EXECUTIVE SUMMARY

Introduction

1. In December 2021, the Government published its Human Rights Act Reform: A Modern Bill of Rights consultation ("**the Consultation**"). JUSTICE submitted a response, shaped by an advisory group of practitioners and academics, chaired by Sir Michael Tugendhat, on 8 March 2022.

2. Our response highlighted several overarching concerns with the proposals:

    a. The case for change as set out in the Consultation lacks any proper evidential basis.
    b. The proposals will significantly increase, not decrease, the volume, time, and cost of human rights litigation for both claimant's and public bodies.
    c. Many of the Consultation's proposals will put the UK in breach of its international obligations under the European Convention on Human Rights ("**ECHR**").
    d. The proposals will weaken rights protection within the UK
    e. The proposals tip the balance heavily in favor of Government by seeking to shield executive action from proper judicial scrutiny.
    f. There was a lack of consideration as to how the proposals would affect the devolved nations.

Summary Responses to the Consultation Questions

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.

3. The proposals to replace section 2 are predicated on an interpretation of this provision that has long been rejected – the UK courts do not follow the European Court of Human Rights ("**Strasbourg**" or "**ECtHR**") case law where it has fallen into error, misunderstood domestic law, misapplied the facts, or adopted flawed reasoning.

4. The proposed options for reform would decouple the interpretation of rights under a Bill of Rights from that of the rights under the ECHR. However, as the Government has committed to the UK remaining a signatory to the ECHR, the UK will continue to be under an international obligation to respect the rights contained therein, as determined by the Strasbourg Court. If the courts repeatedly and 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. 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.

5. The proposed options for reform would undermine legal certainty and result in lengthier and a greater volume of litigation. Both options encourage courts to consider, and therefore litigants to seek out and refer to, a huge range of sources to determine the content of rights. This will lengthen court proceedings, and the judgments and reasoning of a court. There is also likely to be extensive litigation over the meaning of the new clauses. Both options require prior precedent from the Human Rights Act 1998 ("**HRA**") and Strasbourg to be set aside, with no clarity as to what relevance it would have in interpreting rights under the proposed Bill of Rights. Further, there is no reason why 'home grown jurisprudence' or common law rights would be any more certain.

6. 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 result in varying jurisprudence in different UK jurisdictions, causing confusion and uncertainty.

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?

7. The UK Supreme Court is already the ultimate judicial arbiter of UK law, including on the implementation of human rights in the UK. JUSTICE therefore does not consider that there is any need for change as to the position of the UK Supreme Court. As set out in *Kay v Lambeth LBC,*[1] lower courts in the UK will also, subject to a limited exception and in exceptional circumstances, follow the Supreme Court's precedents, including on human rights, even where the ECtHR has decided an issue differently.[2]

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

8. Whilst juries play an integral role in the criminal justice system of England and Wales, codification of the right to a jury is unnecessary. Existing legislation[3] and caselaw[4] already provide a robust and sophisticated legal framework that serves to guarantee and protect an individual's right to a jury trial.

Questions 4 to 7: Freedom of expression

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[1] [2006] UKHL 10.

[2] 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."* [44]

[3] 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.

[4] 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.

9. These questions go far beyond the scope of the Independent Human Rights Act Review ("**IHRAR**"). In our view this Consultation is not the appropriate mechanism for addressing substantive issues relating to freedom of expression. These issues are complex and reforms in this area 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.

10. Freedom of expression is a crucial right; however, it is a qualified right – it is not absolute or unlimited. The Consultation appears to limit the countervailing factors to national security, keeping citizens safe and protecting individuals from "harm", subsequently suggesting that the criminal law should be the ceiling of any limit on freedom of expression. However, as with any qualified right it must be balanced against individuals' other qualified rights. 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. Freedom of expression cannot automatically take precedence over the right to private and family life.

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?

11. No change is required to s.12 HRA which already ensures that courts provide appropriate consideration to freedom of expression.

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?

12. Freedom of expression already has strong protection by the courts – both in the UK and the ECtHR. Any changes to the careful 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.

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

13. We agree that the protection of journalist sources is of great importance to the freedom of the press, as has been recognised by both Strasbourg and the domestic courts. However, there is no evidence put forward in the Consultation to support the Government's implication that sources are currently not "properly protected". In our view, journalistic sources receive sufficient protection under s.10 of the Contempt of Court Act 1981, which sets out a qualified duty on the courts not to order the disclosure of journalists' sources save where in the interests of justice, or national security, or for the prevention of disorder or crime, where the burden is on the applicant.

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

14. The right to protest is a fundamental element of freedom of expression pursuant to Articles 10 and 11. The Police Crime Sentencing and Courts Bill currently going through Parliament contains measures that would severely limit protest rights - these should be removed.

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.

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

15. We are strongly opposed to the introduction of any permission stage. The Consultation conflates 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 is, in the Government's view, not significantly serious to merit consideration by the courts. We fundamentally disagree with the idea that some unlawful human rights breaches are less deserving of redress than others.

16. In relation to unmeritorious claims, a permission stage is unnecessary – there already exist several tools the courts can use to dispose of such claims. A permission stage would add an additional barrier to rights claims, making it harder for individuals to enforce their rights and reducing the accountability of public bodies. A permission stage "significant disadvantage" test would also potentially be incompatible with the Article 34 ECHR by excluding potential victims from bringing a claim.

17. There would be serious adverse practical consequences of introducing a permission stage. Human rights claims arise across the justice system in courts and tribunals with completely different procedures. Adding a permission stage to a multitude of different claims where a human rights element is present would be significant drain on courts, tribunals and public authorities' time and resources. It is also going to cause significant confusion and practical difficulties in cases involving both human rights and other grounds if the court has to address an initial permission stage for the human rights elements of the claim.

Proposal to amend section 8(3) of the Human Rights Act so that claimants will be required to pursue 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

18. This proposal is completely unworkable and raises many more questions than it answers, including:

    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?
    b. Who will argue to the court that there are other claims? Will the defendant be arguing the claimant has private law claims against them?
    c. How will the court determine the existence of other rights based claims?
    d. 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?
    e. What if the time limit for the rights-based claim expires while the claimant is required to pursue other non-rights based claims?
    f. What if the other non-rights based claims have less chance of success than the rights based claim?

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.

19. 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.

20. However, the 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.[5] Moreover, where the state is obliged to act, such obligations have developed in accordance with common sense and in a way that benefits both the Government and the public.[6]

21. 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

[5] There are numerous examples of courts refusing to expand the scope of 'positive' obligations. See e.g. *R. (on the application of Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin), Q.B. 682; *Dove v HM Assistant Coroner for Teesside and Hartlepool* [2021] EWHC 2511 (Admin).

[6] For instance obligations to: require the Police to conduct an effective investigation pursuant to Article 3 ECHR into an individual who committed a series of sexual offences (*Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, A.C. 196); prohibit corporal punishment against a child which amounts to actual bodily harm pursuant to Article 3 ECHR (*A v United Kingdom* (1998), App. No. 100/1997/884/1096, (23 September 1998)); 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 EHCR (*Z & Ors. v the United Kingdom* (2001), App. No. 29392/95, (10 May 2001)).

the likelihood of ECHR breaches and consequently the amount (and complexity) of litigation at both a domestic and Strasbourg level. Positive obligations have played an important role in cementing the peace process in Northern Ireland, for example through the duty to conduct inquests into legacy killings under Article 2, and we are concerned about the impact of these proposals there.

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

22. The changes to s.3 HRA proposed by the Consultation 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*."[7] However, JUSTICE disagrees. Our detailed analysis of s.3 caselaw shows that s.3 has not been used frequently or radically and can be useful in supporting the will of Parliament. The IHRAR panel also concluded that there was no evidence the courts have misused s.3 and did not recommend appealing or amending it.

23. Section 3 has been crucial in protecting individuals' rights. If it was repealed (Option 1) or amended (Options 2A and B) this would lead to more declarations of incompatibility which do not provide the individual whose rights have been breached with an immediate domestic remedy. 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. In addition, amendment or repeal of s.3 would generate considerable uncertainty by creating two different interpretive regimes.

24. The devolution statutes contain an interpretive obligation similar to s.3. 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. A weaker s.3 could also result in more legislation being struck down as outside the legislative competence of the Northern Irish Assembly and Scottish Parliament.

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

25. JUSTICE considers that the Joint Committee on Human Rights ("**JCHR**") has a vital function in monitoring issues relating to important human rights judgments and analysing bills to check their compatibility with human rights. We would therefore welcome an enhanced role for the JCHR and the provision of the necessary resourcing to support their vital work.

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

[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 233.

26. We agree that a database of judgements where the courts have relied on s.3 HRA could help ensure transparency as to the extent of the use of s.3. To ensure a complete picture, any such database should also include cases where s.4 HRA declarations of incompatibility have been ordered. The database should include, where applicable, Parliament's and/or the Government's response to the judgments.

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?

27. The Government is considering proposals to make declarations of incompatibility ("**DOIs**") "*the only remedy available to courts in relation to certain secondary legislation.*"[8] This would deprive courts of their ability to quash or disapply secondary legislation that is incompatible with the Convention. JUSTICE is strongly opposed to this. Secondary legislation cannot be treated as equivalent to primary legislation. To do so would undermine the constitutional balance between Parliament, the executive, and the courts. It would also deny an effective remedy to individuals whose rights have been breached and would result in inconsistency with the powers of the courts in respect of secondary legislation under the common law.

28. Moreover, there is no need for such a proposal. The courts are already sensitive to the difficulties that quashing secondary legislation may have on public bodies and third parties, and rarely quash secondary legislation for a breach of 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.

29. 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, 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.

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?

[8] *ibid,* para. 250.

30. Whilst 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",*[9] we also recognise that practical considerations sometimes make the use of a remedial order necessary. Given this, we would not support the abolition of the remedial order process. 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. However, we are of the view that remedial orders should not be used to amend the HRA itself. Changes to the HRA should be subject to debate and authorisation by Parliament. We therefore support option b).

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.

31. 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. In practice this involves members from the responsible Government department obtaining written advice from the departmental legal advisers on the compatibility with the ECHR. If s.19 were to be amended there is a risk that this valuable process would be lost.

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?

32. 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. Indeed, the HRA is an integral part of the UK's constitutional arrangements via the devolution statutes for Scotland, Wales and Northern Ireland.

33. 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. The concerns expressed with the "growth of rights culture" in the Consultation do not appear to be shared in the devolved nations, and the Scottish and Welsh Governments have made it clear that there is no appetite for wide ranging reforms to the HRA. We are particularly concerned about the impact of the proposed reforms in Northern Ireland, where the Good Friday Agreement requires direct access to the courts and remedies for breach of the Convention.

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.

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

34. We agree that it would be beneficial to examine the existing definition of public authorities under s.6 HRA. As the Consultation recognises, there have been significant changes to the way in which public functions are delivered.[10] JUSTICE is concerned that despite the growth of private sector outsourcing, by both national and local governments, there has been no reciprocal growth in accountability mechanisms.[11] A revised definition of public authority should ensure that individuals' whose rights are impacted by private companies fulfilling the role of public authorities have adequate means of redress.

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.

35. We do not consider that any amendments are required to s.6(2) HRA. Both proposed options 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.

Option 1: provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully

36. We are concerned that the proposed Option 1 would insulate public authorities from having to act in a right's compliant manner. This will make it harder to hold public bodies to account and will undermine the value of the Bill of Rights. The proposal also risks different approaches to the interpretation of the same legislative provision. 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 the concept of equal treatment before the law.

Option 2: retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

37. Please refer to our response to Question 12.

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.

38. 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

[10] Consultation, see n. 7 above, para.267.

[11] Around a third of all public spending is now done through procurement. See Sasse, S. Nickson et al, *Government Outsourcing – When and How to Bring Public Services Back into Government Hands* (Institute for Government, 2020), p.10.

investigations into the deaths and treatment of individuals during armed conflict. Moreover, attempts to water down the extraterritorial application of the ECHR will run the risk of exposing British troops to prosecution in the International Criminal Courts and send a message that the UK is prepared to disregard fundamental rights such as the protection from torture and inhuman and degrading treatment.

Question 23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act?

39. 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. 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. 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. The principle of proportionality has not given rise to "problems in practice" under the HRA. The courts seek to 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.

We wish to provide more guidance to the courts on how best to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

40. 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.

41. 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" – it is subject to significantly less scrutiny than primary legislation and is not subject to any meaningful risk of defeat.

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.

42. Nothing in the HRA has prevented successive governments from imposing further restrictions on the deportation of Foreign National Offenders who are seeking to remain in the UK on Article 8 grounds. In fact, the current deportation position is more stringent than it was before the HRA came into force.

Option 1: 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.

43. Human rights protection cannot be excluded from an individual solely because of their criminal history. In particular, there are Convention rights 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. In respect of the limited and qualified rights, JUSTICE opposes a proposal which prevents any discretion being exercised by the decision-maker and courts. This option would exclude consideration of any evidence relating to the interests and wellbeing of children. Furthermore, such an approach would not prevent an individual petitioning the ECtHR to prevent their deportation, and requesting a direction to the decision-maker to exclude 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.

Option 2: 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.

44. Whilst the Government is entitled to set out legislation or regulations on how limited or qualified rights can be interpreted (as it already has done in respect of Article 8 as it applies to foreign national offenders), the compatibility of that scheme with the Convention rights is for the courts to decide. We oppose this option which 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.

Option 3: 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.

45. 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.[12]

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?

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[12] 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)

46. We do not view human rights protection as “impediments”. 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.

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.

47. We do not consider that the case had been made out for this proposal; the consultation does not provide any evidence that would justify a radical change in the way damages are awarded, bar speculative references to the need for public bodies to pay compensation.[13] We are concerned that the factors listed should not be given undue prominence in the court’s 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 right.

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.

48. The 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. 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, and Option 2 should be rejected for the reason that they are fundamentally incompatible with the very concept of human rights. In addition, these proposals would require judges to engage in a range of complex, sensitive moral and ethical issues that would be inappropriate for them to engage in.

[13] Consultation, see n.7 above, p.40 and 45.

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.

49. JUSTICE considers that the proposed formal process that would follow a decision by the ECtHR that the UK has breached Convention rights is:

    a. Unnecessary: Subsection (1) of the proposed clause and paragraphs 315 of the Consultation reaffirms the supremacy of the UK Parliament, that ECtHR judgments are not part of UK law, and that decisions of the ECtHR cannot affect the right of Parliament to legislate. As set out in our response to Question 2, and as repeatedly state by the court, this is already the case.

    b. Risks wider negative international implications: passing legislation that encourages the UK to disregard ECtHR judgments, and thus breach its international obligations, would undermine the UK's international reputation for upholding and promoting the rule of law. It would send a message that the UK does not seek to abide by international law and is prepared to disregard fundamental human rights 'at home'.

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.

50. The HRA is working well and in our view the case for change has not been made out. Conversely, we are of the view that many of the proposals will significantly increase the cost and length of litigation by introducing additional unnecessary confusion and unworkable procedural steps. This increased cost will be borne by both claimants and public authority defendants.

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.

51. 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[14] and children and other vulnerable individuals from neglect and abuse.[15]
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.[16]
d. Proposals relating to the proportionality test will undermine protection afforded by the HRA to individuals who are minoritised and/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.[17]

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

[15] *Z v UK European Court of Human Rights* [2001] ECHR 333.

[16] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

[17] 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.