of the GFA, and the Scotland Act 1998 received Royal Assent just 10 days after the Human Rights Act 1998.

[441] S.29(2)(d) and s.57(2) SA; s.6(2)(c) and s.24(1)(a) Northern Ireland Act 1998; s.81(1) and s.81(1) and s.94(6)(c) Government of Wales Act 2006.

[442] As discussed at Question 1 above, none of the devolved settlements contain a duty on the devolved courts to take into account Strasbourg case law. However, in the context of Scotland, in *Clancy v Caird (*see n.84 above) Lord Sutherland stated that it is the duty of the Scottish courts to have regard to the decisions of the ECtHR when considering the interpretation of the ECHR, therefore bringing the legal position in Scotland into line with that of the HRA.

[443] See Scottish Human Rights Commission and Northern Irish Human Rights Commission

For example, and as explained in response to Q3 and Q8, the Consultation provides no consideration of the impact of proposals relating to devolved matters, such as those concerning court procedure, in Scotland and Northern Ireland.[444] Given the intertwined relationship between the HRA, the devolved statutes and the powers of the devolved administrations to implement human rights generally, we consider that any amendment to the HRA which alters the scope of those powers will impact upon the legislative consent convention. Again, we reiterate our disappointment that the Consultation does not reflect on this matter either.

228. The lack of attention given to the impact of these proposals on the devolved legal systems is symptomatic of the wider failure to consult with the devolved nations generally. We note the comments made by the Governments of Scotland, Wales and the Chief Commissioner of the Northern Ireland Human Rights Commission in this regard.[445] This is particularly surprising given the unequivocal statements made by a range of committees and individuals tasked with reviewing human rights, on the need to work closely with the devolved nations. This includes comments made by the JCHR in 2008,[446] the 2011 Commission on a Bill of Rights[447] and more recently, Alex Chalk MP.[448]

229. In our view, the failure to consult with Scotland, Wales and Northern Ireland or consider the impact of the proposals on the legal systems there, misses the opportunity to explore the distinct ways human rights developed in the devolved nations and the differing approaches to the HRA. Evidence from Scotland, Wales and Northern Ireland proves that far from conflicting with the distinct cultures, histories and legal traditions of the different territories, the HRA provides an effective dovetail and is widely supported. This is broadly reflected in the findings of the Independent Human Rights Act review which found via its evidence gathering that *"there was an overwhelming body of support for retaining the HRA".*

230. For example, JUSTICE notes the concerns raised in the Consultation that *"the growth of a 'rights culture'…has displaced due focus on personal responsibility and the public interest".*[449] However, this sharply contrasts with the position in Scotland whereby the Scottish Parliament is actively promoting and encouraging the development of "*a culture*

[444] S.2 Scotland Act 2016 places the Sewel Convention on a statutory footing, whereas previously it had been contained in a Memorandum of Understanding.

[445] See Scottish Government, 'Human Rights Act: Letter to the Lord Chancellor', December 2021; Jane Hutt MS and Mick Antoniw MS, 'Written Statement: UK Government Proposal to Reform the Human Rights Act 1998', January 2022; Northern Ireland Human Rights Commission, 'Response to Proposed Replacement of the Human Rights Act', December 2021

[446] *Early engagement with the devolved administrations is necessary… to deal with areas in a UK Bill of Rights which relate to devolved matters and to address differences between the UK's three legal jurisdictions*"; Joint Committee on Human Rights, Twenty-Ninth Report, (2008), pt. 10

[447] "*any future debate on a UK Bill of Rights must be acutely sensitive to issues of devolution … and it must involve the devolved administrations",* Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (2012), Terms of Reference [5], [73], [76]):

[448] See comments made by Alex Chalk MP that Scotland, as "*a distinguished and distinct*" devolved nation, would require to be fully consulted, Hansard, ', 14 July 2020, Vol. 678, col. 1359Human Rights Act 1998: Discussions with Scottish Government', 14 July 2020, Vol. 678, col. 1359

[449] Consultation, see n.7 above, chapter 3, p. 28.

of human rights"[450], as evidenced by the work of the Equality and Human Rights Committee and the National Taskforce on Human Rights.[451] In particular, the work of the Scottish National Action Plan for Human Rights Leadership Panel is specifically designed *to "ensure that public services and economic decisions are guided by human rights principles and promote human dignity for all, even in times of austerity*".[452]

231. Wales too has made it clear that there is no appetite for the wide reforms to the HRA envisaged in this Consultation. We note comments by the Welsh Government to the effect that it is, "*disappointed by the pejorative and leading nature of the report and the consultation questions…The Welsh Government is committed to defending the rights of the people of Wales against any diminution and is not convinced of the need to replace the Human Rights Act".*[453] We also note the recent work conducted by the Welsh Government to develop a stronger commitment to human rights within policy and decision-making and its desire to achieve a more robust implementation of human rights via the work of a human rights Taskforce.[454]

232. These sentiments are also echoed in Northern Ireland, where the Chief Commissioner of the Northern Ireland Human Rights Commission has stated that *"(i)n all our engagement with the public, we learned that what people want is greater and more effective protection, not less."*[455] It is clear that the devolved administrations embrace the HRA and a direction of travel that incorporates greater, not fewer, human rights protections. These divergent approaches to human rights and attitudes to the HRA in Scotland, Wales and Northern Ireland therefore cast serious doubt as to the desire for, and rationality of, reforming the HRA.

233. in the light of Northern Ireland's unique history and constitutional arrangements, JUSTICE considers that the proposed reforms are not only ill-guided, but potentially irresponsible. The context and process of devolution in Northern Ireland is clearly distinct to the

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[450] The Scottish Parliament, *'Getting Rights Right: Human Rights and the Scottish Parliament'*, (2018)

[451] In 2016 the Equality and Human Rights Committee launched an inquiry aimed at ensuring the best possible approach to considering human rights across all parliamentary activity, through gathering evidence under three main themes: participation and engagement, Parliamentary procedure and process, and accountability; in 2017, the First Minister's Advisory Group on Human Rights Leadership (FMAG) was established with a remit to "*make recommendations on how Scotland can continue to lead by example in human rights, including economic, social, cultural and environmental rights*", following which the National Taskforce on Human Rights Leadership was established in 2019. More recently, Scotland's proposals to incorporate the UNCRC evidence a commitment to expanding human rights protections.

[452] See Scottish Human Rights Commission, '*Scotland's National Action Plan for Human Rights'* (2017)

[453] Jane Hutt MS and Mick Antoniw MS, see n.445 above.

[454] See S. Hoffman, S. Nason et al, '*Strengthening and Advancing Equality and Human Rights in Wales'.* (Welsh Government, 2021) In particular, proposals to "*integrate human rights as standards for policy-making to provide a stronger vision to advance equality and well-being".*

[455] See statement by Chief Commissioner of the Northern Ireland Human Rights Commission in 2021 that *"In all our engagement with the public, we learned that what people want is greater and more effective protection, not less."* JUSTICE also notes findings of the Northern Ireland Assembly's *Report of the Ad Hoc Committee on a Bill of Rights* (Northern Irish Assembly, February 2022), p.14 that 82% of survey respondents were in support of implementing economic and social rights into domestic law: *'Economic, social and cultural rights focus on promoting and protecting people's development and livelihood. They relate to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, healthcare and education*.'

accounts of devolution in Scotland and Wales[456]. Indeed, it is in the context of Northern Ireland's unique history and constitutional arrangements, that we consider the proposed reforms to the HRA raise the most serious concerns. In this light, JUSTICE considers that the proposed reforms could have serious negative impacts on the **GFA** and peace settlement. We note the remarks made by the Committee on the Administration of Justice (CAJ) in their response submitted to the IHRAR review in Northern Ireland, in this regard.[457]

234. As acknowledged by the Consultation, the "*protection of human rights is at the heart of the peace settlement in Northern Ireland. It is woven into the terms of the 1998 Belfast (Good Friday) Agreement*"[458]*;* an agreement which was implemented in part by the Northern Ireland Act 1998 and brokered through a complex, internationally mediated process following years of acute violence.[459] As stated above, the Northern Ireland Act and the HRA are inextricably linked. The HRA underpins key obligations made within the GFA, including the obligation on the British Government to *"complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency*". Any proposal which would undermine the existing baseline human rights protections guaranteed by the ECHR and given effect to via the HRA, would therefore risk the UK being in breach of the GFA and its international treaty obligations owed to the Republic of Ireland.[460]

235. Indeed, we draw attention to several proposals in the Consultation which we consider directly contradict the commitments made by the UK in the GFA. As set out elsewhere in this response, including in response to Questions 8, 9, 11, 20 and 24, the proposals to limit the types of human rights cases coming before the courts either through procedural barriers or substantive changes to the content of rights, undercuts the minimum standards set out in the ECHR and directly contradicts the commitment in the GFA to provide to all persons, "*direct access to the courts, and remedies for breach of the Convention*".[461] We are also unclear what impact the proposals relating to section 2 of the HRA may have on the GFA. For example, were the meaning and interpretation given to the Convention rights in the UK to develop asymmetrically from those given in Strasbourg, it is unclear how this may affect the courts when exercising their right to override Assembly legislation on the grounds of inconsistency with ECHR.[462]

236. Not only are we concerned that the proposals may breach the UK's international law obligations, they also risk "rolling back the clock", and undoing significant progress in

[456] See Christine Bell, "*Constitutional transitions: the peculiarities of the British constitution and the politics of comparison*" (July 2014) *Public Law* 446, 458.

[457] Committee on the Administration of Justice, 'Response to the Independent Human Rights Act Review' 2021, p.7.

[458] Consultation, see n.7 above, para 37.

[459] C.Gallagher, K. O'Byrne et al, see n.439 above

[460] The GFA is an Annex to an international treaty between the UK and the Republic of Ireland, registered with the UN.

[461] C.Gallagher, K.O'Byrne et al, see n.439 above.

[462] *ibid*, page 49

terms of emboldening public trust in the peace process.[463] We flag this concern in paragraphs 160 to 165 above, specifically in relation to the proposals regarding positive obligations. As discussed at Question 11 above, positive obligations under the HRA have been fundamental to the success of the Police Service of Northern Ireland which is designed upon strict compliance with the Act and obligations under Article 2 ECHR. Public trust in the new policing structures, built by embedding human rights within the Police Code of Ethics and ensuring the enforcement of positive obligations, has been crucial to the success of the peace settlement.

237. We note that the GFA intends that at some stage there should be a Bill of Rights for Northern Ireland, enacted by the Westminster Parliament. The enactment of a Bill of Rights for the UK would be an obvious opportunity to enact a supplementary one for Northern Ireland, thereby addressing its 'particular circumstances' as the GFA puts it. However, the fact that IHRAR did not look at what additional rights might be provided for Northern Ireland, makes it inappropriate to insert such supplementary provisions at this stage. Moreover, we note that in February 2022 the Ad Hoc Committee on a Bill of Rights within the Northern Ireland Assembly, after almost two years of work, was unable to come up with a consensus document on the matter,[464] a fate that has befallen all previous attempts to arrive at a consensus since 1998.

238. The Lord Chancellor contends that "overhauling" the Human Rights Act is *"a good way of … ironing out our constitution".*[465] In JUSTICE's view it will only cause more wrinkles. Clarity will give way to confusion in the event of any reform. For devolved administrations in particular, the lack of certainty that a new HRA regime will bring will create particular challenges given that the HRA is hard-wired into their constitutional arrangements. As described above, the HRA sets out not only the relationship between the devolved legislatures and Strasbourg, but also that between the devolved nations and Westminster, when it comes to reserved and devolved matters. The HRA is reserved but human rights enforcement is devolved. Whilst this distinction is not always clear-cut, especially in the context of public bodies that operate on both sides of the border, JUSTICE considers that two decades of the HRA has enabled the devolved nations to set their enforcement strategies for human rights with a degree of certainty, and an understanding of the scope of their competence to do so. We are concerned that "re-writing the rule book" on human rights will undermine this. Confusion breeds contention and JUSTICE considers it inevitable that the proposed reforms to the HRA will only lead to more costly litigation as parties turn to courts to seek answers.

239. In practical terms, we also highlight the risk that creating *a* new human rights regime will broaden the scope for judicial interpretation and may inadvertently lead to inconsistent jurisprudence across the UK. Under the HRA, the four constituent parts of the UK benefit from a clear line of judicial authority.

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[463] *ibid*, page 51.

[464] Report of the Ad Hoc Committee on a Bill of Rights, see n.455 above.

[465] See comments made by the Lord Chancellor during Conservative Party Conference in October 2021.

240. We are therefore not persuaded that there is any argument for change to the substantive and procedural guarantees in the HRA, especially when considering the impact of such proposals on the devolved nations. We have not seen any evidence to suggest that devolved nations will be better served by changing or replacing the HRA with a Bill of Rights. On the contrary and for the reasons provided above, we believe that such proposals will seriously dilute existing human rights protections, disrespect the different legal traditions and public interests of the devolved nations and most critically, risk destabilising the peace settlement.

Public authorities – section 6 of the Human Rights Act

Question 20: Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.

241. We agree that it would be beneficial to examine the existing definition of public authorities under s.6 HRA. The case law is not always clear and, as the Consultation recognises, there have been significant changes to the way in which public functions are delivered.[466]

242. The Courts have largely adopted a restrictive approach to the interpretation of s.6(3) HRA. In general, private entities (even those carrying out contracted functions of the state or local government) are not considered subject to the Human Rights Act. The House of Lords case of *YL v Birmingham City Council and Others [2007] UKHL 27* remains a leading case on this issue where Lord Mance found in the context of a private care home that the "*essentially contractual source and nature of Southern Cross's activities differentiates them from any 'function of a public nature'*"[467] . The decision of the Inner House in *Ali v Serco & Ors [2019] CSIH 54,* also cited in the consultation, follows the reasoning of *YL.*[468]

243. However, the decision in *YL* was a 3:2 decision with a strong dissenting minority from Lord Bingham and Baroness Hale. Baroness Hale, in particular, emphasised the importance of human rights values being imbedded within the practices of the private care home. Parliament has since sought to legislate, most recently through Section 73 of the Care Act 2014, to clarify when registered care providers are within the scope of s.6(3) HRA. This demonstrated that there was a compelling argument to include private care homes within a definition of s.6(3) HRA under certain circumstances.

244. The growth of private sector outsourcing, by both national and local governments, requires a re-think within this area. Around a third of all public spending is now done through procurement.[469] This has led to private sector companies now delivering frontline services, such as medical assessments for disability benefits, the running of prisons and

[466] Consultation, see n.7 above, para. 267.

[467] *YL v Birmingham City Council and Others* [2007] UKHL 27 at [120] (Lord Mance).

[468] *Shakar Omar Ali v Serco Limited and Ors* [2019] CSIH 54.

[469] T. Sasse, S. Nickson et al, *Government Outsourcing – When and How to Bring Public Services Back into Government Hands* (Institute for Government, 2020), p.10.

adult social care. Private companies now have an important role in decisions and assessments which affect the rights of people throughout the country.

245. JUSTICE is increasingly concerned that there has been no reciprocal growth in accountability mechanisms for private companies that are making often intimate decisions about the lives of citizens. Such decisions would have been traditionally done by public officials, who are directly accountable under the Human Rights Act. It is important that our human rights laws reflect this new reality. The logic behind applying human rights laws to private care homes (see Section 73 of the Care Act 2014) applies to other outsourced provisions which affect fundamental rights. It may be preferable to have a clearer definition of 'public authorities' that expanded human rights protection rather than requiring a specific legislative provision for each sector.

246. It is also important to stress that the state cannot fully delegate its human rights responsibilities simply by outsourcing to a private contractor. The decision of *LW and Ors v Sodexo and Secretary of State for Justice,* cited in the Consultation, made clear that the Secretary of State for Justice continued to have "*monitoring and supervisory responsibility*" which required adequate and effective safeguards against human rights breaches.[470] The case involved the lawfulness of strip-searching at HMP Peterborough. Mr Justice Knowles made clear in his judgment that the Secretary of State could have required Sodexo to provide details of proposed training on strip-searching in the tender process and then proactively monitored the quality of that training. This is an important judgment which raises serious questions about accountability and the state's supervisory responsibilities when the delivery and gatekeeping of public services are being increasingly outsourced. The case-law demonstrates that this is a complicated issue that requires careful consideration.

247. JUSTICE is in the early stages of developing a working party to consider how outsourcing has affected administrative justice and the ability of individuals to challenge decisions that affect their fundamental rights. This working party will look to hear evidence from a variety of sources and investigate issues such as whether human rights protection and Freedom of Information laws should be extended. This is an issue that requires care and legal precision.

248. The Consultation states that the Government is considering "*alternative drafting*" which might achieve similar objectives as Section 6(3) but set out a "*clearer definition*" of whether a body is exercising a function of public nature. We note that the Consultation states that any such definition "*should not add new burdens for public sector bodies and charities"*. JUSTICE disagrees with this focus. A new approach to defining a public authority under human rights law should start from the position of ensuring proper accountability and oversight when private companies are undertaking public functions that affect the basic rights of individuals. The benefits of this are demonstrated by the case of *Cornerstone,* where an independent fostering agency was held to be a private body for the purposes of the HRA and was found to have breached Article 14 by having a policy

[470] *LW and Ors v Sodexo and Secretary of State for Justice* [2019] EWHC 367 (Admin).

that required foster applicants to be heterosexual.[471] However, the current uncertainty and lack of clarity as to what private companies constitute a 'public authority' for the purposes of the HRA, denies this protection to users of certain public services.

249. Therefore, whilst we agree that the definition of public authority under the HRA should be reviewed, JUSTICE is of the view that there should be further consideration of how the definition should be amended to ensure that individuals, whose rights are impacted by private companies fulfilling the role of public authorities, have adequate means of redress. We cannot see any case for a more restrictive approach to the definition of public authority under the HRA.

Question 21: The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons.

250. We do not consider that any amendments are required to s.6(2) HRA. The proposed changes to this provision risk increased uncertainty for public authorities and individuals, will make it harder for individuals to challenge decisions of public bodies which are incompatible with human rights, and risk reducing the quality and human rights compatibility of public bodies' decision-making.

251. Section 6(1) places a legal duty on public authorities to act in a way that is compatible with a Convention right. However, this does not apply where either: (i) as a result of primary legislation the public authority could not have acted differently (s.6(2)(a)); or (ii) where legislation cannot be read or given effect in a way which is compatible with Convention rights, the authority was acting so as to give effect to or enforce those provisions (s.6(2)(b)). The upshot of s.6(2)(b), according to the Consultation, is that public authorities are compelled to act in a way that is "*contrary to the clear will of Parliament*". Effectively the Government is concerned that when the provisions in section 6 HRA are read in conjunction with the interpretive obligation in section 3, the public authority is left in an invidious position: it has given effect to the authentic interpretation of the legislation, but this interpretation has (according to the Government's concern) been skewed by the courts, leaving the public authority without a section 6(2) defence.[472]

252. In respect of the interpretation of legislation by courts under s.3 HRA, for the reasons set out above (paragraphs 167 to 178), we do not consider that the courts interpret legislation in a way that undermines the "*will of Parliament*", goes beyond the purpose of the legislation or creates uncertainty. Similarly, in respect of s.6(2)(b), the courts are careful not to compel public authorities to act contrary to the intention of Parliament, or to respect

[471] Ofsted found that a Christian charity/ independent fostering agency had breached human rights laws by having a policy that required foster applicants to be heterosexual. Ofsted found that this was a breach of Article 14, read with Article 8, since the charity was carrying out the public function of recruiting foster carers and placing them with young people. The charity challenged the finding by Judicial Review but both the High Court *(Cornerstone (North East) Adoption and Fostering Service Ltd, R (on the application of) v The Office for Standards in Education, Children's Services and Skills* [2020] EWHC 1679)) and Court of Appeal (*Cornerstone (North East) Adoption and Fostering Service Ltd, R (on the application of) v HM Chief Inspector of Education, Children's Services and Skills (OFSTED)* [2021] EWHC 2544) upheld Ofsted's decision.

[472] Consultation, see n.7 above, paras. 270 – 273.

Convention rights where Parliament has chosen not to do so.[473] The Consultation does not provide any examples of the hypothetical problem it identifies occurring in practice. As with the proposed changes to s.3 HRA, we do not consider that a case for change has been made in respect of the impact of the interpretative provisions in the HRA on public bodies.

253. First, s.6(2)(a) already provides a defence to public authorities where they are bound to act incompatibly with people's rights due to primary legislation and s.6(2)(b) provides a defence where the public authority acts to give effect to primary legislation which cannot be read compatibly with the Convention.[474] However, in circumstances, where public authorities have a choice as to how they should act under the primary legislation, s.6(1) requires that they act compatibly with Convention rights.[475] Requiring public authorities to act, where they can under primary legislation, in accordance with individuals' human rights is a key part of ensuring that rights protection is effective and real for individuals in the UK. This cannot be objectionable, and it is therefore not clear exactly what the problem that needs to be addressed is.[476]

254. Second, a case law search on Westlaw for the past three years was conducted[477] and only two cases were identified where a public authority had been held liable under s.6(1) HRA pursuant to an interpretation of legislation relying on s.3 HRA.[478] In both cases, the courts explicitly referred to the need to respect the will of primary legislation and the importance of ensuring that any interpretation under s.3 HRA did not 'go against the grain', purpose or intention of the relevant legislation.

255. For instance, one case we identified involved two individuals who had been unable to meet the requirement under the British Nationality Act 1981 ("**BNA 1981**") of having been physically present in the UK prior to applying for British citizenship, as they had been wrongly refused entry to the UK as part of the Windrush scandal at a time when they had or were entitled to indefinite leave to remain in the UK. Using s.3 HRA the court found that it was possible to read a discretion to disapply the 'five year rule' such that "*where, because the Defendant's default was (or may have been) the reason why the rule could not be satisfied, that reading is necessary to avoid an infringement of ECHR Article 14*

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[473] *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2004] 1 AC 546 at [19], "*Like s.3(2) and 4(6), s.6(2) of the Human Rights Act is concerned to preserve the primacy, and legitimacy, of primary legislation. This is one of the basic principles of the Human Rights Act. As noted in Grosz, Beatson and Duffy on Human Rights, (2000) p 72, a public authority is not obliged to neutralise primary legislation by treating it as a dead letter*."

[474] As was the case, for instance, in *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29.

[475] *R (on the Application of National Council for Civil Liberties) v Secretary of State for Home Department* [2019] EWHC 2057 (Admin).

[476] See further, Joint Committee on Human Rights, n.104110 above, p.26 (Elizabeth Prochaska).

[477] Herbert Smith Freehills conducted case law searches on Westlaw for recent cases (for the period 1 January 2019 to 21 January 2022). Two sets of searches were conducted. Firstly, we looked for cases containing the search terms 'Human Rights Act 1998' AND 'section 3'. We selected the cases tagged 'equality and human rights'. This produced 288 cases. Secondly, we used the search terms 'Human Rights Act 1998' AND 'section 6(2)', again tagging 'equality and human rights'. This produced 28 cases. All the cases responsive to both these searches were reviewed to consider whether they fit the fact pattern identified by the Government Consultation.

[478] *R. (on the application of Vanriel) v Secretary of State for the Home Department* [2021] EWHC 3415 (Admin) and *R. (on the application of Aviva Insurance Ltd) v Secretary of State for Work and Pensions* [2021] EWCA Civ 30 (Admin).

and/or Article 8." In doing so, the court found that while the five year rule was a "*means*"" to put the principle "*that citizenship will be granted only to those of good character who have shown a sufficient commitment and connection to the UK*" into effect, the rule was not, in its own right, a fundamental principle of the BNA 1981.[479] Further, the court took the view whilst Parliament may have foreseen that a hard-edged rule might give rise to some hard cases, it could not be taken to have foreseen that the Windrush scandal would give rise to cases in which applicants would be unable to comply with the 'five year rule' because they had been wrongly refused entry to the UK.[480]

256. Third, the courts will refuse to use s.3 to interpret legislation in a Convention-compliant manner when to do so would go against the "*grain*" or "*thrust*" of the legislation, and thus in these cases the public bodies have a complete defence under s.6(2)(b), and regularly do so. For instance, in *R (Howard*)[481] the court refused to interpret the BNA 1981 to include an exception to the "*good character*" requirement, which the court considered would be at odds with the purpose of the legislation.

<u>Option 1</u>: provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully

257. We are concerned that the proposed Option 1 would insulate public authorities from having to act in a rights-compliant manner. Section 6 is an integral way of ensuring that public authorities respect people's rights and that people can access those rights effectively. This can have considerable benefits in helping public bodies respect the human rights of people accessing the services they provide.[482] Public authorities may also want or need clarification from the court as to how to read or give effect to legislation in a way that is compatible with Convention rights. Insulating public authorities from having to take the 'Convention compatible' reading of legislation will make it much harder to hold public bodies to account and will undermine the value of the Bill of Rights.

258. It is also not clear what the difference would be between the courts' current approach to s.6(2)(b) and s.3, which is to ensure that interpretations of legislation do not go against Parliament's intention, and the proposal at Option 1 which would be to allow public authorities to not be in breach of the Bill of Rights or HRA where they are "*giving effect to provisions of or made under primary legislation, in the way Parliament clearly intended*."[483] Under both approaches Parliament's intention is to be respected. However, by introducing legislation the benefit of the guidance and jurisprudence that the courts' have developed over the past 22 years would be lost. Instead, courts would be faced with having to start from scratch in setting out guidance on how legislation should be interpreted in

[479] *R. (on the application of Vanriel) v Secretary of State for the Home Department* [2021] EWHC 3415 (Admin) at [106].

[480] *ibid* at [112].

[481] *R (Howard) v Secretary of State for the Home Department* [2021] EWHC 1023 (Admin).

[482] The British Institute of Human Rights see n.226 above, p.25: 44% of the respondents to research conducted by the BIHR "*said the Human Rights Act is important to them as a staff member in a public body or service, as it helps them to uphold the rights of people accessing the support they provide*."

[483] Consultation, see n.7, para. 274.

accordance with the Bill of Rights. This will result in uncertainty for litigants, the courts and public authorities who are trying to implement legislation every day.

259. The Consultation also states that Option 1 would "*recognise that if Parliament has passed clear laws leading to incompatibility with the Convention rights, then Parliament rather than the public authority should bear the responsibility for addressing any declaration of incompatibility by the courts*." It is not clear what issue this is addressing. Under s.6(2)(b), a public authority will not be in breach of the HRA if it is giving effect to primary legislation which cannot be read compatibly with Convention rights and therefore in respect of which a declaration of incompatibility is issued. In these cases it will be Parliament that has to address the incompatibility, the responsibility is not, and cannot be, on public authorities. This was clearly stated by Lord Hoffmann in *R (Hooper)* stating that: *"if legislation cannot be read compatibly with Convention rights, a public authority is not obliged to subvert the intention of Parliament by treating itself as under a duty to neutralise the effect of the legislation*".[484]

260. The proposals also risk different approaches to the interpretation of the same legislative provision depending on which provision of the HRA / Bill of Rights applies. A legislative provision could be interpreted in a Convention compliant manner by a court, but meanwhile a public authority giving effect to the legislation would be able to apply it, and continue applying it, in a different non-Convention complaint manner. As well as uncertainty, this also undermines concepts such as equal treatment before the law, which is key to the rule of law and any legal system in a democracy.[485] This also risks a divergence of approaches between public authorities, for instance if one local authority adopts a Convention-compliant interpretation of legislation, while another does not. This could result in individuals being subject to different interpretation of legislation depending on the area in which they live, which would be grossly unfair. It would however be completely contrary to the idea of the protection of fundamental rights in the UK, if the Convention-compliant interpretation, rather than the Convention-breaching interpretation, which accorded with the s.3 interpretation principles developed by the court was held to be unlawful.

<u>Option 2</u>: retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

261. For the reasons set out above, we do not consider that any change should be made to s.6(2)(b). We also refer to our response to Question 12 (see paragraphs 186 to 188 above), as to why we do not consider that the proposed changes to s.3 would be beneficial.

[484] *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681 at [51].

[485] The concept of equality before the law was expressly recognised by the then Lord Chancellor, Michael Gove, '<u>What Does a One Nation Justice System Look Like?</u>' (Speech to the Legatum Institute, 2015): "*The belief in the rule of law, and the commitment to its traditions, which enables this country to succeed so handsomely in providing legal services is rooted in a fundamental commitment to equality for all before the law.*" See also *R. (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58 at [122] (Lord Brown of Eaton-under-Heywood).

Extraterritorial jurisdiction

Question 22: Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.[486]

262. In our view there is no issue in principle with the extraterritorial effect of the Convention and HRA applying to the UK armed forces abroad, including holding Convention-compliant investigations into the deaths and treatment of individuals during armed conflict.

263. The Consultation's primary issue with the extraterritorial jurisdiction appears to be its application to situations of armed conflict. The Government contends that the Convention was never intended to apply to situations of armed conflict, to which it is ill suited and that it creates operational uncertainty for armed forces in particular in respect of its interaction with international humanitarian law ("**IHL**").[487]

264. It is unlikely that the ECHR was intended only to apply in peacetime given that Article 15 provides for derogation of certain rights "*in time of war or other public emergency threatening the life of the nation*".[488] Further, extraterritorial application was not unheard of or novel at the time the HRA was going through Parliament, as there were already a number of well-known cases which had held that the Convention could apply extraterritorially.[489] The International Court of Justice has also supported the position that human rights treaties continue to apply during armed conflict.[490] Furthermore the cases of *Hassan v UK*[491] and *Serdar Mohammed v Secretary of State for Defence*[492] have clarified that although Convention rights do apply in armed conflict, they have to be read in light of IHL.[493]

265. Further, the relationship between the ECHR and IHL has little impact on the personal liability of armed forces personnel engaged in overseas operations. The Ministry of Defence has stated that it cannot identify any treatment of a detainee that would be

[486] Sir Michael Tugendhat has not contributed to the response to this question.

[487] Consultation, see n.7 above, p.43-44.

[488] C.Greenwood, 'Rights at the Frontier' in *Law at the Centre* (Kluwer 1999) 279 cited in Eirik Bjorge, 'The Fogmachine of War: A Comment on the Report "Clearing the Fog of Law"', *EJIL:Talk!*

[489] For example, *Cyprus v Turkey* (1977) 62 ILR 4, 74 [19]; *Loizidou v Turkey* (Merits) (1996) 108 ILR 443 [56]

[490] In *Nuclear Weapons and Wall* ICJ Rep 2004 p 136, 178 at [106]; ICJ Rep 1996 225, 240 [25]: the ICJ held that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation'.

[491] [2014] ECHR 936.

[492] [2017] UKSC 2.

[493] In *Hassan v UK,* the Strasbourg Court interpreted Article 5 in light of IHL. In the context of international armed conflict, it effectively read into Article 5(1) an extra permissible ground for detention where consistent with the Geneva Conventions and read down the requirements of Article 5(4) to allow for the administrative forms of review under the Fourth Geneva Convention. In *Serdar Mohammed v Secretary of State for Defence* [2017] UKSC 1, Lord Sumption expanded the ruling in *Hassan*, to cover non-international armed conflicts as well. He held that detention would be lawful where a positive authority for it existed under some other part of international law.

possible under the Geneva Conventions and under UK criminal law, that applies to UK armed forces at all times, that would be prohibited by the ECHR.[494]

266. Limiting the extraterritorial effect of the HRA would remove the duty to conduct effective investigations into certain deaths and treatment of individuals by British forces in the course of overseas operations under Articles 2 and 3 of the Convention. This runs the risk of exposing British troops (including military leaders who can be held accountable for the actions of their subordinates) to prosecution in the International Criminal Court (the "**ICC**"). The ICC only investigates when the state in question is unable or unwilling to examine war crimes domestically. The ICC prosecutor recently found that there was "*a reasonable basis to believe*" that UK soldiers had committed war crimes against detainees during the conflict in Iraq, however she closed the case due to the existence of inquiries by UK authorities.[495]

267. In respect of the application of the HRA to members of the UK's armed forces, it would be illogical for local inhabitants in territory under the "*authority and control*" of the British armed forces to benefit from the protection of the HRA, yet members of the armed forces themselves not to do so. British military personnel are subject to the authority and control of the UK (including UK criminal law) wherever they are. In exchange, they should also be entitled to the protection of UK law at all times, including the protection of the HRA.

268. In *Smith* (the case that recognised that UK service personnel abroad are within the UK's jurisdiction) it was recognised that although UK service personal were afforded Article 2 protection in principle, the actual application of Article 2 will depend on the individual circumstances of claims. The judgment in *Smith* was cautious, recognising the difficulty of decision-making in the battlefield and the dynamic conditions there. Lord Hope was conscious that "*the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate*" and that policy decisions about training and procurement taken a high level of command would be outside the scope of Article 2, as would actions taken on the battlefield.[496] He went on to put the claimants on notice that the trial judge will be expected to follow the Court's guidance as to the *"very wide measure of discretion which must be accorded to those who were responsible on the ground for the planning and conduct of the operations during which these soldiers lost their lives and also to the way issues as to procurement too should be approached*."[497]

269. As the Consultation recognises, drafting the Bill of Rights to apply on a restricted territorial basis would not alter the extraterritorial effect of the Convention and the UK's obligations in international law.[498] The gap between the Bill of Rights and the UK's obligations under

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[494] Ministry of Defence, Memorandum to the Joint Committee on Human Rights (2007), cited in M. Hemming, Written Evidence to the Defence Committee, *UK Armed Forces Personnel and the Legal Framework for Future Operations* (HC 2013-14, 931) EV94-95.

[495] The Office of the Prosecutor of the International Criminal Court, *Situation in Iraq/UK: Final Report* (2020).

[496] *Smith v The Ministry of Defence* [2013] UKSC 41 [76].

[497] ibid [81].

[498] Consultation, see n.7 above, para. 280.

the Convention would also create issues in relation to procedures for protecting national security information in human rights proceedings. We are therefore pleased that the Consultation acknowledges that what the Government views as the "*issue*" of extraterritoriality would need to be addressed in Strasbourg.

270. However, for the reasons set out above, JUSTICE does not view the extraterritorial application of the ECHR as an "*issue*". Attempts to water this down at an international level will send a message that the UK is prepared to disregard fundamental rights such as the protection from torture and inhuman and degrading treatment. Any attempts to limit the extraterritorial effect of human rights is even more concerning in light of the proposals to provide offshore processing of asylum claims contained in the Nationality and Borders Bill which is currently going through Parliament.

Qualified and limited rights

Question 23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act?

271. We wish to make the following points in respect of this question:

a) We disagree with the framing of this question. Proportionality is a key element of the HRA and the ECHR, and in the protection of human rights.

b) A move away from proportionality will undermine the protection of rights in the UK compared to the ECHR. In turn leading to further confusion, uncertainty, and an increase in cases being decided by Strasbourg.

c) An assessment of proportionality remains a legal question for the courts to address. Some difference in courts' judgments when applying a legal test is unavoidable.

d) The principle of proportionality has not given rise to "*problems in practice*" under the HRA. The courts will consistently ensure that they do not step outside the area of legal questions and into policy. The courts will also give due weight and respect to the views of Parliament and the institutional competence of the respective branches of the state. There is not a problem to address.

The importance of the proportionality test

272. The concept of proportionality is crucial to human rights protection. It is not unique to the ECHR but is present in rights protection in many other jurisdictions.[499] It recognises that not all rights are absolute and that often rights need to be balanced against rights of other individuals and against the interests of the wider community. It ensures the rights are both

[499] Moshe Cohen-Eliya & Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 A M . J. C RIM . L. 463, 467.

given the necessary weight in the circumstances of the case.[500] This allows public body decision-makers, governments, and courts to, "*solve the very complex and intricate collision of human rights with competing principles*."[501]

273. In possibly one of the most well-known statements in modern law, Baroness Hale in *Ghaidan* stated: "*the purpose of any human rights protections is to protect the rights of those whom the majority are unwilling to protect: democracy values everyone equally even if the majority do not*."[502] The concept of proportionality reflects this. It recognises the equal value that each individual's human rights have and the importance that this value is fully weighed and balanced against competing considerations of the majority.

274. We are concerned that the Consultation frames the discussion of proportionality as providing protection to the rights of certain groups of people in situations where the competing interests, both political and otherwise, of society are portrayed as opposing such rights. For instance, the Consultation criticises the decision in *DPP V Ziegler*[503], which related to the proportionality of an interference in the protestors' rights under Articles 10 and 11, as enabling "*a group of protesters to disrupt the rights and freedoms of the majority*"[504]. Further, the decision in *Manchester City Council v Pinnock*[505], where the Supreme Court held that a local authority when seeking to evict a social tenant had to respect the Article 8 right of the tenant, is described as having "*increased the uncertainty around the eviction process for local authorities seeking to remove anti-social tenants in England and Wales*".[506] However, both these narratives fail to recognise the universal nature of rights and the value of the individuals' rights: the protesters' right to freedom of expression in *Ziegler* and the tenant's rights to respect for private and family life in *Pinnock*. This approach also fails to recognise the societal value in protecting the rights of the minority.

275. We are also strongly opposed to paragraph 303 of the Consultation which appears to suggest that the extent to which an individual should have a right, and the extent to which that right should be protected through the principle of proportionality, should depend on that individual's conduct – whether or not that conduct is related to the circumstances of the case. However, human rights exist to recognise that everyone – whether they are in the majority's favour or not – deserves basic protection (see our response to Question 27 at paragraphs 374 to 378).

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[500] Kai Möller, 'Proportionality: Challenging the critics' (2012) 10(3) International Journal of Constitutional Law 709, 731.

[501] Matthias Klatt and Moritz Meister, 'Proportionality—a benefit to human rights? Remarks on the I·CON controversy' (2012) 10(3) International Journal of Constitutional Law 687, 708.

[502] *Ghaidan* see n.201 above.

[503] *Director of Public Prosecutions v Ziegler and others* [2021] UKSC 23.

[504] Consultation, see n.7 above, para. 135.

[505] *Manchester City Council v Pinnock and others* [2001] UKSC 6.

[506] Consultation, n.77 above, para. 162.

276. The Consultation refers to the example of *R v Chief Constable of the Essex Police,*[507] as an example of where the proportionality assessment should include greater consideration of an individual's responsibilities, stating that "*where a person is wanted for a crime there should be no question of limiting the publication of their name and photograph because of their right to a private life*." However, first, the proportionality exercise, by its context-specific nature, does allow, and often requires, the conduct of the claimant to be considered where this is relevant to the circumstances of the case. In the case in question, the claimant's rights under Article 8 ECHR to privacy and family life were being interfered with precisely because of his prior conviction, which necessarily had to be balanced by the court alongside other factors, such as the wider public interest in deterring crime. Second, the case in fact concerned an "*offender naming scheme*", which involved displaying posters of an individual who committed an offence, the nature of their offence, and sentence they were serving. The court did not find that the scheme was unlawful, instead finding that its legality would depend on the circumstances of each individual chosen for the scheme and how it would operate in practice. Third, the proportionality assessment allowed the court to undertake a nuanced and balanced view of competing rights, including the principle of rehabilitation and the harm that might be caused by the posters to both the individual who committed the offence and their family, including their children.[508] To disregard these fundamental concepts in such a sweeping statement is very concerning.

Divergence from Strasbourg

277. Any legislation which changes the way that UK courts are required to apply the proportionality test, compared to the test applied by Strasbourg, will undermine the protection of rights in the UK compared to the protection of rights under the ECHR. We wish to highlight two points in this regard.

278. First, when applying the proportionality test, UK courts have the benefit of years of case law and guidance – both in the UK and Strasbourg. If the UK courts are required to diverge from this, this will introduce considerable uncertainty. For example, there will be uncertainty as to whether the courts should be starting from a blank slate with their approach to interferences with rights and what weight, if any, the previous jurisprudence has. Not only will this result in confusion for litigants and courts, but also for public bodies in their everyday decision-making where they are required to balance competing rights and interests.

279. Second, weakening the proportionality test in UK law will result in individuals being more likely to go to Strasbourg, where the proportionality assessment will be undertaken. Given the Consultation's objective to ensure that rights are determined foremost in the UK,[509] it is counterintuitive to introduce changes which would result in Strasbourg undertaking

[507] [2003] EWHC 1321 (Admin).

[508] In the case in question, the probation service had concluded that including the claimant in the scheme on his release from prison would increase his risk of homelessness, drug misuse and re-offending, and was likely to increase the risk of harm to the public. They also concluded that there was a risk to E's parents, ex-partner and young daughter who all lived in the locality.

[509] Consultation, see n.7 above, Foreword, "*This consultation marks the next step in the development of the UK's tradition of upholding human rights.*".

more proportionality-based analyses of UK legislation and public body measures. It makes more sense for the UK courts, with their knowledge, expertise and respect for Parliament and the Government,[510] to be afforded the opportunity in the first instance to apply the proportionality test.

The nature of the proportionality test

280. Both Strasbourg and the UK courts have clearly set out the different stages of the proportionality assessment, requiring four questions to be addressed:

> (1) Is the legislative objective sufficiently important to justify limiting a fundamental right?
>
> (2) Are the measures which have been designed to meet it rationally connected to it?
>
> (3) Are they no more than are necessary to accomplish it? and
>
> (4) Do they strike a fair balance between the rights of the individual and the interests of the community?

281. This test has been repeated countless times by the courts and provides a clear guide for the courts to follow.[511] Of course, answering these questions, as does answering any question, legal or factual, requires a level of judgment. As Lord Sumption has previously explained these questions call, amongst other things, for an "*exacting analysis of the factual case"* advanced in defence of a measure.[512] As we set out below, the courts recognise the limits to their institutional competence when assessing the proportionality of a measure (and more generally), according appropriate respect to the competence and legitimacy of other branches of the state. However, this does not make any analysis by the courts of the proportionality test one which involves the courts stepping into the realm of policy making nor does it take it away from being a legal test.[513] It may be that different conclusions would be reached by different people or courts applying the same principles, but that is to be expected in any legal system,[514] especially since the UK legal system is

[510] As set out below (paras 291-7) the UK courts are very careful to not step outside their institutional competence and will give careful consideration and weight to the views of Parliament (something which is also reflected in the ECtHR through the margin of appreciation (*Handyside v UK* [1976] ECHR 5 [48])).

[511] Sir Rabinder Singh, University of Nottingham, Human Rights Law Centre Annual Lecture 2016, 'Making Judgments on Human Rights Issues' (2016): "What is also clear, from my experience, is that in the last 15 or so years, since the Human Rights Act 1998 came into full force in October 2000, courts and tribunals in this country have become well accustomed to adjudicating on these questions."

[512] *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700 [20].

[513] The concept of "proportionality" also arises in many different areas of the legal system, outside of the HRA context, such as in costs assessments (*West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220).

[514] See further, Sir Rabinder Singh n.511 511 above: "*People will often disagree about what the particular outcome should be in a given case after applying these principles. However, that is not unusual in any legal system. Judges are well used to applying broad concepts and abstract principles. They are entirely familiar with the notion that decisions are often fact-sensitive and the specific application of general principles may vary with the context*."

one that specifically allows for judicial dissent,[515] it does not detract from the courts' role in applying the law.[516]

282. The Consultation at paragraph 288 states that: "*In the absence of any clarity in the Human Rights Act, judges' opinions have differed as to the extent of the powers involved. Some have considered that this depends on the type of law under consideration and the relevant knowledge the court may have of the issue in question*." We agree that the proportionality analysis and weight ascribed to the executive's view will depend on the type of law in consideration and the institutional competence of the court. In any given case there may be some disagreement as to how much weight to ascribe to the executive's view but that does not detract from the general agreement as to the need to give due regard to the executive's judgement. This is clear from the decision of the majority, as well as the dissent, in *Carlile*[517] which concerned matters of national security and foreign policy. It is unclear to us what the Consultation's concern is.

The courts' approach to proportionality

i. Consideration of the diverse interests of society as a whole

283. The Consultation states that: "*We want decisions regarding human rights to be taken in a fair and balanced way, which consider the needs of the individual who has claimed that their rights have been infringed but also ensures due consideration of the rights of others and the diverse interests of society as a whole*" (emphasis added).[518] However, these considerations are already a core element of the proportionality test, as set out at limb 4 of the test at paragraph 280 above, as well as being included within the text of the Articles themselves.[519] For instance, the ECtHR has been clear that the concept of something being "necessary in a democratic society" to justify a breach of a Convention rights can be described as a measure fulfilling a "*pressing social need*"[520] and the concept of a "democratic society" includes the characteristics of "*pluralism, tolerance and broadmindedness*".[521]

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[515] Lord Kerr of Tonaghmore, 'Dissenting judgments - self indulgence or self sacrifice?' The Birkenhead Lecture (2012).

[516] As Lord Bingham said in *A v Secretary of State for the Home Department* [2005] 2 AC 6; "I do not … accept the distinction … between democratic institutions and the courts. 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."

[517] *R (Carlile) v Secretary of State for the Home Department* [2014] UKSC 60.

[518] Consultation, see n.7 above, para. 289.

[519] Articles 8(2), 9(2), 10(2) and 11(2), and Article 1 Protocol 1 for instance.

[520] *Sunday Times* (1979) 2 EHRR 245 [59]

[521] *Lustig-Prean and Beckett v United Kingdom* (2000) 29 EHRR. 548 [80]; *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 [138]-[139]. For example, in the context of the ECtHR: an individual's Article 10 and Article 8 were not infringed by their dismissal for sadomasochistic activities given that public knowledge of the individual's sexual activities could impair his ability to effectively carry out his duties as an employee of the probation services, with the court taking account the need for public confidence to be maintained and of potential damage to the individual's employer's reputation. (*Pay v United Kingdom* 32792/05, 16 September 2008); a pupil's right to education under Protocol 1 Article 2 (a limited right) was not held to be violated by his temporary exclusion pending

284. The UK courts have often refused to find an interference with a right to be disproportionate because of a wider societal concern. By way of examples, in the context of Article 10 (freedom of expression) and Article 11 (freedom of assembly and association), the wider interests of the public, including to be able to access the area occupied and be able to enter the Houses of Parliament, meant that it was proportionate to make a possession order and grant an injunction against two protesters who were camping on Parliament Square Gardens in London; [522] and gender discrimination of the treatment of the spouses of General Practitioners under the National Health Service pension scheme was held to have an objective and reasonable justification where it had been introduced to combat the disadvantaged position of women.[523]

ii. The courts' respect of their institutional competence

285. The UK courts apply an appropriate level of caution when considering the proportionality of an interference with a Convention right. This involves the courts recognising both the limits of their institutional competence and the competence of public bodies; and giving due weight to the views of Parliament.

286. The courts will give Parliament and the executive a greater margin of discretion in areas of social and economic policy.[524] In these areas, the courts will generally respect the judgment of the legislature unless it is "*manifestly without reasonable foundation*,"[525] which reflects the ECtHR's general approach to the margin of appreciation.[526] This is often in areas of welfare benefits, but is not limited to this – including areas such as housing, immigration, national security and social policy.[527] This is both when considering qualified rights and limited rights under the Convention.[528] For example in *R (Z) v Hackney London*

a police investigation into an incident of arson at his school, the exclusion being a proportionate measure taken in the pursuit of a legitimate aim for the benefit of society of a whole of allowing a criminal investigation. (*Ali v United Kingdom* 40385/06, 11 January 2011, [56]); and leasehold enfranchisement laws were a justified interference was justified with landlords' Article 1 Protocol 1 (right to peaceful enjoyment of possessions) due to the general public interest in property distribution (*James v United Kingdom* (1986) 8 EHRR 123 at [45]-[52]).

[522] *The Mayor of London (Greater London Authority) v Haw and others* [2011] EWHC 585 (QB).

[523] *R. (on the application of Cockburn) v Secretary of State for Health* [2011] EWHC 2095 (Admin) [64]–[86] (Supperstone J).

[524] *R (SC and others) v Secretary of State for Work and Pensions and others* [2021] UKSC 26 [151].

[525] See for example *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 [268] and [92]-[93]; *Humphreys v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKSC 15 [22].

[526] *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173 [19].

[527] *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542 [133]: "However, there is no apparent logic or rationale for restricting the socio-economic policy areas in which Parliament and the executive, as democratically-responsible bodies, are uniquely qualified to assess the public interest as against other interests, to those of welfare benefits. There are other sensitive areas, such as social housing and immigration, in which it may equally be said that they are the most appropriate assessors of what is in the public interest and whether the adverse impacts of any proposed or actual measure are proportionate to the benefits in the public interest."

[528] For example, in *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46 [131] (challenging an infringement of the claimant's rights under Article 1 of Protocol 1) Lord Reed accepted that while the margin of appreciation was not strictly engaged under the HRA, the courts would consider the issue of proportionality while giving due weight to the decisions of public authorities within the discretionary area of judgement accorded to those bodies.

Borough Council,[529] Lord Sales emphasised the wide margin of appreciation to be afforded to Parliament in the area of social welfare benefits and that a court "*should accord weight to the judgment made by the democratic legislature on a subject where different views regarding what constitutes a fair balance can reasonably be entertained."* This is in part a recognition by the courts that in these areas a policy decision is being made on the distribution of finite resources, which the courts cannot make decisions on.[530]

287. In applying the proportionality test the courts will recognise that where this falls into a matter of policy it is not for them, but Parliament and the executive to make the decision. In some cases, this "margin of discretion" will be to the executive, and in other cases it will be to Parliament, as discussed in depth by IHRAR at Chapter 3. The importance of the courts recognising that it is for democratically elected institutions, and thus Parliament, to make policy judgments, and not for the courts to question these, was most recently clearly stated by Lord Reed in *R (SC),*[531] in the context of child tax credit and Articles 8 and 14, who stated that: "T*here are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies*." (emphasis added).

288. The UK courts are also very conscious of the need to "*attach appropriate weight to informed legislative choices at each stage in the Convention analysis*",[532] and will exercise considerable deference to Parliament when considering a matter which Parliament has previously considered. For example, the fact that Parliament had previously considered, and was going to consider again, the issue of assisted dying featured heavily in the Supreme Court's refusal to make a declaration of incompatibility in *Nicklinson*.[533] This can also be clearly seen, for instance, in the recent Court of Appeal decision in *R (Joint Council for the Welfare of Immigrants),*[534] considering the "right to rent" scheme,[535] which prohibited landlords from renting properties to people from outside Europe. The court found that the scheme did cause nationality and race discrimination by landlords. However, the aims of the scheme, including the importance of supporting a coherent

[529] [2010] UKSC 40 [107]-[108].

[530] See, for example, *In Re Brewster* [2017] UKSC 8 [64] (Lord Kerr): "Where a conscious, deliberate decision by a government department is taken on the distribution of finite resources, the need for restraint on the part of a reviewing court is both obvious and principled".

[531] *R (SC and others) v Secretary of State for Work and Pensions and others* [2021] UKSC 26 [208].

[532] *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 [54].

[533] *R (Nicklinson),* see n.33 above.

[534] *R (Joint Council for the Welfare of Immigrants)* see n.527 above.

[535] Part 3 Chapter 1 of the Immigration Act 2014.

immigration system, outweighed the severity of the scheme's effect.[536] The Court of Appeal said that it could not be presumed that when enacting the legislation in question Parliament had not accepted that the potential risk of discrimination by some private landlords was justified by the aims of the policy, with Hickinbottom LJ concluding that *"if the discrimination is greater than Parliament envisaged when enacting the provisions, about which I express no view, then that is a matter for Parliament (or the Secretary of State) to address*."[537]

289. The UK courts will also exercise restraint in the application of proportionality in areas requiring specialist judgments and technical expertise beyond that of the court.[538] This can be clearly seen in the courts' judgments regarding proportionality and questions of national security.[539] For instance, in *R (Miranda*) Lord Dyson recognised that in regard to national security "*the court should accord a substantial degree of deference*" to the police's expertise, since it was the police who have "*both the institutional competence and the constitutional responsibility to make such assessments and decisions. As regards the latter, they are ultimately accountable to Parliament and the constitutional responsibility for the protection of national security lies with the elected government*".[540] (emphasis added).

290. The Consultation suggests that a difference in opinions of some judges as to the weight to ascribe to the views of the executive is a significant problem.[541] However, differences in opinion between courts and judges is a natural part of any legal system, especially one which allows dissenting judgments, and reflects how jurisprudence is developed – further legislation cannot change this. As IHRAR concluded, *"the UK Courts have, over the first twenty years of the HRA, developed and applied an approach that is principled and demonstrates proper consideration of their role and those of Parliament and the Government."*[542] We agree.

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[536] *R (Joint Council for the Welfare of Immigrants)* see n.527 above, [143] The court in reaching its conclusion emphasised repeatedly the importance that "*very considerable deference must be afforded to Parliament's assessment of the public interest, and as to whether the adverse effects for individuals are outweighed by the public benefits of the measure"*

[537] *ibid*.527, [147].

[538] *A and others v Secretary of State for the Home Department* [2004] UKHL 56 [116] Lord Hope: "I am content therefore to accept that the questions whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and for Parliament. The judgment that has to be formed on these issues lies outside the expertise of the courts, including SIAC in the exercise of the jurisdiction that has been given to it by Part 4 of the 2001 Act."

[539] For instance, *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2011] QB 218,131], per Lord Neuberger MR; in *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner London* [2013] EWHC 3724 (Admin) [57], Goldring LJ having reviewed some of the authorities said that, when carrying out the balancing exercise of weighing national security against (in that case) the proper administration of justice: *"….the Secretary of State's view regarding the nature and extent of damage to national security which will flow from disclosure should be accepted unless there are cogent or solid reasons to reject it*."

[540] *R (Miranda) v SSHD* [2016] EWCA Civ 6 [79].

[541] Consultation, n.77 above, paras 288-289.

[542] IHRAR, see n.5 above, p. 96.

We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

291. We are opposed to both draft clauses proposed at Appendix 2 of the Consultation for the interpretation of qualified rights. These provisions would risk greatly limiting the protection provided by qualified rights and the courts' flexibility; and result in increased uncertainty in the courts' ability to interpret and apply rights in practice.

292. We are also concerned by the inclusion of both primary legislation and secondary legislation which has been subject to the affirmative resolution procedure as "legislation" for the purposes of the proposed clauses. Secondary legislation, even when approved by the affirmative resolution procedure, cannot be equated to primary legislation or as being the "will of Parliament". Secondary legislation is, by definition, the act of the executive and no Parliamentary procedure can change this (see further paragraphs 195 to 196).

<u>Option 1</u>: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.

293. Option 1 and the draft proposed clause would mean that in respect of any primary or secondary legislation, the courts would be required to give "great weight" to the fact that the legislation was "necessary in a democratic society" for the purpose of the proportionality assessment. This would undermine the protection that the rights provide in respect of legislation and lead to discrepancy with the protection afforded by the ECHR. When considering whether a provision of legislation infringed an individual's rights, it would leave the courts with essentially no role in ensuring that an appropriate balance has been struck between the interests of the minority and the wider public. [543] As Lord Mance stated in *Nicklinson:* "*even though I fully accept, that, while the legislature is there to reflect the democratic will of the majority, the judiciary is there to protect minority interests, and to ensure the fair and equal treatment of all."*[544]

294. The suggestion that if Parliament has enacted legislation, that must automatically be determinative of Parliament's view that the legislation is necessary in a democratic society, which the courts should defer to, also fails to recognise the complexity of Parliament's legislative process and the nature of legislation. Parliament legislates at a high level as to what should happen. Just because Parliament has passed legislation cannot automatically mean that Parliament has puts its mind to the particular facts of the case before the court, or even the risk of the issue in question arising. The courts require the flexibility to apply the appropriate deference to Parliament. This includes the courts considering the nature of Parliament's assessment, if any, of the public interest in the

[543] Though we note that where legislation confers a genuine discretion on a public authority, the fact that the legislation is necessary in a democratic society, does not determine whether a public authority's decision pursuant to that discretion is necessary in a democratic society.

[544] *R (Nicklinson),* see n.33 above, [134].

issue before them,[545] how egregious the potential rights breach may be,[546] whether the question is legislative in nature or requires a democratic mandate, and the relevant expertise of the court. [547]

295. The draft clause applies both where a court is considering a provision of legislation, and where a public authority has made a decision in accordance with legislation. However, if legislation affords a discretion on public bodies, it is unclear how Option 1 will assist the courts in working out whether the application of a provision by the public body in those cases is necessary in a democratic society. In the alternative, in situations where legislation is clear, s.6(2) HRA already provides that public bodies cannot be in breach of the HRA if, due to primary legislation, they could not have acted differently, or they were acting to give effect to legislative provisions which cannot be read compatibility with Convention rights.

296. Paragraph 291 of the Consultation states that *"where Parliament has expressed its clear will on complex and diverse issues relating to the public interest, this should be respected."* This statement is particularly unclear and, along with the proposed clauses, will likely lead to additional uncertainty. First, as set out above, often legislation will not express a particular result for a particular issue.

297. Second, the court in *R (SC)* was clear that the "will of parliament" is identified through the words that Parliament uses in its legislation.[548] It is very unclear how Parliament can express its "will" for what is necessary in a democratic society outside of legislation.[549] Option 1 and the proposal at paragraph 291 would encourage the courts to search beyond legislation for Parliament's "view". This not only risks undermining concepts of parliamentary privilege and the separation of powers – since "*the legislative function belongs to Parliament not to the executive*"[550] and thus the "*reasons which the Government gives for promoting legislation cannot therefore be treated as necessarily explaining why Parliament chose to enact it*"[551] – but also risks introducing complex and unwieldy arguments and analysis in the courts.

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[545] For example, *R (Joint Council for the Welfare of Immigrants)* see n.527 above, at [143], "*The relevant measure is an Act of Parliament implementing a socio-economic policy, against the backdrop of EU Council Directive 2002/90/EC … As such, very considerable deference must be afforded to Parliament's assessment of the public interest, and as to whether the adverse effects for individuals are outweighed by the public benefits of the measure*."

[546] *Ibid* at [140], "*However, if the measure involves adverse discriminatory effects, that will reduce the margin of judgment and thus the degree of deference. That will be particularly so where the ground of discrimination concerns a core attribute such as sex or race*."

[547] *Nicklinson* see n.33 above, Lord Mance pointed out that "on some issues, personal liberty and access to justice being prime examples, the judiciary can claim greater expertise than it can on some others." [134].

[548] *R(SC) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, [163]-[185], "the will of Parliament finds expression solely in the legislation which it enacts. Parliament does not give reasons for enacting legislation: it simply votes on a motion to approve a proposed legislative text." [167] (Lord Reed).

[549] It is only primary legislation, passed by Parliament, that can be said to have the stamp of authority from a democratically elected institution. For instance, the court in *Stockdale v Hansard* [1839] 9 Ad & E1; 112 ER 1112 was clear that a resolution by either House cannot avoid the authority of the courts, this being reserved for the Crown in Parliament.

[550] *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40 [111] (Lord Hope).

[551] *R(SC)* see n.548 above, [166] (Lord Reed).

298. Third, there is no means for the courts to override primary legislation through the HRA.[552] As detailed above (paragraph 173), under s.3 HRA the courts must respect the "grain of the legislation" and the intention of Parliament,[553] while a declaration of incompatibility under s.4 HRA has no impact on the application of the primary legislation in question.

<u>Option 2</u>: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

299. We do not consider that this clause is necessary. The courts already provide a significant amount of weight to Parliament's view where that is appropriate on the circumstances of the case (see paragraphs 293-8 above).[554] The fact that Parliament is acting in the public interest when it passes legislation is a given. It is not clear why this needs to be set out in legislation, which will likely result in additional litigation as parties seek to make additional arguments as to what weight the courts should provide to the existence of legislation. Further, as set out above in respect of Option 1, simply because Parliament has legislated to give a certain power to a public authority, it does not follow that Parliament has determined exactly how that power should be exercised in context-specific cases, or that Parliament has afforded the public authority the discretion to act in anyway pursuant to that power – regardless of whether it breaches individuals' human rights.

Para 201: The Panel therefore considered, but ultimately did not recommend, the option of clarifying in statute the matters that fall outside the institutional competence of the UK courts, noting that it would in principle be possible, but could undermine appropriate judicial restraint. We would welcome views on this proposal.

300. At paragraph 201 the Consultation proposes "*clarifying in statute the matters that fall outside the institutional competence of the UK courts."* We are strongly opposed to this principle. As mentioned above, and as IHRAR concluded,[555] the courts already do provide appropriate respect to their institutional competence.[556] This can be seen in *Elan-Cane*[557] where the Supreme Court expressly held that given the contentious social and moral

[552] This point was recognised by IHRAR in its discussion of *Nicklinson*, IHRAR, see n.5 above, Chapter 3, para. 32(e)).

[553] *Ghaidan* see n.201 above.

[554] See for instance, *R (Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, e.g. at [99] "*Foreign policy and national security are the Government's business – some would say the first business of any Government. They have access to sources of information which cannot be put before any court. They have advisers whose job it is to assess what is likely to happen in the future and how serious that will be. They are accountable to Parliament if they get it wrong. These, in brief, are the reasons given in all the cases why courts should be slow to differ from the Government's assessment of the importance of the objectives pursued in a national security context*." (Lady Hale).

[555] IHRAR, see n.5 above, Chapter 3, para. 53: "*the Courts have overall (if, inevitably, not always) demonstrated caution in drawing the line between matters that are for them to determine and matters best left to Parliament and Government as a matter of relative institutional competence*"

[556] This can be seen in the recent *Central Bank of Venezuela* case where the Supreme Court had no difficulty differing to the executive in the task of whether to recognise an individual as president of a country (*Maduro Board of the Central Bank of Venezuela v Guaidó Board" of the Central Bank of Venezuela* [2020] EWCA Civ 1249).

[557] *R (on the application of Elan-Cane)* see n.34 above.

issues that the matter raised, it was for the legislature to decide whether to allow gender-neutral options on passports, and not for the court to decide (in an area where there was no judgment from Strasbourg establishing any obligation to recognise a gender-neutral category).

301. Just because there are certain areas, such as social and economic policy and national security, which the courts are reluctant to engage in in detail – this does not mean that a high level of judicial restraint must always apply or that legal questions which are within the courts' remit cannot arise in respect of these cases.[558] For example, a case may involve both national security, and access to justice and the right to a fair trial[559] – issues that fall squarely within the courts' competence and expertise. The courts require the flexibility to assess the case before them and, employing their expertise and experience, to determine the limits of their institutional competence in the specific context.[560] As IHRAR noted "*the rationales of superior expertise or greater democratic legitimacy may be more or less compelling according to the circumstances of the case."*[561] For instance, in the context of discrimination (Article 14), the courts may adopt a stricter approach to differential treatment on certain grounds (such as sex, nationality and ethnic origin).[562] This also ensures that where issues arise in areas which may not be those that typically engage a higher level of judicial restraint, the courts are able to exercise judicial restraint if necessary.

302. Further, in practice every day the courts will be faced with cases which touch on or raise issues relating to the areas which would likely be the ones deemed to fall outside the institutional competence of the court, whether it be national security, diplomatic relations, or contentious moral and ethical allocation, but are required to adjudicate on the matters before them. For instance, the Special Immigration Appeals Commission will often be dealing with immigration and citizenship matters where national security is in issue.

303. The task of identifying and defining what matters fall "outside" the institutional competence of the courts is going to be incredibly difficult. Any list or schedule will invite arguments and litigation over its boundaries – whether narrowly or broadly defined. As IHRAR concluded,[563] prescriptive guidance would be likely to lead to satellite litigation, while general guidance would be unlikely to be beneficial. As Lord Dyson has said:

> "*My own view is that no good purpose would be served. The judges have been wrestling with this problem for years and there are a lot of cases on the subject, but they are very case-specific. If you enacted a statute, what would it say? It would have*

[558] See, for instance*, R (Naik) v SSHD* [2011] EWCA Civ 1546 at [48] *"Ministers, accountable to Parliament, are responsible for national security; judges are not. However, even in that context, judges have a duty, also entrusted by Parliament, to examine Ministerial decisions or actions in accordance with the ordinary tests of rationality, legality, and procedural regularity, and, where Convention rights are in play, proportionality. In this exercise great weight will be given to the assessment of the responsible Minister.*"

[559] See for instance, *Tariq v Home Office* [2011] UKSC 35.

[560] *Humphreys (FC) v Commissioners for Her Majesty's Revenue and Customs* [2012] UKSC 18.

[561] IHRAR, n.55 above, p.106.

[562] As expressly recognised in *R(SC)* at [71] and [151]. For instance, *Vrountou v Cyprus* (2015) 65 EHRR 31 in the context of the Strasbourg Court.

[563] IHRAR, n.55 above, Chapter 3, para. 64.

to be at a very high level of abstraction and generality, and it would have to give examples, but life is so complex that the range of examples is almost infinite. Ultimately, if you had a statute that identified certain categories of case that a judge should not decide, the judges would still have to interpret that statute. All that would happen is that you would build up a new body of case law, which I suspect would not in fact be doing anything very different from what has been happening for the last few decades, if not longer." [564]

304. Further, removing areas from the courts' competence does not stop human rights, and the Convention, applying in those areas. It makes considerably more sense for the UK courts, with their in depth understanding of the UK constitution and respect for the other branches of the state, to address "contentious" matters, rather than encouraging these matters to go to Strasbourg. When considering the suggestion to "*amend the HRA to specify areas that fall outside the UK Courts' institutional competence regarding the margin of appreciation*", IHRAR concluded that:

> "*Removing specific areas from the ambit of the HRA would, however, tend to do no more than increase applications against the UK to the ECtHR. It would thus frustrate the central aim of the HRA, and Convention itself: to have Convention rights determined in the UK. It would also ensure that any analysis carried out by the ECtHR of the UK's approach to the issue was not fully informed by the UK Courts' analysis of it, a factor which plays an important role in determining the ambit of the margin of appreciation. This version of the option thus has no positive benefit and serious drawbacks of the same nature as those found in the proposal for statutory reform rejected above.*"[565]

305. We fully agree.

Deportations in the public interest

Question 24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective?
Please provide reasons.

Evidence

306. The issue of human rights and deportation has been subject to intense political debate over the years. We urge all decision-makers when making policy in this area to provide evidence-based analysis and ensure that immigration decisions are reported in their full context. Our ability to answer this question is hampered by the fact that it is not possible to find publicly available data that differentiates between immigration appeals allowed on different Convention grounds.[566]

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[564] See, evidence given by Lord Dyson, Joint Committee on Human Rights, Oral evidence: Judicial review and enforcing human rights, HC 871, (12 October 2010) p.11-12.

[565] IHRAR, see n.5 above, Chapter 3, para 56.

[566] Ministry of Justice, 'Tribunal Statistics Quarterly, April to June 2021', 'Immigration and Asylum' (2021).

307. To that end, we understand that the Government has indicated that it will publish details of the Home Office data and sample review (cited at page 45) which provide an important evidence base for this aspect of the Consultation.[567] This would greatly assist an open and honest fact-based discussion about these important issues, however when this is done it will be too late to inform responses to the Consultation.

308. From the data that has been cited in this Consultation, we note that there were 21,521 appeals lodged against deportation by foreign national offenders ("**FNOs**") between April 2008 and June 2021. Of these, only 2,392 FNOs (or approximately 11%) had their appeals allowed *solely* on human rights grounds. In the last thirteen years, this is an average of 134 successful human rights appeals per year. This is not particularly high, especially as this figure includes those who were successful on Article 3 (prohibition on torture and inhumane/ degrading treatment) grounds.

309. The Home Office sample review from the Consultation states that, between 1 April 2016 and 8 November 2021, there were 1,011 appeals against deportation by FNOs allowed on human rights grounds at the First tier Tribunal. The survey's random sample found that approximately 70% were allowed on solely Article 8 ECHR grounds. This is an average of 129 successful appeals on solely Article 8 ECHR grounds every year. For context, in 2019/2020, there were approximately 20,000 successful immigration appeals at the First Tier Tribunal.[568]

310. The Consultation summarises three immigration cases which are said to demonstrate the need for further reform of Article 8 ECHR.[569] However, their full context and the reasons their appeals succeeded have not been explained. This does not assist with an evidence-based approach to this issue and risks undermining accurate public discourse on this important issue.

> ***Case X***
> No case reference has been provided. However, this case pre-dates the significant legal changes in the Immigration Act 2014. It is unclear what the relevance of this case is to the need for reform.
>
> ***AD (Turkey)***
> The Consultation states that the appellant was a Turkish national, convicted of grievous bodily harm in 2018 and sentenced to 54 months' imprisonment but that he was able to prevent his deportation relying on a period of lawful residence and his marriage to a UK national.
>
> However, the Consultation does not note that *AD* came to the UK 29 years earlier in 1989, had been married to a British citizen since 1990, had two adult children and five

[567] See, evidence given by Lord Wolfson, Joint Committee on Human Rights, Oral evidence: Human Rights Act reform, HC 1033, (2 February 2022) p.31.

[568] Ministry of Justice, Tribunal Statistics Quarterly: July to September 2021, Main Tables (July to September 2021).

[569] Consultation, see n.7 above, para 131.

grandchildren. He was approaching the retirement age in Turkey so would find it difficult to work, had no connections with Turkey as had only travelled there a few times since coming to the UK and suffered from depression. *AD's* son had Chron's disease and required ongoing care and support. *AD's* wife whom he had been married to for thirty-one years had no ties to Turkey, suffered from her own health problems and needed her husband to support her financially. Finally, *AD* had entered a guilty plea to his offence, shown remorse for his offending (which was said to be out of character), and had been a model prisoner. The case was said by the Judge to be "one of the rare and exceptional cases" where deportation would have been a disproportionate interference with his and his family's Article 8 rights.[570]

OO (Nigeria)

The Consultation states that in 2016 *OO* was convicted of Class A drug supply and concealment of criminal property and in 2017 plead guilty to assault occasioning Actual Bodily Harm (ABH) and battery. He was given a four-year prison sentence (and an eight month sentence to run concurrently). His deportation appeal is said to have been allowed on Article 8 grounds due to 'very significant obstacles' to his integration on return to Nigeria.

However, the Consultation does not set out that *OO* was born in the UK in 1990 and lived solely in the UK from the age of 9. *OO* was said to have known only life in the UK. An expert report was said to have outlined in 'considerable detail' the difficulties he would face on return to Nigeria. The Home Office did not challenge that *OO* had been lawfully resident in the UK for much of his life, or that he was socially and culturally integrated in the UK. Furthermore, there was unchallenged evidence that *OO's* parents would support him and prevent him committing further offences. *OO* had also received employment offers in the UK. It is also notable that the decision made clear that, if *OO* was to commit further offences, he would be unlikely to be able to successfully resist a further deportation decision.[571]

Developments in Article 8 deportation law

311. We focus in this response largely on Article 8 rights, since that is the government's primary justification for why reform in this area is necessary.[572] We are also not aware that Articles 5 and 6 ECHR are used routinely to prevent the deportation of FNOs and there is very limited available case-law on the issue.[573] No example of an Article 5 or Article 6 ECHR deportation case is cited in the Consultation.

[570] Appeal number: HU/01512/2019.

[571] Appeal number: HU/16908/2018.

[572] Dominic Raab, 'New bill of rights will deliver a healthy dose of common sense', *The Times* (14 December 2021).

[573] The most high-profile Article 6 case was that of *Othman (Abu Qatada) v UK* [2012] ECHR 56 where the European Court of Human Rights found that the UK could not lawfully deport Abu Qatada to Jordan due to the risk of evidence being used in his trial that was obtained by torture. The UK were subsequently able to deport Abu Qatada in 2013.

312. It is important to place the current legal position on deportation in its full historical context. Prior to 2006, and before the HRA itself, paragraph 364 of the Immigration Rules set out that before a deportation decision is made, the Secretary of State for the Home Department ("**SSHD**") was required to consider a list of relevant factors (such as age, length of residency, criminal record and compassionate circumstances) and then balance these factors against any public interest in pursuing deportation. There was no presumption in favour of deportation.[574]

313. As the immigration barrister Colin Yeo has said, *"This was the system that had been in place since the 1970s and it continued uninterrupted when the Human Rights Act came into force in 2000. No foreign criminal resisting deportation really needed to rely on the Human Rights Act because the immigration rules offered better protection*".[575] This system continued even after the Human Rights Act 1998 came into force.

314. It was not until the UK Borders Act 2007 that 'automatic deportation', was introduced for the first time. Deportation of a 'foreign criminal' was set out in legislation to be "conducive to the public good" and a deportation order was required to be made unless an exemption applied. The definition of a "*foreign national offender*" liable for automatic deportation, as set out in s.32 UK Borders Act 2007, is a non-British/ Irish citizen who has been convicted of a period of imprisonment of at least twelve months or for other specified offences. Section 33 includes an exemption if deportation would breach that individual's rights under the ECHR.

315. In 2012, the then Coalition government tightened the test for an Article 8 ECHR challenge to the deportation of a FNO through changes to the Immigration Rules.

316. For a person who had been sentenced to over four years imprisonment, only exceptional circumstances could now prevent deportation. For other cases, there was a new set of tests which had to be met. For example, to succeed with an Article 8 claim against deportation based on a relationship with a child, the individual would need to show (i) that they had a 'genuine and subsisting relationship with a child' under the age of 18; (ii) that the child was a British citizen or had been in the UK for at least seven years before the deportation decision, (iii) that it was not reasonable to expect the child to leave the UK *and* (iv) that there was no other family member in the UK who could care for the child.[576]

317. In 2014, further changes were introduced through s.19 of the Immigration Act 2014 (which amended the Nationality, Immigration and Asylum Act 2002). These provisions:

    a) In all Article 8 cases, stress that it is in the public interest that individuals be able to speak English, be financially independent and that little weight should be given to a private life established when a person was in the UK unlawfully or when their immigration status was precarious.

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[574] See Liam Byrne MP, then Minister for Borders and Immigration confirming this, *Hansard* 4 September 2016 Column 1746W

[575] Colin Yeo, 'Does the Human Rights Act prevent us deporting serious criminals?', *Free Movement* (26 May 2015)

[576] *'Statement of Changes in Immigration Rules'* (13 June 2012), para 114

b) In relation to deportation cases, the more serious a criminal offence, the greater the public interest is in deportation.

c) Where an individual is sentenced to more than four years imprisonment, the public interest requires deportation unless there are "very compelling circumstances".

d) For other FNOs, the public interest requires deportation unless one of two exceptions apply:

i) they have been lawfully resident in the UK for most of their life, are socially and culturally integrated in the UK and would face "very significant obstacles" to integration in the country that deportation is proposed to; or

ii) the individual has a genuine and subsisting relationship (or parental relationship) with a qualifying partner or child and the effect of deportation on the partner or child would be "*unduly harsh*". Lord Carnwath has subsequently set out in the Supreme Court case of *KO (Nigeria)* that the 'unduly harsh test' involves "*a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent*".[577]

318. A Government's 'Immigration Bill Factsheet' published at the time of the Immigration Act 2014 stated that the legislation would *"end the abuse of Article 8"* and would *"ensure the courts have regard to Parliament's view of what the public interest requires when considering Article 8 of the European Convention on Human Rights in immigration cases"*.[578] The Consultation itself states that the Government's view is *"some progress has been made in confronting the use of the Human Rights Act to prevent deportation of FNOs, most notably through the changes in the Immigration Act 2014".*[579] It is unclear how this position is consistent with the Consultation also stating that there are *"expanding human rights restrictions on the government's ability to deport serious foreign offenders".*[580]

319. It is also worth noting that all of the above measures, including the Immigration Act 2014, were passed by Parliament and contained a clear set of guidelines as to how the balance should fall within Article 8 cases. It set a series of restrictive legal tests which decision-makers and immigration judges were required to apply. Nothing in the HRA prevented Parliament from implementing such legislation.

320. The Consultation is critical that "*the discretion left to the courts to 'balance' the respective criteria has enabled the Human Rights Act to be used to dilute the intended impact, intended and articulated by Parliament through the passage and enactment of the 2014 Act, namely to deport FNOs who have shown little or no regard for the rights of others by*

[577] *KO (Nigeria) & Ors v SSHD* [2018] UKSC 53 [23].

[578] Home Office, *'Immigration Bill: Fact Sheet: Overview of the Bill'* (October 2013)

[579] Consultation, see n.7 above, p. 45

[580] *Ibid.*

committing crimes in the UK".[581] However, the tests implemented by the Immigration Act have left very little discretion to the courts. The courts have merely been implementing the will of Parliament as expressed through the Immigration Act 2014.

321. We also note that the SSHD has been granted permission to appeal by the Supreme Court in two important cases, *HA (Iraq)* and *AA (Nigeria),* on Article 8 deportation law. The Supreme Court is now due to consider the "unduly harsh" test, the "very compelling" circumstances test and the relevance of evidence of rehabilitation.[582] These cases are likely to have a significant impact upon the issues within this question and in our view it is inappropriate for the government to proceed until the legal position has been clarified by the Supreme Court.

322. Notwithstanding this, the reality is that the HRA has not prevented successive governments from imposing further restrictions on the deportation of FNOs who are seeking to remain in the United Kingdom on Article 8 grounds. In fact, the current deportation position is more stringent that before the HRA came into force.

Option One: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment.

323. It is difficult to respond to this option since it does not specify which Convention rights it would apply to and provides limited detail of the proposed threshold. However, human rights protection cannot be excluded from an individual solely because of their criminal history. In particular, there are Convention rights – Articles 2 (the right to life) and Article 3 (freedom from inhuman and degrading treatment) - which are absolute and there is no scope for returning an individual somewhere where these rights will be breached, regardless of the length of their imprisonment.

324. In respect of the limited and qualified rights, JUSTICE opposes a proposal which prevents any discretion being exercised by the decision-maker and courts. As already set out above, an FNO sentenced to at least four years imprisonment, is already subject to deportation unless there are "very compelling circumstances". Removing the remaining discretion from an individual case would mean that a decision-maker would not be able to consider any evidence to override the state's decision to deport once the relevant criminal threshold had been met. Lord Bingham in *EB (Kosovo)* emphasised that "*the search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires"*.[583] This could include evidence of rehabilitation, cooperation with the police to prevent further criminal activity or the care needs of a partner.

325. It would also prohibit the consideration of any evidence relating to the interests and wellbeing of any children including the opinion of social services or a family court judge,

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[581] *Ibid, p38*

[582] Free Movement, *'Deportation law up for MORE revision: Supreme Court to hear appeal in HA (Iraq) case'* (21 December 2021)

[583] *EB (Kosovo) v SSHD* [2008] UKHL 41 [12].

the vulnerability or ill-health of a child, the impact on the child of them or a parent being removed from the UK, the other parent's ability to look after the child as a single parent and evidence from the school of the impact of separation on the child's development.

326. The UK has signed the United Nations Convention on the Rights of the Child which states, at Article 3(1), that *"in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*". Section 55 of the Borders, Citizenship and Immigration Act requires the SSHD to ensure that regard is had to the need to safeguard and promote children's welfare in the exercise of immigration functions.[584]

327. If the only factor which a decision-maker is permitted to consider is the criminal offending of the parent, then the human rights of the child are ignored in the decision-making process. This would be incompatible with respect for the Article 8 rights of affected children and with s.55 Borders, Citizenship and Immigration Act 2009. As Lady Hale said in *ZH (Tanzania)*, "*in making the proportionality assessment under article 8, the best interests of a child must be a primary consideration"*. [585]

328. Furthermore, such an approach would not prevent an individual petitioning the ECtHR to prevent their deportation. The ECtHR has consistently held that an Article 8 deportation decision must have considered all relevant factors and carried out a proper evidence-based analysis. Directing a decision-maker to not consider certain evidence, by applying an inflexible test as suggested in this option, would mean that the ECtHR was more likely to intervene in deportation decisions.[586] This option would prevent decision-makers and courts from carrying out their own proportionality assessment. It would therefore set up a completely unnecessary confrontation with the Strasbourg Court in circumstances when, as is demonstrated by *Ndidi,* the UK is already given a significant margin of appreciation in relation to immigration matters.[587] As a result, individuals would be able to bring a claim

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[584] In *Zoumbas v SSHD* [2013] UKSC 74 [10], Lord Hodge further elucidated how the Section 55 duty was to be applied: (a) the best interests of a child are an 'integral part' of the Article 8 proportionality assessment; (b) the best interests of a child must be a primary consideration, though not the only primary consideration; (c) whilst the best interests of a child can be outweighed by other considerations, no other consideration should be treated as inherently more significant; (d) judges must ask the right questions in an orderly manner to avoid undervaluing the child's best interests; (e) it is important to have a clear idea of a child's circumstances and their best interests before assessing whether those considerations are outweighed; (f) there is no substitute for a careful examination of all relevant factors; and (g) a child must not be blamed for matters which they are not responsible for (such as the conduct of a parent).

[585] *ZH (Tanzania) v SSHD* [2011] UKSC 4 [33].

[586] For example, see *Ndidi v The United Kingdom* [2017] ECHR 781 [81] in which the lawfulness of the deportation order was upheld because the ECtHR was satisfied that the First-tier Tribunal (and all relevant decision-makers) had given *'thorough and careful consideration'* to the proportionality test required by Article 8. Indeed, the Court did not overturn the decision of the domestic courts specifically because of the careful scrutiny of relevant factors applied by domestic decision-makers. These factors included length of residence, family ties in the UK and ongoing relationship with his son.

[587] *Ndidi v United Kingdom* (2017) ECHR 781 [76]; *'The requirement for "European supervision" does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the Article 8 proportionality assessment afresh. On the contrary, in Article 8 cases, the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests*

in Strasbourg and seek an interim measure under Rule 39 to suspend their deportation whilst their application is being considered. This will likely result in an individual remaining in the UK for a significant period given the length of time taken for cases to be finally determined in Strasbourg.

329. JUSTICE therefore strongly rejects this proposal which would clearly lead to breaches of the Convention rights and undermines the human rights of the entire family unit.

<u>Option 2</u>: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights.

330. JUSTICE notes that the UK already has a legislative scheme for balancing the Article 8 rights of individuals against the wider public interest in deportation for FNOs in the Immigration Act 2014. The government can already pass legislation and amend the immigration rules to set out how human rights should be interpreted when decisions are being made about deportation. As set out above, it has changed the Article 8 deportation rules on several occasions, tightening the criteria for success. The Government itself acknowledges in the Consultation that it considers that this has led to *"some progress"* in achieving its stated aim.

331. However, this option sets out that *"certain rights can only prevent deportation where provided for in a legislative scheme"*. Whilst the Government is entitled to set out legislation or regulations on how limited or qualified rights can be interpreted, the compatibility of that scheme with the Convention rights set out in the HRA or any new Bill of Rights is for the courts to decide. This option suggests it will be for Parliament and/or the executive to definitively determine the circumstances in which deportation will not breach an individual's rights. As explained in answer to Question 23 above, we are opposed to such an approach which would undermine rights protection in the UK and leave the courts with essentially no role in protecting qualified or limited human rights. This would be a concerning challenge to the fundamental separation of powers in our constitution.

332. The Consultation does not propose substantially amending s.6 HRA, which requires public authorities to perform their functions in a Convention compliant manner. Deportation decisions are made by Home Office individuals, based on the individual facts of a case. It is unclear how this option would be consistent with the equivalent provision to s.6 HRA in the new Bill of Rights.

333. JUSTICE is also concerned that this option refers to "certain rights". As with Option 1, it is notably vague as to which European Convention rights the Government envisages it would apply to. Whilst the Consultation confirms that the government would not deport an individual to face torture (or inhuman or degrading treatment), it also concerningly states that Article 3 rights are being "incrementally expanded" by both the ECtHR and UK courts.

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against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities'

No further information is provided as to how Article 3 rights have been expanded. JUSTICE would state forcibly that there is no public interest that could justify deportation when an individual would face torture, or inhuman or degrading treatment in the proposed country of return.

334. Similarly, there is no mention of Article 2 rights in the context of deportation in the Consultation. JUSTICE would emphasise that no individual should be deported if there are substantial grounds for believing that there would be a breach of Article 2, such as if an individual would face a real risk of being subjected to the death penalty.[588] It has also been found to be a breach of the SSHD's Article 2 obligations to attempt to remove someone who could provide key evidence around an inquiry into a death in an immigration removal centre.[589]

335. JUSTICE therefore does not support this proposed approach. Whilst Parliament and the executive are permitted to set out a legislative scheme to balance limited or qualified rights with the wider public interest, and indeed already do, any such scheme must enable consideration of all the factors involved in a particular case and the impact of deportation on all concerned. In the absence of scheme which allows this, the Courts are constitutionally entitled, and indeed are required by s.6 of the HRA, to assess the balance of rights in a deportation case.

336. As with Option 1, this option also risks creating a gap in rights protection between the UK and ECtHR if UK courts are prohibited from undertaking a Strasbourg-compliant approach to deportation cases, increasing the number of deportation cases that will end up at the ECtHR.

<u>Option Three</u>: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.

337. There is very limited information in the Consultation about how the Government envisages this proposal operating in practice and it is accordingly very difficult to properly respond to it. However, as we understand it, the proposal seeks to limit the ability of specialist immigration judges to make findings as to whether deportation would breach an individual's human rights or whether it is justified in the public interest. This proposal assumes that the Home Office will make a properly reasoned and informed initial decision. However, the Consultation does not put forward any evidence to demonstrate that the 'issue' of courts overturning Home Office decisions is a product of the courts being overly-interventionist rather than of poor Home Office decision making. Conversely, there have been numerous reports which have been critical of poor-quality immigration decision-making within the department.[590]

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[588] *Al Nashiri v Poland* [2014] ECHR 833

[589] *Ahmed Lawal v SSHD* [2021] UKAITUR JR006262020

[590] See, for example, *Wendy Williams, 'Windrush Lessons Learned Review',* (March 2020) which found that *'within UK Visas and Immigration (UKVI) and Immigration Enforcement (IE) decision-making there was a "target-dominated" work environment and low-quality decision making…a lack of empathy for individuals and some instances of the use of dehumanising jargon and cliches'* (page 13)

338. Section 94 of the Nationality, Immigration and Asylum Act 2002 already contains a provision for certification by the SSHD of a human rights claim which is 'clearly unfounded'. The SSHD's certification policy states that a caseworker must consider the individual circumstances of every applicant and a family's claim as a whole but can then certify a claim where it is so clearly without substance that it is bound to fail. This is an important tool which the SSHD already has to deal with abusive or completely unmeritorious claims. We are therefore solely talking here about human rights claims involving meritorious arguments which require detailed consideration.

339. We are particularly concerned about how this would operate in the context of absolute rights (Articles 2 and 3). If an individual has a credible claim that their deportation would result in their death or torture or inhuman treatment, then they should have the right to have that claim fully assessed and reviewed by an independent tribunal.

340. It has long been a feature of our immigration system that experienced, independent judges can and should establish the relevant facts within human right appeals. As was stated in the House of Lords decision in *Huang,*[591] immigration judges are often in a better position than the Home Office to make, for example, an Article 8 assessment. Lord Bingham held in that case that, *'"(i)n any event, particularly where the applicant has not been interviewed, the [appellate immigration] authority will be much better placed to investigate the facts, test the evidence, assess the sincerity of the applicant's evidence and the genuineness of his or her concerns and evaluate the strength of the family bond in the particular case".*[592] No evidence has been put forward in the Consultation to convincingly set out that immigration judges have been improperly undertaking this task.

341. JUSTICE is concerned with how this option would work in practice and fit within the current complex labyrinth of immigration appeals and judicial reviews. At present, a human rights decision is either certified as clearly unfounded (a decision which can only be challenged in the UK by way of judicial review or an out-of-country appeal) or, if it is not certified, is granted a full in-country appeal at the First-tier Tribunal. This proposal would add a third option in deportation cases, where a judge would have to review whether a deportation decision was "obviously flawed". It is unclear from the Consultation what the legal test would be; the phrase "obviously flawed" suggests that there could be a situation where a decision was found to have been flawed but that would not be sufficient for the court's intervention. This would clearly be hugely unsatisfactory.

342. If the proposed Court process would work like a judicial review, then there would presumably be legal submissions made to a judge who would then apply the "obviously flawed" test. However, first, this is likely to provide more limited grounds than are presently available for a judicial review of an immigration decision where a court could examine for example whether there was procedural unfairness, a breach of s.6 HRA or a breach of government policy. There is no proper justification made for limiting the grounds for challenging such a decision, and why those grounds would be potentially more limited

591 *Huang v SSHD* [2007] UKHL 11.

592 *Ibid* [15].

than those available to an individual in a judicial review of a human rights certification decision.

343. Second, human rights decisions are an inappropriate type of case for a judicial review-type hearing. A deportation case, especially one involving Article 8 considerations, is likely to involve factual evidence which may be in dispute about the nature of an individual's relationships with partners or children. Such evidence is normally critical to the balancing of rights in an individual case and factual errors could lead to a decision which is said to be 'obviously flawed'. However, it is doubtful that factual evidence around an individual's family life could be properly examined by a judge without evidence and cross-examination of relevant witnesses. This is especially true given there is not usually a Home Office interview for an Article 8 claim and the Home Office will often dispute factual assertions made by applicants. Alternatively, if the Tribunal did hear evidence, it would be procedurally unfair to not allow a Tribunal judge to make findings on that evidence.

344. Given the delays between the initial human rights application, a decision and a subsequent appeal hearing, there is also likely to be new evidence and/or a change of circumstances in many cases. The logic of this proposal would suggest that any new evidence, even that which was not available at the time of the initial decision, would not be able to be considered in any hearing. This would not only be unfair on the appellant, who would not able to put forward their full claim, but also procedurally absurd. It would mean that a further fresh human rights claim would need to be made by the individual. This could then lead to a further appeal or judicial review which would further delay any final decision on deportation.

345. It would also create an unfair, discriminatory and legally confusing situation where different Tribunal hearings had different legal purposes. An individual would be substantially disadvantaged because their immigration application involved human rights, rather than another basis in the Immigration Rules. It is also unclear how this would work if an individual was to raise multiple grounds of appeal, for example both Refugee Convention and human rights grounds. In such a case, the Tribunal judge would be permitted to consider the refugee claim substantively but not the human rights claim, even if they were concerned with the same country situation and similar issues of credibility. This would be unworkable and lead to discrimination between individuals based on their case type, for example those who had an Article 3 claim rather than a claim under the Refugee Convention.

346. We would also note, in the context of Article 8, that legal aid has been out of scope for Article 8 ECHR claims since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO**"), though an individual can apply for Exceptional Case Funding. JUSTICE have called for Article 8 applications to be back 'in scope' for legal aid[593] as have numerous other organisations such as the JCHR.[594] It is notable that, at the time, the Government justified the legal aid reforms on the basis that, whilst immigration law was

[593] JUSTICE and Public Law Project, *'Legal Aid and the Nationality and Borders Bill: A Joint Briefing by Public Law Project and JUSTICE for House of Commons Committee Stage'*, (21 September 2020), p 5.

[594] Joint Committee on Human Rights, *'Enforcing human rights: Tenth Report of Session 2017–19'* (11 July 2018), para 55

complex, an individual would not need to make legal submissions as "*immigration cases are generally about whether the facts of a particular case meet the immigration rules*".[595] The proposed changes, and added complexity of this option, would undermine this rationale.

347. Finally, as emphasised above, if a UK court or tribunal is not able to fully assess the circumstances of an individual and come to a view on the compatibility of deportation with Convention rights based on all of the facts and circumstances of the case, then it will likely result in increased litigation in Strasbourg.

Illegal and irregular migration

Question 25: Whilst respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

348. JUSTICE is perplexed by this aspect of the Consultation. The Government considers there are "challenges" to its attempt to tackle illegal migration and then cites the non-refoulement principle in international law and the rights of refugees set out in the 1951 Refugee Convention. The question then makes clear that the UK is committed to respecting our international obligations but wants to address "impediments" arising from the ECHR. There is no indication provided of what these impediments are.

349. We do not view human rights protection as "impediments". The ECHR does not contain a right to asylum within a particular country. However, the ECHR and the HRA provide that everyone in the United Kingdom is entitled to a basic level of human rights protection and fair treatment, which cannot be removed simply because of that individual's background or their precarious immigration status. To do so would be not only discriminatory but undermine the fundamental principle that human rights are universal and available to all.

350. We are already concerned that the Government's current attempts to address illegal and irregular migration in the Nationality and Borders Bill will create a system where people with a legitimate basis to stay in the UK and genuine grounds to fear removal, may be removed without effective access to justice.[596] Numerous experts are also of the view that the Nationality and Borders Bill would violate the UK's international obligations and risk human rights violations, including in respect of victims of trafficking, both adults and children.[597] Leading practitioners have described the Bill as the "*biggest legal assault on*

[595]Ministry of Justice, *'Reform of Legal Aid in England and Wales: the Government Response'*, (June 2011), para 86

[596] JUSTICE, *'Nationality and Borders Bill'*

[597] For example, the United Nations High Commissioner for Refugees, *'Updated Observations on the Nationality and Borders Bill, as amended'* (January 2021); Siobhán Mullally, Special Rapporteur on trafficking in persons; Felipe González Morales, Special Rapporteur on the human rights of migrants, Fionnuala Ní Aoláin, Special Rapporteur on the promotion and protection of human rights while countering terrorism, Tomoya Obokata, Special Rapporteur on contemporary forms of slavery, including its causes and consequences, *'Letter to UK Government'* (5 November 2021). Endorsed by Reem Alsalem, Special Rapporteur on violence against women, its causes and consequences.

international refugee law ever seen in the UK".[598] We are opposed to the introduction of any measures that would further threaten individuals' rights and deny them access to justice based on their nationality and immigration status.

351. The Consultation suggests that the above options in question 24 could apply to "asylum removals". We have the same concerns as set out in response to question 24 in relation to the removal of failed asylum seekers and overstayers. To the extent that the Consultation is suggesting that the proposals could be used to remove those who have been granted refugee status, there are already provisions under the Refugee Convention for those who pose a danger to the United Kingdom[599] which apply both to those seeking asylum and those granted refugee status. However, this is a serious undertaking by any state and requires detailed analysis of the factors in the individual case. It would be a serious breach of the UK's international obligations to seek to exclude those from the Refugee Convention, and to propose returning an individual to a real risk of persecution, solely based on an arbitrary test of their length of sentence. It would be plainly incompatible with the ECHR to apply such a test to Article 3 cases given this is an absolute right. In relation to other qualified/ limited rights, we have set out our views clearly above that such an approach would not be proportionate and compliant with our obligations under the ECHR.

Remedies and the wider public interest

Question 26: We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:

a. **the impact on the provision of public services;**
b. **the extent to which the statutory obligation had been discharged;**
c. **the extent of the breach; and**
d. **where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.**

Which of the above considerations do you think should be included? Please provide reasons.

352. The Government considers that "*the compensation system can be used to make sure that the wider public interest is properly protected alongside individuals' rights*".[600] Damages awarded under the HRA have a crucial role in ensuring that human rights protections are effective. JUSTICE is concerned that the Consultation proposals appear to seek to limit the amount of damages awarded by the court. We do not consider that the case has been made out for this proposal and are concerned that the factors listed should not be given undue prominence in the courts' assessment of damages, to the detriment of compensating a claimant for the harm suffered, both financial or otherwise, due to a breach of their human rights.

[598] Freedom from Torture, *'In the Matter of: Nationality and Borders Bill: Joint Opinion'*, (October 2021), para 3

[599] See, for example, Article 33(2) of the Refugee Convention

[600] Consultation, see n.7 above, para 299

Damages Play a Crucial Role in Creating a Human Rights Culture

353. At present, domestic courts can award compensation pursuant to section 8 of the HRA, in line with ECtHR principles which stipulate that courts should be satisfied that any award is necessary to afford "*just satisfaction*" to the victim.[601] Broadly, damages are granted where the loss is clearly quantifiable or where the violation is sufficiently severe that a declaration or other non-financial remedy would not be considered sufficient to achieve an equitable outcome. Fundamentally, the court should seek to place the victim, insofar as is possible, in the same position as if their rights had not been infringed.[602]

354. However, as the Supreme Court noted in *DSD*, financial compensation is "*by no means automatically payable*".[603] The Supreme Court went on to explain that an award under the HRA serves a different purpose to one in a civil claim, being to uphold minimum human rights standards and vindicate those rights as opposed to compensating claimants for their losses.[604] Broadly, they are incurred where a declaration, quashing, or mandatory order would fail to provide the victim with just satisfaction.

355. The value of this option is, therefore, twofold. On the one hand, victims are compensated for what can be severe and traumatic violations of their rights.[605] On the other, the State is incentivised to uphold the Convention and ensure individual's rights are protected. As the court noted in the case of *Brennan*, awards should be kept modest, "*but not minimal because this would undermine respect for Convention rights*".[606]

356. For this reason, it is concerning that the Government has not fully weighted the benefits both for good governance and victims at large. This is clear where the Consultation claims that the "*potential reduction in compensation awards could lead some litigants to decide no longer to pursue their claims, resulting in cost savings for the courts*",[607] without considering the detrimental impact such reductions would have on some of society's most vulnerable.

357. Where the Government is concerned about the costs of compensation, the clear solution is for the State to act in a way that is compliant with the Convention. The Government should not be considering watering down one of the key avenues for compliance where the fault for compensation amounts rests solely with their own decision-making

[601] Section 8(3) Human Rights Act 1998; Article 43 ECHR.

[602] *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 [59]. The centrality of this principle has also been reiterated in subsequent cases. For instance, see *R (Infinis Plc Infinis (Re-Gen) Ltd) v Gas & Electricity Markets Authority and another* [2011] EWHC 1873 (Admin) [105]; and *R v Secretary of State for the Home Department ex parte Greenfield* [2005] UKHL 14 [10].

[603] *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11 [136].

[604] Ibid [64]-[65].

[605] See examples of non-pecuniary harm which can be severe – e.g. proven psychiatric harm in *DSD & Anor v The Commissioner of Police for the Metropolis* [2015] WLR 1833; *Re H (Parental Responsibility: Maintenance)* [1996] 1 FLR 867; *Kate Wilson v (1) The Commissioner of Police of the Metropolis and (2) National Police Chiefs' Council* IPT/20/01/CH (22 February 2022).

[606] *Brennan v City of Bradford MBC* [2021] 1 WLUK 429 [152].

[607] Consultation, Appendix 3, para 5.

processes. This clearly contrasts with the Ministry of Justice's stated commitment to improving the service and support victims receive and "*guarantee that victims are at the heart of the criminal justice system"*.[608]

Levels of compensation are already modest

358. The Consultation does not provide any evidence that would justify a radical change in the way damages are awarded for claims concerning breaches of the HRA, bar speculative references to the need for public bodies to pay compensation following successful claims.[609] This is likely because, in reality, courts seldom award damages, and when they do, they are generally low in amount.

359. It is important to first distinguish between damages for pecuniary loss (financial) and for non-pecuniary loss (such as psychological and physical damages, anxiety and distress).[610] In both cases, UK courts will, pursuant to s.8(4) refer to the principle of "just satisfaction" applied by the ECtHR in respect of Article 41. However, the principles that govern these two categories of loss under the HRA, and the ECtHR, context are necessarily different – in the former the claimant has lost a determinable amount of money due to a breach of a human right, while in the latter the financial compensation is a means to compensate a claimant for the non-financial effects of a human rights violation.[611]

360. The domestic courts, following the approach of the ECtHR, are generally much more willing to award financial compensation for pecuniary loss over non-pecuniary loss. As the ECtHR has made clear, the principle underlying the provision of just satisfaction in respect of pecuniary damage is that "*the applicant should as far as possible be put in the position he would have been in*" had the requirements of the ECHR not been disregarded.[612] This is also referred to, particularly in domestic jurisprudence, as the principle of *restitutio in integrum* (i.e., restitution to the original position). In these contexts, the courts have recognised that proven significant pecuniary loss caused by the human rights violation should be "*compensated in full*".[613] For example, in the context of the ECtHR in *Smith and Grady*[614] damages were awarded to homosexual individuals who had been discharged from the armed forces in breach of Article 8 ECHR. The award of damages therefore rightly compensated the claimants for lost earnings and pension rights.[615] It is also worth noting that the Consultation does not explain why the approach to damages under the HRA should be any different to that for any other claim against a

[608] Ministry of Justice, *'Delivering Justice for Victims: A consultation on improving victims' experiences of the justice system'* (December 2021),

[609] Consultation, see n.7 above, pages 40 and 45.

[610] A distinction that is made clear in the Practice Direction of the ECtHR on Just Satisfaction claims

[611] *R (on the application of Faulkner) v Parole Board* [2013] UKSC 23; *Anufrijeva v Southwark London Borough Council* [2004] QB 1124.

[612] See, for instance, *Piersack v Belgium* [1984] 7 EHRR 251 at [11]-[12] and *Kingsley v United Kingdom* [2002] 35 EHRR 177 at [40].

[613] *Faulkner see* n. 611 above, [13]; *Anufrijeva*, see n.602 above, where the court stated that *"where the established breach has clearly caused significant pecuniary loss, this will usually be assessed and awarded"* [59].

[614] *Smith and Grady v United Kingdom* [2001] EHRR 620.

[615] *Faulkner, see* n.611 above, [59].

public body (e.g., for breach of statutory duty). Not only would two diverging regimes of compensation (one based on human rights-related claims; the other not) be manifestly unjust, it would also introduce yet another level of complication, again raising the costs of litigation which is contrary to the Government's supposed aim.

361. In contrast, where damages are for non-pecuniary loss, the court is much less willing to award compensation. In *Rabone*, the Supreme Court held that held that Article 2 ECHR imposed an obligation on the NHS Trust to take reasonable steps to protect a mentally ill individual from the risk of suicide. Taking into account *Savage (No 2)* [2010] EWHC 865 (QB), it was noted that compensation for non-pecuniary loss relating to breaches of Article 2 ECHR ranged from €5,000 to €60,000 which are sums that were considered "*fairly modest, but nevertheless within a considerable range*".[616] The court acknowledged that in that case "*there is real force […] that £5,000 each was too low*",[617] however the parents did not appeal and the Court of Appeal proceed to award such amount.

362. In the case of *Omar Mahmud*, the State violated claimant's rights under Article 3 ECHR when it refused their asylum claim and withdrew accommodation and ancillary financial support for 167 days. The claimant sought a declaration and damages of £10,000. In evaluating the quantum, it was noted that no authority, domestic or European, justified an award of such a high amount. Taking into account the case of *R (W) v Secretary of State for the Home Department (Project 17 intervening)* [2020] EWHC 1299 (Admin), where the claimant was a mother who was a foreign national and was denied access to public funds which exposed her and her child to imminent homelessness over a number of years, the court awarded a total of £3,000. It was then acknowledged that whilst there was authority to the effect that awards should be modest as cases are not about the money, this should still not skew a proper evaluation of quantum.[618] The court also therefore, following *Alseran*, used the *Vento* amounts as a touchstone.[619] Taking all this and the specific circumstances into account, the claimant was awarded a total of only £1,750.

363. Similarly, in *Greenfield*, in relation to violations of Article 6 it was observed that where the ECtHR has awarded compensation for pecuniary or non-pecuniary loss, "*the sums awarded have been noteworthy for their modesty*".[620] Likewise, in *DSD*, Green J noted that when assessing quantum, actual sums awarded should be viewed in light of sums claimed: "*quite routinely modest sums are claimed and hence modest sums are awarded*".[621]

364. As well as being regularly modest in amount, it is important to note that there are other limiting factors which require a breach to be sufficiently severe in the context of non-pecuniary losses. In *R (KB and others) v Mental Health Review Tribunal*, Burnton J stated that "*even in the case of mentally ill claimants, not every feeling of frustration and distress*

[616] *Rabone*, n.2525 above, [85]

[617] *ibid*, [88].

[618] *In the Matter of an Application by Omar Mahmud for Judicial Review* [2021] NIQB 37 [62].

[619] *Alseran & Ors v Ministry of Defence* [2017] EWHC 3289 (QB)

[620] *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14 [17]

[621] *DSD*, see n.306 above, [68].

will justify an award of damages. The frustration and distress must be significant: 'of such intensity that it would in itself justify an award of compensation for non-pecuniary damages".[622] Similarly, in *Faulkner*, the position was summarised as being that damages can be awarded for non-pecuniary losses such as frustration and anxiety only where they are sufficiently severe, and that where this is presumed or shown, a "*mere finding of violation of the relevant article of the ECHR will not ordinarily constitute sufficient justification. An award of damages should also be made, but on a modest scale*."[623] In this case such damages were awarded as it was held the claimant had suffered "*substantial anxiety, frustration and distress over the period of a number of years*".[624]

365. In cases of pecuniary losses, full compensation is not guaranteed. Apart from the principle of restitutio in integrum, the ECtHR's "guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case".[625] This approach is applied by the ECtHR not only to non-pecuniary damage claims, but also for cases involving pecuniary damage where equity may lead the ECtHR to award less than the actual loss suffered despite the principle of restitutio in integrum.[626]

366. In relation to cases in which the violation is continuing, courts generally prioritise declarations and stopping the breach in the first instance, and thereafter consider the issue of damages, and whether they should be awarded, as a secondary matter. For example, in *DSD*, the court noted that "*the importance of declaratory relief in an appropriate case is not to be underestimated. It provides a formal, reasoned, vindication of a person's legal rights and an acknowledgment in a public forum that they have been wronged. It is an integral part of the democratic process whereby a public body can be called to account*."[627] Likewise, this is clear from the case of *SXC,* which involved a breach of Article 14 ECHR for discrimination in relation to universal credit. The court acknowledged that in certain cases, compensation "*may be the primary if not sole way in which just satisfaction can be afforded*" but that the present case was not of that nature as the primary objective was to quash the secondary legislation creating the ECHR violation and it was indistinguishable from the overwhelming majority of public law claims in which traditional judicial review remedies are sought, and in which the grant of that remedy is sufficient to address the wrong alleged.[628] In practice, new regulations had been introduced to allay the issue and this was therefore just satisfaction in itself.[629]

367. In sum, the existing wealth of case law, at both a domestic and Strasbourg level, makes clear that the amount of compensation awarded tends to vary between modest and very low sums. Where the Government remains concerned about such payments, the only

[622] [2003] EWHC 193 (Admin) [73]

[623] *Faulkner,* see n.611 above, [16].

[624] *Ibid*, [155].

[625] *Al-Jedda v United Kingdom* [2011] 53 EHRR 23 [114]

[626] As explained in the practice direction, see n.610 above.

[627] *DSD,* see n.306 above, [18].

[628] *SXC*, see n.409 above, [12].

[629] *Ibid*, [12].

reasonable solution would be to ensure that the State undertakes such policies as to ensure consistent and high-quality compliance with the Convention, for the benefit of individuals as well as the public purse.

The factors listed are already considered to some extent

368. To a certain extent, the courts are already able to consider a number of the factors proposed by the Consultation. For example, section 8(3) of the HRA provides that a court may not award damages unless it takes into "*account of all the circumstances of the case*" including any other relief or remedy granted, as well as the consequences of any decision in respect of that act.

369. The courts already take into account the extent to which the public authority had discharged its obligation and the extent of the breach. For example, in *DSD* the court acknowledged that case law broadly reflects the position that "*logic dictates that the greater degree of police culpability, the higher the award*".[630] In this case the women were among many who an individual had attacked over six years and there had been systematic and operational failures by the Police. The court provided for a sliding scale of awards, for instance claims involving psychological, mental or other harm in Article 3 ECHR violations received between €1,000 and €8,000 for a nominal award, €8,000 to €20,000 for a routine violation with no serious long term mental health issues and €20,000 to €100,000 for cases with aggravating factors such as medical evidence of material psychological harm.[631]

370. With respect to the impact on the provision of public services, the Court of Appeal in *Anufrijeva* stated that "*(i)n considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole*".[632] The Court further reasoned that "*(t)here are good reasons why, where the breach arises from maladministration, in those cases where an award of damages is appropriate, the scale of such damages should be modest. The cost of supporting those in need falls on society as a whole. Resources are limited and payments of substantial damages will deplete the resources available for other needs of the public including primary care*".[633]

371. While the courts may, therefore, take such factors into account, they do not consider the factors in the explicit way or to the extent the Consultation proposes. For example, while impact on the provision of public services is a factor that is taken into account (as noted above), a potential increase in the number of similar claims brought against the State cannot necessarily justify departure from the fundamental ECtHR principle of *restitutio in integrum*. Similarly, while the courts may take into account the public authority's conduct, in particular whether the breach arose from a misunderstanding of the legal position, this does not equate to the proposed specific consideration of whether the public authority

630 *Ibid*, [68].

631 *Ibid*, [68].

632 *Anufrijeva,* see n.602 above [56].

633 *Ibid,* [74].

was trying to give effect to legislation or considering the extent to which the statutory obligation had been discharged.

372. JUSTICE considers that inserting these factors explicitly into legislation would result in a division between the established jurisprudence (developed both domestically and in Strasbourg) and the new Bill of Rights and represents a change in approach to the awards of damages for violations of Convention rights. Since damages currently tend to be awarded either where the loss is clearly quantifiable or where the violation is sufficiently severe that a declaration or other non-financial remedy would not be considered sufficient to achieve an equitable outcome, the Government's intention appears to prioritise reducing the financial burden on the State that results from its own misconduct and Convention violations, even where such cost is already very modest. The outcome would be a compensation framework that is inconsistent with Strasbourg, highly likely to incur complex litigation (with the UK being found in breach), and victims left without their full entitlement to compensation where the State has done them wrong.

373. Given the present legal situation, combined with the fact that compensation awards are already modest, it is unclear what problem the Government wishes to address beyond relieving itself of any responsibility for its material breaches of the Convention. If this is the rationale, then it is plainly unacceptable.

IV. Emphasising the role of responsibilities within the human rights framework

Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.

> **Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or**
>
> **Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.**

374. The Government rightly recognises that "*[e]veryone holds human rights whether or not they undertake their responsibilities, particularly the absolute rights in the Convention such as the prohibition on torture*". Yet, in the same breath, the Consultation goes on to state that "*our new human rights framework should reflect the importance of responsibilities*".[634] Two options are offered to achieve this by way of a reduction in damages: the first, on account of the claimant's conduct specifically linked to the circumstances of the claim (which is broadly the case at present);[635] the second, with respect to the claimant's wider conduct, and whether there should be any limits, temporal or otherwise.

375. The very premise of this proposal is unacceptable and belies the fact that the Government at best misunderstands the human rights framework and traditions that exist in the UK, or at worst seeks to undermine its core principle, that all should be treated equally regardless of background or conduct. In sum, JUSTICE considers that both options can be rejected; the first because, to the extent it intends to reflect current practice, it is not necessary. Alternatively, if Option 1 is designed to go further than the status quo, it and Option 2 should be rejected for the reason that they are fundamentally incompatible with the very concept of human rights.

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[634] Consultation, see n.7 above, p.84.

[635] In *DSD*, n.306306 above, the court identified "*the conduct of the [c]laimant, and whether it may, in any relevant way, be described as reprehensible*", as a relevant factor. In particular, in the context of claims involving claimants accused or guilty of criminal offences, such as claims in relation to Article 6 ECHR, "*the reprehensible nature of the claimant's conduct may preclude or substantially reduce a pecuniary remedy*". Citing the Law Commission report 'Damages under the Human Rights Act', Green J noted that a claimant's conduct may be relevant in two ways: (i) it may be relevant to causation, as the responsibility of the state will be diminished to the extent that the claimant has contributed to the loss for which he is claiming; and (ii) it is taken into account more generally in determining whether it is equitable to award just satisfaction ([37]). Equally, in *McCann v United Kingdom* [1996] 21 EHRR 97 the Court was concerned with IRA gunmen killed by military forces and stated "*…having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award under this head*".

Threat to Human Rights architecture

376. The Government proposes that the courts could "*be invited to hear about the lawfulness of the claimant's conduct in the circumstances surrounding the claim but could also be empowered to consider relevant past conduct, such as whether the claimant has respected the rights of others*".[636] In practice, this would involve the courts being

> "*expressly guided to think critically about the redress they offer and avoid rewarding undeserving claimants who may themselves have infringed the rights of others. This will serve to put on a statutory footing those considerations which the courts have already recognised as being relevant to the determination of remedies*".[637]

377. JUSTICE recalls that it is a fundamental principle of our domestic and international human rights obligations to treat all equally, regardless of status or prior conduct. This is incontrovertible. In the words of Lord Hope:

> "*The rights and fundamental freedoms that the Convention guarantees are not just for some people. They are for everyone. No one, however dangerous, however disgusting, however despicable, is excluded. Those who have no respect for the rule of law – even those who would seek to destroy it – are in the same position as everyone else*".[638]

378. As a matter of principle, we are therefore strongly opposed to the principle that underlies much of the Government's proposal. The question appears to fundamentally misunderstand the purpose that human rights as a concept serve. Such rights are not earned; rather they exist for every individual to enjoy, without discrimination. Indeed, the preamble to the Convention explains clearly that the Contracting Parties have "*the primary responsibility to secure the rights and freedoms defined in this Convention*".[639] This is a responsibility that the State should take seriously, and not seek to water down as mooted in this Consultation. Indeed, both proposals would afford the State the ability to diminish its own responsibilities to those within its jurisdiction. This is in line with the *travaux préparatoires* to the Convention, which state that: "*All the States that have taken part in drawing up, signing and promulgating our Statute have bound themselves to respect the fundamental rights of the human individual. They have accepted the principle of a collective guarantee of fundamental freedoms*".[640]

Consideration of prior conduct is already permitted in limited circumstances

379. The Government's two proposed options are premised on broad and undefined concepts of individual's "*responsibilities*" which are alien to domestic and international human rights

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[636] Consultation, n.77 above, p.85.

[637] *Ibid*, p.85.

[638] *RB (Algeria) v SSHD* [2009] UKHL 10, [210].

[639] European Convention on Human Rights.

[640] *Travaux Préparatoires, 'Preparatory Work on Article 1 of the European Convention on Human Rights'* (31 March 1977), p.8.

jurisprudence. However, with respect to Option 1, claimants' behaviour can already, in certain instances, have a relevance on the way that a right applies to them. This is clear from the case of *DSD*, when the court noted that "*the reprehensible nature of the claimant's conduct may preclude or substantially reduce a pecuniary remedy*".[641] There are a number of cases which demonstrate courts already take into account conduct where an individual has contributed to their situation, injury, or damage (in line with claims for civil compensation).[642] Option 1 is therefore unnecessary. However, if the Government's intention is to expand the specific circumstances in which the claimant's conduct is already taken into account by the courts, then we disagree for the reasons set out below.

380. Further, successful claims for damages include some of the most egregious instances of unacceptable State behaviour. For example, in 2022, the Investigatory Powers Tribunal awarded an environmental activist who was deceived into a two-year intimate relationship by an undercover police officer (the 'SpyCops' case) with £229,000 in compensation.[643] Where a range of Government proposals seek to restrict the ability of citizens to seek redress in the face of serious State abuses, individuals who have suffered as a consequence will inevitably be dissuaded from bringing a claim – resulting in a chilling effect for potential victims. Both options would represent the imposition of yet another barrier to justice.

381. In respect of Option 2, an applicant's wider conduct should not have any relevance as to how 'bad' the breach of the applicants' human rights is considered to be, or whether the applicant is considered to be 'deserving' of a damages award to seek to compensate for that breach. For instance, by definition, most of those who are in prison will have criminal records. This should not mean that they are not deserving of any damages if they are subject to rights abuses. This contradicts the fact that "*(t)he very essence of the Convention is respect for human dignity and human freedom."*[644] As such, the Convention bestows rights on an individual simply by virtue of them being human, regardless of who they are or the decisions they have made.

<u>Reforms would incur a wide-range and severe impact on citizens</u>

382. Option 2 would allow courts to reduce damages "*in part or in full on account of the applicant's wider conduct*".[645] As a general point, it is not clear what the Government means by this. We are therefore concerned that 'conduct' could presumably include prior conduct or behaviours that are completely irrelevant and unrelated to the claim at hand. Not only is this unacceptable as a point of principle, but it would also potentially capture an enormous number of individuals resulting in a sizeable percentage of the population having a reduced entitlement to redress where their human rights are violated.

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[641] *DSD,* see n.306 above.

[642] *R (on the application of KB) v South London and South and West Region Mental Health Review Tribunal* [2003] EWHC 193 (Admin); [2004] Q.B. 936 at [23]-[24]. Johnson v United Kingdom (1999) 27 E.H.R.R. 296 at [77].

[643] Remedy Order (24 January 2022) in *Kate Wilson v (1) Commissioner of Police of the Metropolis; (2) National Police Chiefs' Council* [IPT/11/167/H].

[644] *Pretty v United Kingdom* (2002) 35 EHRR 1 [65].

[645] Consultation, see n.7 above, p.89.

383. For example, data from 2017 indicate that over 11 million people in the UK have a criminal record.[646] In 2014, 735,000 people had unspent convictions.[647] By 2006, over a third of men born in 1953 had been convicted of at least one standard list offence (including all indictable, triable either way, and certain summary offences) in England and Wales.[648] Among these individuals, the impact would certainly be greatest for those already socio-economically disadvantaged. This is clear from data which shows approximately 26% of those on out-of-work benefits had received at least one caution or conviction between 2000 and 2010.[649]

Unintended Consequences

384. One of the Government's main purported grievances with the HRA is that it gives rise to "*legal uncertainty*".[650] However, this proposal will result in precisely the legal uncertainty that the Government claims it wants to avoid, especially given that the Consultation does not specify what is meant by "*responsibilities*", "*conduct of claimants*", "*the applicant's wider conduct*", or the impact of these assessments could have on the remedies awarded.[651]

385. Finally, the Government itself acknowledges in the Consultation that domestic courts must "*exercise judicial restraint in contentious moral or ethical issues*".[652] This proposal would require judges to do exactly the opposite, and directly involve them in a range of complex, sensitive, and potentially controversial matters which at present would be wholly inappropriate.

V. Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role

Question 28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.

386. JUSTICE considers that the proposed formal process that would follow a decision by the ECtHR that the UK has breached Convention rights is both unnecessary and risks wider negative international implications.

387. Subsection (1) of the proposed clause and paragraph 315 of the Consultation reaffirms the supremacy of the UK Parliament, that ECtHR judgments are not part of UK law and

[646] Home Office, *'Freedom of Information Request response to Mr Christopher Stacey'*, (27 October 2017).

[647] Unlock, *'The number of people with unspent convictions'*.

[648] Unlock, *'Key facts: Setting out the issues in numbers'*.

[649] *Ibid.*

[650] Consultation, see n.7 above, p 28.

[651] *Ibid*, p.85.

[652] *Ibid*, p.60.

that decisions by the ECtHR cannot affect the right of Parliament to legislate. As set out in our response to Question 2 (at paragraphs 13 to 16 above) and as repeatedly stated by the courts, this is already the case.[653] As the Consultation recognises, Parliament is already able to consider adverse Strasbourg judgements.[654] However, the underlying thrust of the proposal is that adverse Strasbourg judgments should be treated as advisory - only to be considered and potentially overruled on a case-by-case basis by Parliament. However, this is not the case. The UK has agreed to be bound by the Convention and under Article 46 ECHR must implement final judgments of the Strasbourg Court in cases brought against it.[655] As the previous Attorney General has said "*international law binds the UK, both as a central tenet of our constitutional framework and as a distinct legal regime at the international level*."[656] Therefore whilst it is in practice possible for Parliament to enact, or fail to enact, domestic laws in violation of the UK's international obligations under Article 46 ECHR, it would be a significant breach of the rule of law and the UK's constitution.[657]

388. We are concerned about the potential wider international implications of the proposals. For instance, the previous secretary general of the Council of Europe, commenting on the situation in Azerbaijan after a series of adverse ECtHR rulings in 2014, noted that "*proposals to render the binding decisions of the Strasbourg court merely advisory, if enacted, will be welcomed by regimes less committed to human rights than the UK*."[658] The UK has an international reputation for upholding and promoting the rule of law[659] – including promoting human rights – both in the UK and abroad.[660] However, increasing the instances where the UK is, and remains in, breach of its international law obligations under the Convention, and specifically passing legislation that encourages the UK to disregard the ECtHR judgments and thus breach its international obligations, goes directly

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[653] As the former Chief Justice, Lord Judge, has said "*In our constitutional arrangements Parliament is sovereign. It can overrule, through the legislative process, any decision of our Supreme Court. In relation to the Strasbourg Court, and the Convention, is this principle negatived by our accession to the treaty obligation contained in Article 46? Do we, can we, accept the obligation … that when a UK case arises, our Parliament must take 'general measures in its domestic legal order to put an end' to the violations found by the European Court? Can that possibly be required if Parliament disagrees? For me the answer is, of course not*." Lord Judge, 'Constitutional Change: Unfinished Business', University College London (2013).

[654] Consultation, see n.7 above, p.86.

[655] As Lord Sumption has stated, *"It is an international obligation of the United Kingdom under article 46.1 of the Convention to abide by the decisions of the European Court of Human Rights in any case to which it is a party. This obligation is in terms absolute." Chester and McGeoch v Secretary of State for Justice and another* [2013] UKSC 63 at [119].

[656] Jeremy Wright QC, 'The Importance of International Law for Government Lawyers' (2015).

[657] See, Lord Goldsmith QC, "*we signed up in Article 46 to an obligation to respect judgments of the court in cases to which we were party … the nature of courts is that from time to time they reach decisions with which parties disagree … [but] the rule of law requires that when you have signed up to an obligation to respect that judgment, you must do so*." House of Lords; House of Commons, *'Joint Committee on the Draft Voting Eligibility (Prisoners) Bill: Draft Voting Eligibility (Prisoners) Bill Report Session 2013 - 2014'*, (18 December 2013), p 29.

[658] Thorbjørn Jagland, 'Azerbaijan's human rights are on a knife edge. The UK must not walk away', The Guardian, (2014).

[659] For instance, Boris Johnson has argued that "*the rules-based international order which we uphold in Global Britain is an overwhelming benefit for the world as a whole*". *House of Commons, Official Report,* 13 March 2017; col. 89.

[660] George Bridges, *'Internal Market Bill – why I cannot support an attack on the rule of law',* Reaction.life (19 October 2020)*; "Our nation, its stability and democratic process, relies on the rule of law. Likewise, our relations with foreign countries are governed by rules and processes designed to maintain peace and underpin prosperity".*

against this.[661] It sends a message that the UK does not value international law and is prepared to disregard fundamental human rights 'at home'. The result will not only be that the UK remains in breach of international law but broadcasts the message that it does not care.[662]

389. The UK Parliament already has a role in responding to adverse judgments from the ECtHR or decisions of the UK courts finding a breach of Convention rights, including where to do so requires primary legislation.[663] The Government also updates the JCHR annually on its position and proposed response to implementing adverse human rights judgments from the ECtHR and domestic courts.[664] The HRA does not require Parliament to take any specific action when the UK is found to have breached human rights, but this does not prevent Parliament having the final word, if it wants to. This was clearly demonstrated with the discussion around allowing prisoners to vote in elections. Although the ECtHR found the UK in breach of Article 3 of Protocol 1 of the Convention[665], the discussion on this topic has been consistently clear that it is for Parliament to decide whether or not to change the law on enfranchisement of prisoners.[666] In our view the HRA and Parliament's involvement in responding to adverse judgments from Strasbourg is working effectively and no change is necessary.

390. The UK Government is also very rarely found in breach by Strasbourg,[667] for instance in 2020 out of 284 applications to the ECtHR concerning the UK which the court dealt with, 280 cases were struck out and only two of these applications found a violation of human

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[661] As the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill concluded in 2013, "*A refusal to implement the Court's judgment would not only undermine the international standing of the UK; it would also give succour to those states in the Council of Europe who have a poor record of protecting human rights and who may draw on such an action as setting a precedent that they may wish to follow*." See n.651 above, p.3.

[662] As Professor Mark Eliott has said in the context of the Internal Markets Bill: *"The harsh reality is that as a matter of international law, there is no hierarchy of legal orders — and certainly no group of lesser such orders that the UK is privileged to sit outside. Like the rest of the world, the UK, if it wishes to be part of the rules-based international order, cannot pick and choose the international legal obligations that it honours — and talk of parliamentary sovereignty in this context can be evidence of nothing other than ignorance or disingenuousness."* Professor Mark Eliott, 'Legal Exceptionalism in British political discourse: International law, parliamentary sovereignty and the rule of law', Public Law for Everyone (October 2021).

[663] Consultation, n.7 above, para 310: "*the government co-ordinates all of the steps for implementing a final judgment, including, for example, proposing legislative amendments to Parliament if the judgment needs more than an operational or administrative response*".

[664] Gov.uk, *'Collection: Human rights: the government's response to human rights judgments'* .

[665] *Hirst v UK (No. 2)* [2005] ECHR 681 and subsequent cases, including: *Greens and MT v United Kingdom* (2010) 53 EHRR 710; *Firth and Others v. the UK* [2014] EHRR 874; *McHugh and Others v UK* [2015] ECHR 155.

[666] For instance, the consultations held by the UK Government made clear that the final decision on enfranchisement of prisoners should be for Parliament, see *'Voting rights of convicted prisoners detained within the United Kingdom: second stage consultation: Consultation Paper CP6/09'*, Ministry of Justice, 8 April 2009, p. 15; and a Backbench Business debate in February 2011 on a motion which stated in response to Hirst (No 2): "*That this House notes the ruling of the European Court of Human Rights in Hirst v. the United Kingdom in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand"* (emphasis added), HC Deb 10 February 2011, c493-586. *See* further, House of Commons Library, *'Briefing Paper: Prisoners' voting rights: developments since May 2015'* (19 November 2020).

[667] Ministry of Justice, *'Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2020–2021'* (December 2021) p.13, noting that for 2020, "*the number of judgments and adverse judgments remain low*".

rights.[668] We are concerned that the implementation of the proposals in the Consultation will result in an increase in cases against the UK being brought to the Strasbourg Court, and thus potentially the number of adverse judgments against the UK. However, rather than increasing the processes, and thus time and resources required, in Parliament to address any adverse ECtHR judgments, our view is that the Government should instead focus on avoiding incompatibility with the ECHR in the first place.

391. Further, often, these limited number of adverse judgments can be dealt with effectively through administrative or operational changes by the Government, engaging Parliament if necessary and at the appropriate time when any necessary primary legislation is to be introduced.[669] In addition, in some instances, the UK Government or Parliament may have already implemented the necessary changes domestically prior to the adverse judgment from the ECtHR which would therefore relate to historical matters.[670] In most circumstances therefore there may not be a need for Parliament's direct and immediate involvement, unless it so wishes. If primary legislation must be passed, Parliament by definition will be involved at that stage. The process proposed by the Consultation, that the relevant Minister must lay notice of the adverse judgment before each House of Parliament and that any Minister may table a motion to debate the response to the adverse judgment, would risk excessively using Parliament's already limited time.

Impacts

Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:

a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate.

392. The HRA is working well and in our view the case for change has not been made out. Conversely, as we have highlighted throughout the response we are of the view that many of the proposals will significantly increase the cost and length of litigation as they will result in litigation over the meaning of new provisions, setting aside years of developed jurisprudence, as well as introduce additional unnecessary, confusion and unworkable procedural steps. This increased cost will be borne by both claimants and public authority defendants.

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[668] European Court of Human Rights, *'Press country profile'*, (January 2022).

[669] For instance, in response to *JD and A v The United Kingdom* [2019] ECHR 753, the Government has amended secondary legislation to include an exception to the reduction in housing benefit / Universal Credit for those considered to be under-occupying their home, for claimants whose home has been adapted under a sanctuary scheme due to domestic violence. *The Domestic Abuse Support (Relevant Accommodation and Housing Benefit and Universal Credit Sanctuary Schemes) (Amendment) Regulations 2021* (SI 2021/991).

[670] For instance, in *Gaughran v The United Kingdom* [2020] ECHR 144, the ECtHR found that a regime in Northern Ireland that allowed the police to retain biometrics of those convicted indefinitely to be disproportionate and a breach of Article 8, in part due to the lack of sufficient safeguards or review of the retention. However, given the Data Protection Act 2018, which requires periodic review of data retention as well as other safeguards, has come into force, the Government has taken the view that no change to legislation is required to implement the ECtHR's judgment. However, the Northern Ireland authorities are considering whether to amend provisions of the Police and Criminal Evidence Act (Northern Ireland) Order 1989, which would be done via legislation. See Ministry of Justice, *'Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2020–2021'* (December 2021), p. 30.

393. In respect of the supposed benefits set out in Appendix 3:

a) In many instances we disagree that the stated 'benefit' will in fact result from the proposed changes. For example, the Consultation states that restricting the scope of positive obligations will reduce litigation against public authorities. However, as explained in paragraphs 139 to 148 above, in our view trying to restrict positive obligations will likely have the opposite effect. Similarly, the proposals relating to FNOs are likely to increase rather than decrease litigation against the UK in Strasbourg (see paragraphs 328, 336, and 347 above).

b) For others, the Consultation has not provided any evidence to suggest that the perceived benefits do not already exist. For example, the changes to the way in which freedom of expression is taken into account by the courts my allow wider society to benefit from greater dissemination of information and debate. The Consultation has not put forward any evidence that there is a current issue with dissemination of information and debate.

c) In other cases the stated benefit is a 'false economy'. For example, the Consultation states that the proposals would reduce the cost of holding FNOs in prisons in the UK. However, the Home Office spends millions of pounds every year in compensation for unlawful detention under immigration powers. This would be a better focus for cost-saving than preventing meritorious deportation appeals from being properly heard and considered.

b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate.

c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.

394. It is difficult to consider the impact of many of the proposals as the Government has not provided evidence which demonstrates the existence of the issues they are seeking to address in the Consultation. Basic information such as the protected characteristics of those bringing HRA claims or even the type and volume of cases that involve human rights claims at all is not available. Further in instances where the Government has relied on data in the Consultation, including in its overview of the equality impacts, this has not been made publicly available.[671] In addition, the vague nature of many of the proposals and the lack of detail provided as to how it is envisaged they might operate in practice makes it very difficult for respondents to assess the impact of the proposals.

[671] See Consultation, n.7 above, p.45, reference to *"Home Office internal data"* and *"a review of a sample of recent cases";* Appendix 3, para 13 *"The Government does however hold data on the protected characteristics of applicants granted legal aid in freestanding claims categorised under Human Rights"*; and Appendix 3, para 16 *"We have identified the broad groups that may potentially be disproportionality impacted by specific aspects of the proposed changes, such as ethnic minority individuals, children and men".* Further, at a roundtable with the Ministry of Justice on 28 February 2022, data that the Ministry of Justice had been looking at relating to children and young people was referenced.

395. We would expect the Government to have done its own detailed equalities impact assessment in respect of the proposals in order to help meet its Public Sector Equality Duty and publish that assessment.

396. That being said, in our view the proposals are likely to have a disproportionate effect on those with protected characteristics, who are marginalised and are underrepresented. For example:

a) The introduction of a permission stage would most severely impact those individuals who already face barriers to accessing justice.

b) Limiting positive obligations would undermine protection afforded under the HRA to women whose lives may be at risk from domestic abuse and sexual violence[672] and children and other vulnerable individuals from neglect and abuse.[673]

c) Section 3 has been vital in protecting the rights of people with protected characteristics, for example relating to sexual orientation. The proposed changes would make it more difficult for individuals to remedy human rights breaches.[674]

d) Proposals relating to the proportionality test will undermine protection afforded by the HRA to individuals who are minoritised and under or unrepresented in the political system.

e) The proposals relating to FNOs will have a disproportionate effect on Black, Asian and Minority Ethnic individuals, who are both more likely to be migrants and are overrepresented in the criminal justice system.[675]

JUSTICE

8 March 2022

[672] *DSD*, n.306306 above.

[673] *Z v UK European Court of Human Rights* [2001] ECHR 333.

[674] *Ghaidan v Godin Mendoza*, see n.201 above.

[675] Ethnic minorities are more likely to be stopped and searched, remanded in custody, and subsequently receive a custodial sentence than their White counterparts. *See* David Lammy, 'The Lammy Review', (2017). A disproportionate number of foreign nationals, who made up 13% of the total prison population in June 2021, are also ethnic minorities. Nationalities by continent were: EEA Europe (47%); Africa (17%); Non-EEA Europe (12%); Asia (12%); West Indies (5%); Middle East (5%); Central and South America (2%); North America (1%) Oceania (0% - i.e., 24 individuals). See Sturge, Georgina, '*UK Prison Population Statistics*', House of Commons Library, (29 October 2021), p.13.