**HUMAN RIGHTS ACT REFORM : A MODERN BILL OF RIGHTS**

**CONSULTATION RESPONSE OF GARDEN COURT CHAMBERS**

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## Introduction: Garden Court Chambers and our expertise

1. Garden Court Chambers is a multi-disciplinary chambers based in London. It has over 180 barristers (including 27 Queen's Counsel) and is one of the largest in the country with over 40 years of experience in cases with a human rights context. Details are here: https://www.gardencourtchambers.co.uk/.

2. Around a third of chambers' members practise in criminal law, another 39 in family law and the remainder in civil law, comprising public and administrative law, housing law, inquests, immigration, civil liberties, and community care. In our practices we act predominantly for individuals or not-for-profit organisations. A large part of this work is either legally aided or, in the case of not-for-profit organisations, pro bono or with the benefit of a protective costs order. Some is conducted on conditional fee arrangements. Although not always "high value" in monetary terms this work is invaluable for the individuals and organisations concerned and can often have wider public interest implications, playing a key role in access to justice often for disadvantaged groups, in ensuring equality before the law and in maintaining the rule of law by holding the executive and other public authorities to account.

3. Significant cohorts of the clients we represent face barriers in access to justice and effective participation in legal proceedings arising from factors such as physical or mental disability, race and ethnic origin, language, gender, education and social class. Many have a past experience of violence and abuse and are victims or potential victims of serious human rights violations in the UK and/or abroad.

4. Our experience of the Human Rights Act 1998 (HRA) and of human rights issues raised in litigation runs across all disciplines that we practise in. We are fully conversant with human rights arguments, whether that is in day-to-day practice in first instance hearings (Magistrates' and Crown Courts, County Courts, tribunals), in judicial review claims in the High Court, on appeal to the Court of Appeal and Supreme Court or representing individuals in their applications to the European Court of Human Rights (ECtHR).



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5. The purpose of the HRA was and continues to be that human rights are made integral to our domestic law and legal practice, including the longstanding traditions established over many centuries in the common law of recognising and protecting fundamental rights.



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## Executive Summary

6. The purpose of the Human Rights Act ('HRA') was to bring human rights home: to make the rights enshrined in the European Convention of Human Rights enforceable in our domestic Courts. Notwithstanding a decade of consultation and consideration of whether there ought to be a British Bill of Rights, the Government does not advocate for alternative substantive rights to those already set out in the European Convention on Human Rights. In this Consultation Paper ('CP'), the Government's proposals focus largely on *restricting* Convention rights in a new Bill of Rights, making Convention rights *harder* to enforce and *limiting* recovery for breach of those rights. Critically, the evidence base underlying the concerns said to motivate the proposed reforms to the HRA is in large part lacking. Throughout our response, we have highlighted the lack of logic and accuracy in the claims made by the Government concerning the necessity of reform.

7. We observe that the CP's proposals are not justified by reference to the Independent Human Rights Act Review Panel's report, which took a much more limited view of the need for any reform of the HRA. It is surprising that the IHRAR Panel were not asked to consider the possibility of a British Bill of Rights, a proposal which is central to the CP. Neither does the CP engage with the Select Committee on Human Rights' report which reached the overall conclusion that there was "*no case for changing the Human Rights Act*".

8. We reject the CP's premise of over reliance upon Strasbourg authority by domestic courts in relation to rights-based claims brought before them. We believe, based on over 40 years' of experience of human rights issues arising in litigation, that on the whole the relationship between the domestic Courts and the ECtHR works well. It is a symbiotic one, with each informing and improving the other. We see no need to amend the HRA. Legislating so as to encourage departure from ECtHR jurisprudence is likely to undermine and distort the development of human rights protections in the UK. Critically, it will increase uncertainty and create protection gaps, forcing individuals to bring cases to the ECtHR against the UK government. It will likely increase the number of Strasbourg judgments adverse to the UK, causing damage our reputation on the international stage.



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9. Section 2 does not bind the Courts but requires Strasbourg case law of *relevance* only to be *taken into account*. That does not equate with "follow". The UK Courts await a clear line of consistent jurisprudence from the ECtHR before interpreting domestic law and practice to ensure compatibility with Convention rights. The Convention requires the Strasbourg Court to take into account subsidiarity and the margin of appreciation We note that Courts have observed that judicial decision-making has been enhanced by judicial dialogue between the domestic Courts and ECtHR.

10. The CP fails to make the case for reform of sections 3 and 4 HRA, which are carefully drafted instruments that ensure rights-compliant decision making whilst respecting Parliamentary sovereignty. Primary legislation cannot be struck down; a declaration of incompatibility does not have the effect of requiring a public authority to act differently. Instead, the mechanisms identify human rights breaches and, if a human rights compatible reading is not possible, allow the Minister to consider the possibility of legislating to remedy the breach. There is no compulsion on the Minister to do so. Section 4 declarations of incompatibility are made rarely. When they have been made, Parliament has legislated so as to remedy them.

11. Our strong view is that imposing a permission stage for any or every human rights claim is unnecessary and unjustified. In our experience, courts are not dealing with unmeritorious cases; the CP advances no evidence supporting its narrative of a proliferation of "*frivolous or spurious*" cases. The introduction of a permission stage would create an unnecessary additional administrative burden on the Courts and the parties, create satellite litigation, increase the courts' backlogs and, as a result reduce public confidence in the system of justice.

12. The CP expresses a desire to "*reduce the number of human rights-based claims being made overall*", including by making it more difficult for claimants to access remedies. This should not be a goal in and of itself. There is both a public and individual interest in the courts making declarations that the state has violated Convention rights. The public interest lies in the state being held to account in an independent and public forum in order that it remedy the breach in the individual case and to avoid further comparable breaches occurring in the future. The individual interest for claimants lies in recognition by an



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independent court that their rights have in fact been violated. The goal should be working toward eliminating violations of human rights delivery and enhancing (rather than stripping away) access to justice and avenues of accountability. We are moreover extremely concerned by proposals to restrict recovery for breach of Convention rights by reference to a person's conduct. The framing of individuals as deserving or undeserving of rights and/ or remedies must be fiercely resisted as wrong in principle, and inconsistent with fundamental principles of English law that pre-date the HRA.

13. Positive obligations have been essential to the protection of rights in a range of important contexts, all of which the CP is silent on, for example, enabling bereaved families to seek justice for their loved ones, ensuring detained children are treated with humanity and dignity, holding the police to account for failures to tackle gender based violence, protecting victims of modern slavery and trafficking, and requiring the state to facilitate Gypsies' and Travellers' way of life. Despite these important protections, the Strasbourg and domestic courts are nevertheless cautious about extending the scope of positive obligations, and the thresholds applied are high. The CP fails entirely to acknowledge the stringent approach of the courts when assessing positive obligations.

14. In our view, the Consultation does not point to any good reason for the UK seeking to extricate itself from being bound by the approach taken to extra-territorial jurisdiction. When seen in the context of the approach taken in other jurisdictions, and in general international law, the approach taken by the ECtHR to extraterritorial jurisdiction cannot be accused of over-expansiveness. In our view, attempting to prevent the extra-territorial application of the ECHR would put the UK in breach of international law, which clearly mandates the extra-territorial application of duties under international human rights law, whether they emanate from the ECHR or otherwise.

15. The evidence cited in the CP fails to justify its claims that human rights constraints detrimentally interfere with operational decision-making. To the contrary, operational decision-making is enhanced where decision-makers pay full regard to the human rights of those their decisions effect.



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16. We dispute the premise that under current law too many deportations are frustrated by human rights appeals, and that this represents a lack of respect by the judiciary for the weighty public interest in the deportation of foreign criminals. We agree that the law concerning deportation should be clear but we are not persuaded that the existing uncertainty is attributable to the HRA. Moreover, we remain unconvinced, in particular in the absence of any indicative draft text, that introduction of a new legislative scheme will produce this clarity. As concerns the "*challenges posed by illegal and irregular migration*", the way to tackle this is to provide safe and legal routes for those in need of international protection to come to the UK directly from their home countries and/or third countries. We reject any suggestion that the right of asylum-seekers to rely upon the HRA to challenge their removal should be curtailed as having potentially catastrophic consequences for those concerned.

17. Enshrining the right to a trial by jury in a British Bill of Rights will do *almost nothing in practice* to protect against the incremental abolition of jury trials for many indictable offences which is the practical consequence of recent pressures on the Criminal Justice System (CJS). If the Government is serious about protecting the right to trial by jury it will address the neglect and underfunding which has limited the real and practical availability of jury trials to many defendants.

18. Our view is that the Government's proposed reforms will result in a poorer quality of public decision making, will insulate the Government from accountability and will make it harder for individuals to enforce their rights. In all cases, the proposed reforms will result in individuals with meritorious claims facing an increase in the cost and length of litigation.

19. We do not think that the Government is truly concerned with rights protection or preserving Parliamentary sovereignty; the recent government's repeated attempts to pass controversial legislation at speed or through extensive use of delegated powers makes that clear. Instead, the Government aims to increase the power of the executive whilst reducing its accountability, at the expense of the ordinary citizen.

20. If the Government was truly concerned with creating a modern British Bill of Rights, it would properly consult with the public as to its content and at a minimum should seek



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views on whether a British Bill of Rights should: (i) consolidate UK rights legislation that covers free standing non-discrimination rights and socio-economic rights as well as the civil and political rights set out in the Convention; (ii) incorporate rights set out in other international rights-oriented treaties that the UK has ratified, such as the UN Convention on the Rights of the Child or UN Convention on the Rights of Persons with Disabilities and (iii) update the rights set out in Schedule 1 to the Human Rights Act to better phrase and strengthen rights that reflect our culture and values, 60 years on from the treaty text being drafted.



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**Theme 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.**

21. The proposal relates to replacing section 2 Human Rights Act 1998 (HRA), which currently provides:

> *"2 Interpretation of Convention rights.*
> *(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—*
> *(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,*
> *(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,*
> *(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or*
> *(d) decision of the Committee of Ministers taken under Article 46 of the Convention,*
> *whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen".*

22. The mischief this proposal is concerned with is the supposed over reliance upon Strasbourg authority by domestic courts in relation to rights-based claims brought before them. The policy aim of the change appears ultimately to be to avoid uncertainty for public authorities in exercising their duties and costly litigation – an objection that applies to both Strasbourg and domestic courts in the Consultation Paper (CP).



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23. For completeness, we would question the logic and accuracy of these claims across the CP. The CP appears to fundamentally misunderstand the common law legal system in the UK. The complaints could be applied to any area of litigation at common law where the system of precedent applies and through which the law is developed. To suggest that this is a "problem" caused by either the Strasbourg Court or Human Rights Act is extremely misleading. Access to the courts is a fundamental right, which in our common law system enables interpretation by the courts of legislation, policy and actions across every area of public life and law.

24. As to the issues of objection, courts grapple daily with questions of public policy and in the vast majority of circumstances, do not enter the sphere of public decision making. Most of the cases used as examples in the CP are at least a decade old, if not two. The decisions have been applied over that period in a way that has enabled sufficient certainty to emerge as to the ambit of public powers and duties vis-a-vis human rights protections. There is longstanding familiarity with the procedures necessary to give effect to these rights in relation to that case law.

25. In many cases cited, the claimant actually failed in their action against state actors for the very reasons that the Government complains should be applied in the CP – courts exerted deference to public policy and resources, and balanced competing rights and responsibilities. Far from a significant problem requiring legislative amendment, the "mischief" complained of, namely the expansion of rights, or bringing of successful human rights claims pursuant to the scheme set out in the HRA, is in fact rare.

26. The complaint appears largely focussed on the cost of litigation to Government. This is disingenuous. The cost of litigating human rights claims is a drop in the ocean compared to other areas of public expenditure. In any event, it is not the fault of claimants that legal representation paid for out of the public purse is expensive. Furthermore, two more immediate solutions would address these concerns more readily than attempting to restrict the availability of human rights claims. Firstly, they could scrutinise the obstructive and defensive approach most state actors take to any claims raised, which results in protracted and satellite litigation in many cases in which we are instructed. Secondly, they could situate these assertions in their proper context. The overwhelming



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majority of potential cases are not pursued since claimants receive accurate and proper advice as to the prospects of success, or the case fails in its early stages due to a decision of the courts.

27. In consulting on constitutionally significant changes to the law, the Government should provide accurate, complete and overarching statistics to illustrate the actual scale of the so-called problem. None are provided in the CP.

28. Furthermore, the cases referenced in the CP which have been successful concern fundamental human rights – the rights of children to a family life; the right to life; the right not to be tortured or falsely imprisoned. But the thrust of the objection throughout the paper is that some claimants are not deserving of these protections, especially those who are convicted criminals. Does the Government suggest that a person convicted of crime loses their human rights protection and no longer has actionable rights? This is a remarkably draconian stance which we consider in no way accords with the values and principles held by the UK public.

29. The CP, in particular, appears to object to the expansion of certain rights by way of the "living instrument" doctrine. This approach to treaty interpretation is applied across almost all constitutional courts in common law, liberal democracies. It is the logical approach to an instrument rarely subject to any kind of parliamentary amendment. It would be fanciful to suggest that the alternative approach, which is to attempt to interpret the Convention in its original 1950 context, would vindicate modern day rights. In any event, as the CP correctly identifies, the Convention requires the Strasbourg Court to take into account subsidiarity and the margin of appreciation. The living instrument doctrine requires that in all cases where Convention rights are expanded, they reflect a development that can be discerned across the Contracting Parties in their domestic law and in their adoption of relevant international instruments, signalling their position on the issue. The case law is replete with these examples.

30. The emergence of positive obligations has taken place in this same way. Positive obligations relate foremost to State obligations to prevent the loss of life (but also to prevent torture and trafficking into slavery). We do not consider it objectionable to expect the State to put measures in place to protect these most important of rights. Moreover, the



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principle that we, as a society, should do all we can to prevent loss of life has been long acknowledged and does not stem solely from the Human Rights Act.[1]

31. As to the specific objection to the way UK courts have applied section 2 HRA, para 114 of the CP acknowledges that courts do in fact apply these rights in a UK context. Section 2 does not bind the Courts but requires Strasbourg case law of *relevance* only to be *taken into account*. That does not equate with "follow". This is of course sensible because the Strasbourg Court is the specialised interpreter of Convention rights and is a court to which applicants can make an individual petition. Departing from decisions of the Court in domestic cases would create inconsistency and lengthy delay in the vindication of rights by encouraging applicants to go to the Strasbourg Court – the very reason the HRA was said to "bring rights home".

32. As such, UK case law requires a clear and constant line of jurisprudence on the issue before a domestic court would consider it in any way bound by the Strasbourg decision (*R v Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295) and given that the Strasbourg cases are context specific, could even then be departed from if, for example: (i) it is inconsistent with some fundamental substantive or procedural aspect of our law or (ii) its reasoning appears to overlook or misunderstand some argument or point of principle: *R (Haney) v Secretary of State for Justice* [2014] UKSC 66; [2015] AC 1344 at [21].

33. Where a decision does not properly reflect UK law or practice, courts have had no trouble departing from Strasbourg authority, even in cases concerning the UK, as the case law in the footnotes to paragraph 114 of the CP attest.

34. Importantly, the Supreme Court recently underlined in *R (AB) v Sec State for Justice* [2021] UKSC 28; [2021] 3 WLR 494 at para. 59, that in situations which have not yet come before the Strasbourg Court, they 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. However, they should not establish new principles; Parliament's purpose in enacting the Human Rights Act was to ensure that there is

[1] Addressed further under Question 11 below.



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correspondence between the rights enforced domestically and those available before the European Court, not to provide for rights which are more generous than those available in Strasbourg.

35. The position is helpfully summarised at para. 105 of the Independent Human Rights Act Review (IHRAR)[2] but not acknowledged in the Paper.

36. The CP concludes on this issue (at para 196-197):

> *"It is right, though, that the courts should have recourse to a wider range of jurisprudence to assist them in reaching decisions, as they do across all branches of law. We would like to establish a formulation that emphasises the primacy of domestic precedent, while setting out a broader range of case law – including, but not confined to, the Strasbourg case law – that UK courts may consider, if they so choose.*
>
> *This would help to mitigate the incremental expansion of rights driven by the Strasbourg Court, and promote a more autonomous approach to human rights, in line with the UK's common law principles".*

37. Affording courts far broader access to other courts and instruments of interpretation would not mitigate incremental expansion of rights. It would *enhance* it by widening the lens to invite other approaches to rights interpretation to be considered. It would do what Lord Reed cautioned against in *AB,* which is allow rights to expand out of step with the Convention.

38. Nevertheless, we welcome a less constrained approach to the development of rights protection in the UK, founded on recognition of where rights should be afforded in accordance with our culture and values, while also giving effect to our international standards and obligations. In the example of *AB,* the Court declined to find that solitary confinement of a child violated article 3 ECHR since Strasbourg has not adopted a bright

[2] CP 586 (December 2021) available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf



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line rule on the issue. A Bill of Rights, which placed the primacy on domestic, common law ought to enable UK courts to make such a finding. As the IHRAR observes, the common law is in any event subject to judicial restraint, institutional respect and Parliamentary Sovereignty, which would guide any such development.

39. That being said, it is inaccurate to suggest that courts solely consider Strasbourg authority when faced with a human rights claim. UK courts are very familiar with considering a wide range of persuasive sources and authorities in reaching their decisions, particularly in the Supreme Court. They need not be invited by legislation to do so.

40. As pointed out by Professor Mark Elliott,[3] the repeated references in the CP to the common law raises the question of its inter-relationship with Convention rights. He observes that *"the ECHR sets out a substantially broader range of rights than the common law has (so far) recognised"* and that the HRA contains mechanisms for the protection of rights as yet unavailable in the common law.

41. With regard to Options 1 and 2 posed as potential amendments to section 2, we do not consider either to be particularly satisfactory or clearer than section 2. We make the following observations.

Option 1

42. We are not clear why this option would not be an amendment to the HRA and why a third rights regime would be established separate to the HRA. If the meaning is not the same as that conferred by either the ECHR or HRA 1998, a third meaning would emerge in situations to which the Bill of Rights applies rather than the HRA, which would create an unhelpful divergence in respect of rights and cause (greater) uncertainty and complexity.

43. Option 1 codifies the system of precedent which already exists, to this extent we do not object. However sub-para (5) applies the test of relevance already set out in section 2 to an

[3] Professor Mark Elliott, *The common law and the European Convention on Human Rights: Do we need both?*, Constitutional Law Matters, 11 February 2022, available at: https://constitutionallawmatters.org/2022/02/the-common-law-and-the-european-convention-on-human-rights-do-we-need-both/



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expanded range of countries and international law judgments or decisions while at the same time removing any primacy of the Strasbourg Court. To place the same weight on decisions of the Inter-American Court of Human Rights as the European Court of Human Rights would be curious, given that we are a party to one treaty and not to the other.

44. The option does not preserve s 2(1)(b)-(d), which we presume is an oversight since decisions of the Commission and Committee of Ministers are provided for in the Convention and ought at least to be regarded as relevant to the question being decided.

45. The option simply sets out in (6) that decisions of the Strasbourg Court need not be followed. This ignores the recommendation of the IHRAR that section 2 be amended as follows:

> *"A court or tribunal determining a question which has arisen in connection with a Convention right must first apply relevant UK statutory provisions, common law and UK case law generally and then, if proceeding to consider the interpretation of a Convention right, must take into account* (those matters set out in s2(1))".

46. This proposal is preferable as it acknowledges that the Convention is interpreted by the Strasbourg Court and for that reason its decisions logically attract greater weight than those of other international courts or courts of other countries. Not only are we bound by Article 1 to secure the rights and freedoms set out in the Convention, Article 46 is binding on the UK to abide by final judgments of the Strasbourg Court in any case to which it is a party. Furthermore, from a practical perspective, it is important that the UK courts address Strasbourg case law in order for an applicant to demonstrate exhaustion of domestic remedies when applying to Strasbourg, by way of individual application in accordance with Article 34, the effective exercise of which cannot be hindered by the UK.

<u>Option 2</u>

47. As to (1) it is not clear what legal consequence flows from "ultimate responsibility" being held by the Supreme Court. This appears to relate to the proposal at question 2, which we address below.



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48. As to (3) the *travaux preparatoires* to the Convention, as with Hansard, are considered by the courts where there is an ambiguity to the text which has not since been resolved. However, it is over 60 years since the meetings took place. It is unclear what ongoing value they may hold such as to specify them in statute. To do so suggests that they ought to hold some primacy over decisions of the Strasbourg Court itself, which could lead to further uncertainty, as the discussions that took place in 1950 are added to legal submissions and attempts are made to interpret these as well as the text of the right and the relevant case law.

49. Paras 43-45 above apply equally to Option 2.

**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?**

50. Para 198 of the CP states:

> *"Under the Human Rights Act, the domestic courts have generally treated Strasbourg case law as having presumptive authority, which should be followed unless there are special circumstances. This approach has indirectly resulted in the supremacy of the UK Supreme Court being undermined by Strasbourg."*

51. We disagree with this statement. Strasbourg case law is considered by domestic courts in the way set out above at paras 32-34 above. But more importantly, domestic courts in the UK follow the common law system of precedent. They apply the decisions of senior courts above them, not decisions directly from Strasbourg. In *Kay v Lambeth BC* [2006] UKHL 10; [2006] 2 AC 465, the House of Lords confirmed that UK courts were bound to apply the domestic doctrine of precedent notwithstanding any inconsistent ECtHR case law. As Lord Bingham stated (at para 44):



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> *"…The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. 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."*

52. A good illustration of this is *R (Hallam) v Sec State for Justice* [2016] EWCA Civ 355; [2017] Q.B. 571, in which the Court of Appeal was asked to consider whether an amendment to the compensation regime for miscarriages of justice was compatible with the presumption of innocence. Lord Dyson MR flagged (at para 21) that:

> *"In my view, therefore, the Divisional Court was right to hold that the ratio of the [UK Supreme Court] decision in* Adams *on the article 6(2) issue is that article 6(2) is not applicable to the operation of section 133, whatever definition of "miscarriage of justice" is adopted.* Adams *is binding precedent on that point, for the reasons given by Lord Bingham in* Kay v Lambeth LBC *[2006] UKHL 10, [2006] 2 AC 465 at paras 40 to 45. This remains the position regardless of any subsequent observations of the ECtHR in* Allen v UK *and later cases."*

53. The Government's intention in specifying the UK Supreme Court as the ultimate judicial arbiter is not clear. The UK Supreme Court already is the ultimate judicial arbiter and as set out above, performs this role within the UK system of precedent. Despite this, the Paper refers to constitutional courts of other jurisdictions by comparison and proposes in option 2 that the primacy of the UK Supreme Court is stated.

54. If the intention is for the Supreme Court to act akin to a constitutional court, specific powers and causes of action would be necessary to provide access to it directly by claimants. At a minimum, to give effect to the assertion being made, it would be necessary



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to ensure that routes of appeal are available to it in all Bill of Rights claims. However, if all that is intended by this question is to ensure human rights are interpreted in accordance with UK law, principles and values, then as set out at para. 45 above, the IHRAR has already made a viable recommendation and drafting proposal to give effect to this concern.

**Trial by Jury**

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

55. The benefits of a jury trial are well known. They are more representative by race, gender, and age than magistrates and judges (95% of Magistrates are over 40). A 2010 Ministry of Justice study by Cheryl Thomas[4] found that juries are fair, effective and efficient and do not discriminate against BAME defendants. The Lammy Review,[5] a damning indictment of systemic racism at all levels of the criminal justice system, identified juries as one of the few "success stories" - with no difference in outcome for BAME vs white defendants, and juries do not become 'case hardened', leading to lower conviction rates in the crown court.

56. Furthermore, as the CP rightly identifies, trial by jury is such a *"quintessentially UK right"* with a "*significant historical place in our legal traditions"*. It follows that if a 'Modern Bill of Rights' is to enshrine, in a written document, our rights and liberties, it must recognise the right to a trial by jury. However, we submit that this will do *almost nothing in practice* to protect against the incremental abolition of jury trials for many indictable offences which is the practical consequence of recent pressures on the Criminal Justice System (CJS).

57. To be effective, the right to jury trial in the Bill of Rights must be delineated with explicit reference to charges attracting a potential sentence not less than six months and we must

[4] Thomas, Cheryl, *Are Juries Fair?*, Ministry of Justice Research Series 1/10, February 2010, available at: https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf
[5] The Lammy Review, Final Report, September 2017, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf



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guard against the risk that nominal protection in a Bill of Rights will supersede meaningful commitment to the reforms necessary to ensure that jury trials are a realistic prospect for everyone who is entitled to one.

58. The true threat to jury trials is not their sudden abolition, but the disincentives to elect a jury trial caused by the following factors:

    a. Magistrates' power to commit cases to the Crown Court for sentence after trial, now found in s 14 of the Sentencing Code 2020, has enabled the Magistrates' court to retain jurisdiction of far more cases for trial than ever before;

    b. Under LASPO/ Criminal Legal Aid (Remuneration) Regulations 2013, Schedule 2, part 3, criminal solicitors are paid a fixed fee of £362 where the defendant elects to be tried by a jury, but subsequently enters guilty pleas. This fee covers all work done in police station, magistrates'/crown court. In the volume business of criminal legal aid this creates huge financial disincentives to advise on the benefits of jury trials;

    c. The very long wait for a crown court trial, especially in busy court centres, adds a further disincentive for defendants to elect to be tried by a jury.

59. All of this is further compounded by the widely acknowledged practice of the Crown Prosecution Service (CPS) favouring summary only charges over either way offences in borderline cases in order to avoid costly crown court trials (e.g. between in 2019 the number of cases received in the magistrates' courts had fallen by 6.6% since 2012/13 – the first year in which data is available – from 1.6 million (m) to 1.5m. This relatively small decline masked a change in composition: the number of summary cases has increased by 0.7%, while the numbers of 'either way' and 'indictable only' cases have fallen by *18.6% and 27.2% respectively*.

60. Taken together, these factors have drastically reduce the real and practical availability of jury trials to many defendants and now only approx. 2% of all criminal charges conclude with a jury verdict.[6]

[6] Open Democracy, *Why you should care about the right to trial by jury*, 15 July 2020, available at: https://www.opendemocracy.net/en/openjustice/why-you-should-care-about-right-trial-jury/



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61. Magistrates' court sentencing powers have recently been increased and there has been some serious discussion about reclassifying certain offences as summary only. In real terms, this will restrict the right to trial by jury in huge tranches of cases. If the Bill of Rights is to protect the right to trial by jury it must expressly delineate that right with reference to the length of sentence at large, and we submit that to be an effective protection, 6 months is the appropriate cut-off point. This would bring the UK in line with constitution protection of jury trials afforded in the United States of America (see *Baldwin v. New York*, 399 U.S. 66 (1970)).

62. If, however, the Government is serious about protecting the right to trial by jury – let us ensure that anyone who wishes to have their guilt determined by their peers is able to obtain that verdict within a reasonable time and that their lawyers are properly remunerated for their work in doing so.

63. Furthermore, we object in *the strongest possible terms* to the CPs characterisation (at para 35) of *DPP v Ziegler and others* [2021] UKSC 23; [2021] 3 WLR 697 as highlighting "*the problems that the Human Rights Act creates when assessing proportionality in relation to the Convention rights*" and as enabling "*a group of protesters to disrupt the rights and freedoms of the majority"*.

64. On the contrary, we submit that the Supreme Court enabled a group of people to express their firmly held opposition to the arms trade in the face of arguably disproportionate interference in their article 10 and 11 rights by the police and CPS.

65. The decision in *Zeigler* properly reflects that the police and CPS have a duty to respect human rights, that courts must interpret criminal statutes compatibly with the ECHR, and that therefore, where a criminal statute prohibits conduct which is 'unreasonable', and a defendant claims to engage a qualified convention right, the tribunal of fact must determine whether the state's intervention in bringing the prosecution is *proportionate* on conventional ECHR grounds. That is incorporated into an element of the offence the crown must prove and so the decision falls to the jury who represent the views of ordinary right-thinking citizens.



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66. This is not a principle imposed by Strasbourg, it has been at the heart of our common law traditions of liberty since 1670 when a jury refused to convict Quakers William Penn and William Mead for an unlawful assembly and were imprisoned for their trouble (known as *Bushell's case*).

67. Question 12 – on the options for the replacement of s.3 of the HRA and question 23 – on the extent to which the principle of proportionality can "*give rise to problems"* must be carefully evaluated with this important role of the jury firmly born in mind.

68. One of the purposes of the new Bill of Rights is to re-establish the supremacy of Parliament. Lord Devlin famously said in his 1956 Hamlyn Lecture *Trial by Jury* that "*each jury is a little Parliament… it is the lamp that shows that freedom lives*". Let us not erode the supremacy of our little Parliaments by hampering their ability to hold law enforcement to account.



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**Theme II: Restoring a sharper focus on protecting fundamental rights**

**A permission stage for human rights claims**

69. We are opposed to the introduction of a permission stage for any or every human rights claim as we believe this is unnecessary and unjustified. We cannot identify any evidential basis for the consultation on these points. The courts are not in our experience dealing with what is referred to in the Consultation as *"frivolous or spurious"* cases.

70. First, there are already various safeguards available both to public authorities and the Courts to prevent cases that are totally without merit from proceeding. In the immigration context, for instance, the certification regime under section 94 of the Nationality, Immigration and Asylum Act 2002 already provides the Secretary of State for the Home Department with a means of certifying human rights claims as *'clearly unfounded'* which has the effect that appeals can only be brought from outside the United Kingdom (which in reality is rarely a possibility).

71. Furthermore, in the context of 94B certification, the Supreme Court in *Kiarie and Byndloss v SSHD* [2017] UKSC 42; [2017] 1 W.L.R. 2380 struck down the lawfulness of those certificates as being in breach of section 6 of the HRA 1998 and contrary to section 94B itself based on ineffectiveness of the out of country appeal system. There, where the mechanism was judicial review and prior to the UKSC judgment, many people were refused permission to challenge the certification of their claims. This permission threshold exacerbated the harm, in some cases fatally, for example ZF[7] who was deported to Afghanistan to pursue his out of country appeal certified under 94B. Whilst he was waiting over two years for his accepted to be arguable out of country appeal against deportation he was killed by the Taliban, having been unable to survive in Kabul and forced to return to his home area where he was at risk of persecution. ZF had never been to prison for his criminal offences and had four minor British citizen children whom unsurprisingly it was agreed could not live in Afghanistan. In the context of British citizen children's rights, their claims are often dealt with without any express reference to their rights through the prism of the human rights claims made by their parents. In *OO (Nigeria) v SSHD* [2017] EWCA

[7] ZF v SSHD - appeal currently pending before the First-tier Tribunal (Immigration and Asylum Chamber)



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Civ 338 the claim concerning the proper consideration of the child's human rights was initially refused permission by the Upper Tribunal in the judicial review. It was only granted by the Court of Appeal and the human rights claim finally allowed on the basis that the 94B certificate was unlawful. Absent the successful appeal, the imposition of a permission threshold there risked long-term separation of parent and child. Ultimately *OO* won his in-country appeal against deportation.

72. The Courts also have various case management powers to deal with unmeritorious claims including costs penalties against claimants and costs sanctions against lawyers who pursue unmeritorious claims. The Court has various powers under CPR r 3.4 to strike out a statement of case which has no reasonable ground for bringing the claim, or is an abuse of the court process. This includes an inherent jurisdiction preserved by r 3.1(1) and 3.4(5) of the CPR which would normally lead to cost consequences for the Claimant. If the claim is determined totally without merit that is recorded and the court may consider whether a civil restraint order should be made. Further the proceedings may be subject to a summary judgment application with similar costs consequences under CPR Part 24. Further, it may be open for a defendant to apply for wasted costs against the Claimant's personal representatives pursuant to r 46.8 of the CPR.

73. In our view, rather than alleviating the courts of *'unmeritorious'* claims, the introduction of a permission stage would add an unnecessary additional administrative burden on the Courts and the parties, create satellite litigation, increase the courts' backlogs and, as a result and contrary to the stated intention, reduce public confidence in the system of justice.

74. Hence overall it is also difficult to see how such an added test could work in practice. For example, in judicial review claims, it is unclear how any such additional permission test would interact with the already existing permission test.



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**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.**

75. As set out above, we are opposed to the introduction of a permission stage for human rights claims. In particular, adding an assessment of whether a person has or would suffer a '*significant disadvantage*' would not be an effective or necessary means for the courts to ensure a focus on what is referred to in the consultation as '*genuine*' human rights matters. We repeat our strong view that the courts are not in our experience dealing with unmeritorious cases and the Consultation fails to provide any evidential basis for the existence of human rights claims which are not '*genuine*'.

76. The proposed test appears to resemble that for judicial review at s. 31(2A) Senior Courts Act 1981 (inserted by the Criminal Justice and Courts Act 2015) which provides that the High Court in a claim for judicial review must refuse to grant relief where *"it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred"*. In *R (Hawke) v SSJ* [2015] EWHC 4093 (Admin); [2016] A.C.D. 56, a judicial review claim failed on the basis that s. 31(2A) prevented the court from making a declaration that the Secretary of State for Justice had failed to discharge the public sector equality duty under the Equality Act 2010 because the claimants had not suffered any loss as a result of the breach. Importantly, this claim was a discrimination and not a human rights claim.

77. In our view, it is obvious in most human rights claims that a breach would result in a *'significant disadvantage'*. We regularly act for individuals bringing human rights claims in relation to immigration, welfare or housing where a human rights breach would result in a person's separation from family members, return to a country where they would be tortured or otherwise seriously ill-treated, poverty, homelessness etc. Given the nature of these types of claims, it is usually inherent that a breach of a person's human rights would result in *'significant disadvantage'*. Adding an additional test to that effect would in our view add little and therefore be unnecessary.



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78. We are concerned about the retrospective nature of the test *'must have suffered a significant disadvantage'*. In our experience human rights claims are often brought prospectively. For example, the First-tier Tribunal (Immigration and Asylum Chamber) can allow an appeal on human rights grounds where the effect of losing the appeal e.g. removal from the UK would constitute a breach of a person's human rights. It is therefore necessary that any legal test provides for prospective breaches as much as for retrospective breaches.

79. We also note that this is not to be properly compared with the inadmissibility threshold operated by the Strasbourg Court as that process necessarily takes place when domestic remedies have been exhausted.

80. It also appears that the Government have failed to appreciate the procedural complexity in introducing of a permission stage specific to "human rights claims". Human rights issues arise in an extremely wide range of contexts and ECHR principles potentially apply to every aspect of the UK's legal systems. Introducing a permission stage in order to raise any issue of human rights law would be profoundly cumbersome and impractical. Unlike, for instance, judicial review proceedings, human rights "claims" are not subject to a single court procedure into which a permission stage can be introduced.

81. A pertinent example is possession proceedings: human rights law is frequently relevant where social landlords seek possession of residential properties and can be raised in defence (*Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104). It should be emphasised that the county courts already deal with the majority of such defences on a summary basis *(Pinnock*, para 61; *Hounslow London Borough Council v Powell* [2011] UKSC 8; [2011] 2 AC 186, paras 34-37). Successful defences to possession under the HRA are most likely to success "in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty" (*Powell*, para 64. An additional permission stage in this context adds nothing but confusion.

82. Human rights issues can also arise in relation to various procedural and evidential issues, for instance considerations relevant to the reliance upon hearsay evidence in civil committal proceedings in light of Article 6 (see *Raja v Hoogstraten* [2004] EWCA Civ 968 and *Daltel Europe Ltd (In Liquidation) v Makki (Committal for Contempt)* [2005] EWHC



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749). A "substantial disadvantage" test is not readily applicable to such issues nor is it clear how it would be dealt with procedurally.

83. In summary, a permission stage relating to human rights claims is neither necessary nor workable.

**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.**

84. The wording of the second limb of the proposed test appears to import a similar test to that in respect of judicial review claims at s. 31(2A) Senior Courts Act 1981 (inserted by the Criminal Justice and Courts Act 2015) which affords the court discretion to allow a claim which fails under s. 31(2A) (referred to above) to proceed if there is an exceptional public interest in doing so. That section amended s. 31 of the Senior Courts Act 1981 (SCA 1981) from 13 April 2015, to provide that if it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred, the court must refuse to grant relief on an application for judicial review and may not make an award under subsection 4 (relating to damages) on such an application.

85. As set out in detail above, we are opposed to the inclusion of any permission stage for human rights claims. However, should there be a permission stage, it is our view that there should be such a safeguard for cases which fail to satisfy the first limb of the test. An example of the public importance test as an alternative to the '*significant disadvantage*' test is *FB (Afghanistan) v SSHD* [2020] EWCA Civ 1338; [2021] 2 W.L.R. 839, which successfully challenged Secretary of State for the Home Department's removal notice window policy. FB had by chance not suffered a substantive breach of his human rights, however the Secretary of State's policy guidance was nevertheless held to be unlawful because the operation of the policy created a real risk of denial of access to justice in breach of the procedural obligations under Article 8 ECHR.



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86. In *QH v SSHD* [2020] EWHC 2961 (Admin) the SSHD admitted that there had been a removal in breach of her own notice policy but denied any material illegality nor any remedy of return, declaration or damages. Had this higher permission stage been in place there would undoubtedly have been an argument as to whether the Applicant had to satisfy this higher threshold in addition to the permission threshold for judicial review. In that case and during the course of the litigation the SSHD finally conceded a breach of Article 8. The Applicant was assessed by the Court to be a minor at the time of the unlawful removal (a fact which was disputed by the SSHD), the Court made a declaration in favour of the Applicant and the question of damages is currently before the Court of Appeal, the SSHD having disputed her liability to make any financial award in line with those awarded by Strasbourg or the domestic courts.

87. Moreover, the recent cases brought by the Attorney General in *AG v BBC* [2022] EWHC 380 (QB) concerning an injunction to restrain publication of a program by the BBC and arguments as to closed proceedings on the basis of alleged infringement of a CHIS human rights would very likely fail to satisfy this second test.

88. For these reasons we are not in support of the introduction of this additional test.

**Judicial Remedies: section 8 of the Human Rights Act**

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

89. We do not believe that the consultation makes the case for amending the approach to damages under s. 8(3) HRA. Our view is that this question, and the accompanying CP, proceeds from a flawed premise and does not stand up to scrutiny.

90. First, it is concerning that the CP expresses a desire to "*reduce the number of human rights-based claims being made overall*" (para 227), including by making it more difficult for claimants to access remedies, which should not be a goal in and of itself. As a general point, the goal should be working toward eliminating the conditions that create violations



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of human rights by improving governance and public service delivery and enhancing (rather than stripping away) access to justice and avenues of accountability.

91. Second, it suggests that there is an objective standard against which a *'serious'* or *'trivial'* human rights breach can be assessed. Even more concerning, the framing suggests that some people are more deserving of seeing their rights vindicated than others (para 224).

92. It should go without saying that in order for a human rights claim to proceed to consideration of remedy, it has been successful. This means that it has been adjudicated upon by the courts and a substantive breach of the state's obligations under the Convention has been made out. To get to this point, if publicly funded, the case has gone through a merits assessment for the purposes of obtaining legal aid. In judicial review claims, it has gone through a permission stage. In a civil context, unmeritorious claims are subject to strike out. The facts, evidence and legal argument have been tested by a court at a substantive hearing, and a violation has been found. No claim which reaches this stage can properly be described as '*trivial*'.

93. Further, it is difficult if not impossible to provide a normative standard for what constitutes a *'serious'* case where a breach has been made out, not least because what is experienced as a '*serious*' rights violation by an individual claimant may be framed as *'trivial'* when set against '*objective'* standards. This does not diminish one bit the severity of any breach of Convention rights for an individual claimant and the importance of having one's rights vindicated through an independent judicial process.

94. If we see human rights as fundamental and belonging to all, due to their nature as a human being, it is very difficult to argue for a difference in remedies. Human rights frameworks are inherently counter-majoritarian and the framing of individuals as deserving or undeserving of rights and/ or remedies must be fiercely resisted. This is particularly important where individuals are already minoritized or marginalised in society, such that protection against the majority or the mainstream is particularly important (indeed this is rooted in the post-war origins of the ECHR which undergirds the HRA).



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95. Third, it conflates the fundamental nature and purpose of private law as against human rights claims. The primary aim of the Convention, as incorporated through the HRA, is to protect against and prevent human rights violations (*R (Greenfield) v SSHD* [2005] UKHL 14; [2005] 1 W.L.R. 673, at para 3). Where there has been an alleged violation, claimants must be able to seek vindication of their rights through the courts. The primary objective of human rights claims is not the pursuit of damages.

96. There is both a public and individual interest in the courts making declarations that the state has violated Convention rights. The public interest lies in the state being held to account in an independent and public forum in order that it remedy the breach in the individual case and to avoid further comparable breaches occurring in the future. The individual interest for claimants lies in recognition by an independent court that their rights have in fact been violated, a declaration which in the majority of cases has been hard won, with claimants fighting against systemic barriers along the way.

97. The CP suggests that claimants should have to pursue other claims prior to pursuing human rights claims, either so that rights-based claims would not generally be available where other claims can be pursued or made in advance of any rights argument being considered, to allow the courts to decide whether private law claims already provide adequate redress. As above, this fundamentally misunderstands the differing nature of private law as against human rights claims.

98. Moreover, where a human rights claim is allowed to proceed, such an approach would be destructive of its prospects. First, litigation takes months, if not years. Claims stand or fall on the evidence, and the longer the time that passes, the less contemporaneous evidence is available, weakening the strength of a claim. Moreover, per s. 7(5) HRA, human rights claims must be brought within 12 months, unless just and equitable to grant an extension. Second, litigation is an arduous and stressful process for claimants. The prospect of going through not one but two rounds of litigation to vindicate one's rights is likely to serve as an unjust deterrent to pursuing human rights claims. Third, if the human rights challenge falls behind a private law claim, the claimant may find their hands tied and be prevented by operation of the principle of *res judicata* from litigating their otherwise wholly meritorious human rights claim.



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99. Finally, it misrepresents the legal position under s. 8(3) HRA and the approach of the courts to human rights damages claims. The CP suggests (at para 226) that the "*existing rule does not go far enough"* but provides no evidential basis for this assertion. It is telling that the questionnaire fails to put forward any concrete proposal on reform to s. 8(3) HRA. The drafting of s. 8(3) HRA is already incredibly restrictive. The presumption is that no award of damages will be made unless, taking into account all the circumstances including any other relief or remedy granted, it is necessary in *'just satisfaction'* in the case, pursuant to Article 41 ECHR.

100. The reality is that a court will rarely choose to award damages in a HRA case. Where it does, this is not, as suggested at para 225 of the CP, a *"fall-back route to compensation"* and the quantum of damages awarded is comparatively low. There are multiple safeguards in place, guarded jealously by the courts, to avoid over recovery of damages in human rights claims. The Administrative Court Judicial Review Guide 2021 requires (para 12.8.3) that any claim which includes a claim for damages under the HRA is properly pleaded and particularised. Claims for damages which are not adequately particularised may give rise to costs consequences for the claimant, see *R (Fayed) v SSHD* [2018] EWCA Civ 54, at paras 54-56. The legal principle preventing double recovery applies just as much to HRA damages claims as it does in any other damages claim.

**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.**

101. We reject the framing of this question and the implications of the Government's proposals for the protection of fundamental rights in the UK.

102. As explained by Dr. Mavronicola, "*On the flip side of rights are wrongs. It is indisputable that the state may wrong us as a matter of human rights law not only by*



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*actively mistreating us, but also by failing to protect us from certain harms*".[8] Positive obligations are not 'imposed' as suggested by the CP but are rather part and parcel of an effective human rights framework and are instrumental to good governance and the provision of public services.

103. The approach to positive obligations is emblematic of the overall approach to the framing of the human rights 'problem' throughout the CP and proposals; the matter is skewed entirely by focussing on at best a handful of examples with which the Government takes issue, overstating or indeed inventing the problem, while obscuring entirely the broader operation of positive obligations under the Convention and the pragmatic and cautious approach of the courts. Having set out its flawed and problematic stock, the CP is then entirely silent on how its proposals regarding positive obligations can be carried into effect.

104. The only positive obligation pointed to in the CP is the Article 2 duty to take preventative operational measures to protect an individual whose life is at risk, which the CP argues (at para 230) is "*creat[ing] uncertainty as to the scope of the government's (and other public authorities') legal duties*". In particular, the CP argues that the scope of Article 2 positive obligations is uncertain. The application of the duty to hospital authorities caring for voluntary psychiatric patients in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72 and to local authorities caring for children in need in *R (Kent County Council) v HM Coroner for Kent (North West District) and others* [2012] EWHC 2768 (Admin) is the only 'evidence' cited of this uncertainty.

105. The CP further argues that the *Osman* duty (derived from *Osman v United Kingdom* (2000) 29 EHRR 245) has "*added considerable complexity and expense to ongoing policing operations*" such that "*substantial police time and effort is engaged in carrying out measures for serious criminals*", i.e., by requiring the police to issue "Threat to Life" notifications.

[8] Stasbourg Observers, 'Positive Obligations in Crisis', 7 April 2020, available at: https://strasbourgobservers.com/2020/04/07/positive-obligations-in-crisis/



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106. We take issue with this claim. Human rights are of universal application; they apply irrespective of whether a person is 'law-abiding' or not, and to cordon off their protection on this basis – and worse, to scapegoat a wider regime of rights protections (i.e., positive obligations) because they benefit a certain group – takes us into extremely dangerous territory.

107. Further, the CP fails to substantiate its dangerous costs-based assertion. The CP itself acknowledges at para 145 that "*the cost of Threat to Life notifications … has not previously been quantifie*d". The CP then goes on to cite the number of such notifications issued by four police forces in 2019 and a number of individual operations. The state tasks the police with protecting members of the community from harm. While the extent to which the police achieve this aim may be disputed, in the context of 'Threat to Life' notifications, the risk of harm is to life and limb. Whether those individuals are 'law-abiding' or not is wholly irrelevant. The references cited in the CP are therefore no more than a description of the police doing what their job is supposed to be. By way of analogy, irrespective of a person's individual circumstances, the NHS will not refuse life-saving treatment.

108. Beyond the cherry-picked examples cited in the CP, positive obligations have been essential to the protection of rights in a range of important contexts, all of which the CP is silent on. For example:

a. **Enabling bereaved families to seek justice for their loved ones**: The Article 2 'investigative' duty requires the state to investigate the circumstances of any death that occurs at the hands of the state, in state custody, or with a nexus to state involvement, via a Coroner's inquest.

b. **Ensuring that detained children are treated with humanity and dignity**: Articles 3 and 8 impose on the Prison Service positive obligations to take reasonable and appropriate measures to ensure that children detained in Young Offender Institutions are treated by Prison Staff and fellow inmates in a way which respects their inherent dignity and personal integrity and are not subjected to inhuman or degrading treatment (*The Queen (on the application of the Howard*



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*League for Penal Reform) v SSHD v Department of Health* [2002] EWHC 2497 (Admin); [2003] 1 F.L.R. 484).

c. **Holding the police to account over failures to tackle gender-based violence**: The investigative duty requires state authorities to carry out an 'effective investigation' into complaints of human rights abuses, most often in the context of Article 2, but also Articles 3 and 4. In *DSD & NBV v Commissioner of Police for the Metropolis* [2018] UKSC 11; [2019] A.C. 196, the Supreme Court held that the Metropolitan Police had failed to discharge its positive obligations with respect to the victims of John Worboys, on both a systemic and operational level.

d. **Protecting victims of modern slavery and trafficking**: The state owes positive obligations under Article 4, to identify victims of trafficking and afford them protection, including immigration status, for their safety and recovery. The Supreme Court in *MS (Pakistan) v SSHD* [2020] UKSC 9; [2020] 1 W.L.R. 1373, clarified the scope of positive obligations owed under Article 4, highlighting that a defective decision from the National Referral Mechanism (NRM) may result in a person being denied the protective measures required by the Trafficking Convention.

e. **Requiring the state to facilitate Gypsies' and Travellers' way of life**: The Court of Appeal in the *Mayor and Burgesses of the London Borough of Bromley v Persons Unknown* [2020] EWCA Civ 12; [2020] 4 All E.R. 114, unanimously reaffirmed the positive obligation on the state to facilitate the traditional way of life of the Gypsy and Traveller community, and that this will normally require some positive action on the part of local authorities to consider the circumstances in which the Article 8 rights of members of those communities are 'lived rights', i.e. capable of being realised (para 104).

109. Despite these important protections, the Strasbourg and domestic courts are nevertheless cautious about extending the scope of positive obligations, and the thresholds applied are high. The CP fails entirely to acknowledge the stringent approach of the courts when assessing positive obligations, as illustrated in the following cases:



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a. *R (NB) v SSHD* [2021] EWHC 1489 (Admin); [2021] 4 W.L.R. 92: This case challenged the accommodation of asylum seekers at Napier Barracks. Despite findings by the APPG on Immigration Detention (Dec 2021) that residents were forced to live in *"appalling conditions*", resulting in their mental health deteriorating *"in some cases to the point of suicidality*" and concluding that "*no person fleeing persecution and danger should be treated in this way*" (para 4.1), the Court failed to find a breach of the positive obligations under either Article 3 or 8 (paras 262-268, 275-278).

b. *R (SC & Ors) v SSWP* [2021] UKSC 26; [2022] A.C. 223: This case challenged the 'two child limit' under the Welfare Reform and Work Act 2018. The Supreme Court underscored the fact that Article 8 has never been held to impose an obligation on the state to have in place a programme of financial support for private or family life while Article 12 has been held *not* to impose a positive obligation on the state to provide the material means to enable the founding of a family (paras 25, 35).

c. *R (Elan-Cane) v SSHD* [2021] UKSC 56; [2022] 2 W.L.R. 133: This case challenged the lack of availability of non-gender specific 'X' passports to non-gendered, non-binary, intersex and other trans persons who do not identify as, or exclusively as, male or female. The Supreme Court declined to find that Article 8 imposed a positive obligation on the Secretary of State to offer 'X' passports. In doing so, the Supreme Court noted the significance of the margin of appreciation in the context of positive obligations, *"because the imposition of such obligations requires [states] to modify their laws and practices, and possibly … to incur public expenditure, in order to advance social policies which they may not wholly support"*, concluding that the courts must *"exercis[e] caution"* before imposing them (paras 55-58).

110. None of this is to say that there are not justifiable critiques of the Strasbourg and domestic courts' approach to positive obligations, rather that the 'mischief' which the CP purports to address is no mischief at all. Taken together, the CP fails to make the case for any change to the courts' approach to positive obligations. None of the concerns raised are



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substantiated, the analysis completely omits to address the reality of the courts' approach to positive obligation and the importance of those obligations to the protection of fundamental rights, while failing entirely to put forward any concrete proposal for comment.



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**Theme 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.**

- **Option 1: Repeal section 3 and do not replace it.**

- **Option 2: 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. We would welcome comments on the above options, and the illustrative clauses in Appendix 2.**

111. When enacting the HRA in 1998, Parliament's clear intention behind section 3 was to impose an interpretative obligation on all public authorities, including the courts, to give effect to human rights. It signified a real commitment to human rights and expressly placed a duty on courts to ensure that other statutory provisions are compliant with that commitment. The notion that any perceived *'expansion of rights'* lacks *'proper democratic oversight'* is misconceived. By fulfilling their interpretative duty under section 3, the courts are acting in accordance with the will of Parliament. This cannot be said to be anti-democratic nor to undermine Parliamentary sovereignty.

112. It is our view that the existing arrangement expressly retains Parliamentary supremacy and is underpinned by Parliamentary sovereignty. Unlike, for example, the US Supreme Court, UK domestic Courts are not permitted under the HRA to declare that an Act of Parliament is unconstitutional and therefore null and void.

113. Parliament retains supremacy and sovereignty in that:



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a. Parliament frequently expressly confers powers on Courts and tribunals to supervise and review decisions made under controversial legislation including on the merits (*A v SSHD* [2005] UKHL 71; [2006] 2 A.C. 221) or on judicial review principles (Prevention of Terrorism Act 2005).

b. Whatever else Courts do, it is their constitutional role to interpret legislation, to ascertain and give effect to the terms Parliament has used, its intentions and purpose: *"the courts are the authoritative organ for the interpretation of a statutory power"* (*R (Palestine Solidarity Campaign Ltd and another) v SSHCLG* [2020] UKSC 16; [2020] 1 W.L.R. 1774, at para 67).

c. The case law relating to section 3 (including that referred to at paras 118-123 of the Consultation paper) shows that the courts have taken a cautious and restrictive approach in relation to their interpretative obligation. They afford appropriate deference, see for example these welfare benefits decisions: *R (Carmichael) v SSWP* [2016] UKSC 58; [2016] 1 W.L.R. 4550), *R (DA) v SSWP* [2019] UKSC 21; [2019] 1 W.L.R. 3289 and *R (JCWI) v SSHD* [2020] EWCA Civ 542; [2021] 1 W.L.R. 1151. See also *McDonald v McDonald* [2016] UKSC 28; [2017] A.C. 273 where the Supreme Court's decision that a proportionality inquiry should not be undertaken in cases brought by private landlords against their tenants was based upon its conclusion that the existing statutory framework contained an adequate balance. If anything, it is our view that Courts are too deferential to the role of Parliament and should be more robust.

d. A section 3 reading of legislation as interpreted by the Courts can subsequently be overturned by legislation, as was the case when the House of Lords held that private care homes were not exercising public functions in their provision of care and therefore their residents could not rely on human rights (*YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95). Parliament subsequently legislated so as to bring those private care homes within the scope of the HRA (Health and Social Care Act 2008, s. 145, now at Care Act 2014, s. 73).



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e. Section 3 expressly provides for a qualification and limit to a Court's ability to interpret statutory provisions in a way which is compatible with Convention rights as Courts are only able/ required to do so *"so far as it is possible*". Where it is not possible to do so, a court cannot interpret the provision compatibly and must instead issue a 'declaration of incompatibility'. Such a declaration does not prevent public authorities from continuing to apply the primary legislation (section 6(2)(b)).

f. A declaration of incompatibility does not strike down legislation; the issue of whether or not to amend, repeal or otherwise deal with the incompatible legislation is a matter for Parliament.

g. The mechanisms at section 3 (human rights compliant reading of legislation) and section 4 (declarations of incompatibility) exist to right wrongs potentially contained in Acts of Parliament enacted prior to October 2000.

h. In relation to Acts of Parliament enacted since October 2000, Parliament receives a statement from the Minister that the proposed legislation is compatible with Convention rights; if a breach of human rights is subsequently identified by the Courts, the Courts are implementing Parliament's intention to legislate in compliance with the Convention, the Courts' role in identifying legislation or decisions which is incompatible with minimum human rights protections is an adequate and necessary "check" and functions as part of the constitutional checks and balances.

<u>Option 1</u>

114. We are strongly opposed to a repeal of section 3 of the HRA and welcome the indication that the government is not in favour of this option.

115. The House of Lords' decision of *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 is a leading authority on how section 3 principles should be applied and an important example of why section 3 is crucial to achieve rights-compliant



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decision-making. In that case, the House of Lords interpreted the words *"as his or her wife or husband"* as extending to same sex partners, for the purposes of Rent Act 1977 and whether the surviving partner of a same sex partnership should be entitled to succeed to the deceased tenant's statutory tenancy. The Secretary of State, as intervenor, submitted that this was the correct interpretation.

116. It is certainly possible that Parliament, when it enacted the Rent Act 1977, considered that the mechanism for succession should be limited to married couples only (which, at the time, meant married heterosexual couples). The additional mechanism for succession, between heterosexual cohabiting couples, was added by Parliament by amendment in 1988. Again, it is likely that in 1988, Parliament would not have considered that the same mechanism should be applied to same sex couples. However, once the HRA came into force, the House of Lords recognised that the failure to provide for succession by same sex couples, on the same basis as different sex cohabiting couples, was discrimination contrary to Article 14 and that it could not be justified. The House of Lords accordingly applied section 3 so as to create a human rights compliant reading of the legislation.

117. Parliament had the opportunity to legislate so as to amend the Rent Act 1977 to exclude same sex couples, following the House of Lords' decision. It did not do so. Indeed, shortly after the House of Lords' decision, it passed the Civil Partnership Act 2004 which amended Rent Act 1977, Housing Act 1985 and Housing Act 1988 so as to provide for statutory succession to certain tenancies to be available on the same terms for same sex couples (whether in a civil partnership or cohabiting) as for different sex couples.

118. *Ghaidan* is therefore an example of a case where section 3 human rights interpretation was appropriately used, to reflect current attitudes and values, and Parliament's subsequent actions, in enacting the Civil Partnership Act 2004, supported this interpretation.

119. In *R v Waya* [2012] UKSC 51; [2013] 1 A.C. 51, the Supreme Court applied section 3 to avoid a breach of Article 1, Protocol 1 of the ECHR and read into the Proceeds of Crime Act 2002 a provision that a confiscation order should not be made if,



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and to the extent, that to do so would be disproportionate. We presume that it was not the original intention or policy of the 2002 Act that confiscation orders be disproportionate to the extent that they effect double recovery, which is what the amendment avoids. Indeed, Parliament subsequently amended the legislation by way of the Serious Crime Act 2015 to specifically add the proviso created by the Supreme Court into POCA 2002, suggesting that they endorsed the Supreme Court's decision. *Waya* is therefore another good example of a positive dialogue between the Courts and the legislature created by virtue of the HRA.

120. Even in protest cases, which are often more political in substance, it cannot be said that Courts have been drawn into policy issues. Section 3 has had an overall positive effect in relation to enhancing freedom of expression, requiring the Courts to take Articles 10 and 11 into account when interpreting criminal legislation used against demonstrators. For example, when determining whether particular conduct was reasonable, which amounts to a defence in some cases, the Courts are required to bear in mind the rights to protest and to free speech. In *Percy v DPP* [2001] EWHC Admin 1125; [2002] Crim LR 835, a conviction under section 5 of the Public Order Act 1986 arising out of a protest against an American air base was quashed where the judge had failed to properly take Article 10 into account. In contrast, however, the Courts have also been careful to restrict the use of Articles 10 and 11 as a defence against criminal charges where they found that in accordance with section 3 it would not be possible to do so due to the wording of the offence-creating provision; *James v DPP* [2015] EWHC 3296 (Admin); [2016] 1 W.L.R. 2118, *Richardson v DPP* [2014] UKSC 8; [2014] A.C. 635 and *Bauer v DPP* [2013] EWHC 634 (Admin); [2013] 1 W.L.R. 3671.

121. In our view, section 3 is a carefully drafted instrument that ensures rights-compliant decision-making. Rather than undermining the will of Parliament, it has been used to safeguard against human rights violations in individual cases or to realise what was clearly the legislative intention behind the underlying statutory provision. Section 3 interpretation is also an effective remedy, in that if a person has had his or her human rights breached, the domestic Courts can declare that is the case and award compensation for just satisfaction. Without this mechanism for interpretation, dissatisfied claimants would petition the ECtHR directly. Additionally, the existing backlog of cases awaiting determination by the ECtHR would increase.



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Option 2

122. In relation to proposed amendments to the wording of section 3, it is our view that these are neither necessary nor appropriate. Section 3 is already expressly limited to circumstances where a Convention-compliant interpretation is *"possible"* within the wording of the statutory provisions. This itself provides a sufficiently strong safeguard. Prescribing this restrictions further in the ways suggested by the illustrative clauses in Appendix 2 would create a serious barrier to a Convention-compliant interpretation being achieved in individual cases. In *Ghaidan* for instance it would not have been possible for the Court to interpret the words of the Rent Act 1977 *"as his or her wife or husband"* in a non-discriminatory way on the basis that the *"ordinary reading of the words used in the legislation"* at that time would have prohibited the Court from including same-sex partners into the words wife or husband. Section 3 is an important constitutional safeguard which is used sparingly by the Courts. Amending its wording in the ways proposed would seriously undermine its effectiveness in protecting human rights.

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

123. The current system is already such that parliament can scrutinise section 3 judgments as it can overturn any section 3 interpretation of legislation by the Courts through subsequent legislation. For example, in the case of *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95 (mentioned above) the House of Lords held that residents of private care homes could not rely on human rights and Parliament subsequently legislated so as to bring those private care homes within the scope of the HRA. Accordingly, there is in our view no need for any additional legislative provision. Parliament can simply choose to further engage with (and should it be required scrutinise) section 3 judgments.



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

124. We welcome the proposal to increase transparency, public accessibility and understanding including the idea of a judgments database.

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

**Declarations of incompatibility**

**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?**

125. In judicial review litigation, making a declaration is already an option under the Senior Courts Act 1981. See, for example, the 'bedroom tax' case, in which the Supreme Court held that the Housing Benefit Regulations were unlawfully discriminatory within the meaning of Article 14 of the European Convention on Human Rights.[9] The court went no further than making a declaration and left it to Parliament to amend the offending regulations.

126. It is difficult to see why it is not better for courts to have the power to quash secondary legislation that is in breach of human rights. It is troubling that the consultation appears to suggest that the courts should not have this power. It is instructive that the majority of the expert IHRAR panel rejected any option that would prevent statutory instruments from being quashed: any such step would be significantly retrograde and would reduce the human rights protections of British citizens. It is particularly troubling

[9] *Carmichael v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 W.L.R. 4550. The Supreme Court held further in *RR v SSWP* [2019] UKSC 52; [2019] 1 W.L.R. 6430 that decision-makers, including courts and tribunals, are constitutionally bound to disapply unlawful secondary legislation that would otherwise result in acting incompatibly with rights under the ECHR – thereby assisting with individuals who may be affected in the period between a declaration being granted and amending legislation coming into force.



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that this is suggested at a time when the use of secondary legislation is increasing significantly.

127. There is, moreover, no evidence that the powers in s4 of the Human Rights Act 1998 are being overused: despite the preponderance of secondary legislation in recent years only 14 have been struck down since 2014.

**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.**

128. We reject the proposals for suspended and prospective quashing orders in their entirety, for the reasons set out below. They should have no place in the Judicial Review and Courts Bill and should have no place in any reform of the Human Rights Act.

129. We note that the Independent Review of Administrative Law (IRAL) Panel in their report did not recommend prospective-only remedies as a proposed change to judicial review. They were correct not to do so; it is a potentially very damaging proposal that would not only undermine very significantly judicial review as a means of obtaining justice for state wrong-doing, but would also significantly undermine the principle of parliamentary sovereignty which is unlikely to have been the government's intention.

130. Where a government body has acted unlawfully it is not in the public interest for the courts to be unable to prevent that wrongdoing and it is troubling that the consultation would entertain that idea.

131. We note further that it is difficult to conceive of any scenario in which a prospective-only remedy would uphold the rule of law, and provide for the accountability of decision-makers for unlawful action. It is understood that none have been offered by the government. The fact that no such scenarios have been suggested is in our view significant.



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132. Introducing a concept of prospective-only relief would in our view significantly undermine the principle of legality and the ability of judicial review to ensure considered, fair and lawful decision-making.[10] This would also undermine the principle of government by consent, a cornerstone of which is the principle that Ministers cannot act outside their lawful powers. The proposal is, in effect to permit Ministers to act outside their powers.

133. These factors apply with even greater force in respect of human rights breaches. What the proposal amounts to is the following question: "where human rights can be breached by legislation, should the law allow human rights to continue to be breached". The answer can only be "no".

a. Firstly, prospective-only remedies would discourage individual claimants (with meritorious claims likely to benefit themselves and others) from seeking to hold decision-makers to account. That would not only be for practical reasons, in terms of the available remedies, but also because the availability of such a remedy may affect their ability to obtain legal aid funding or to recover their legal costs if successful. It is difficult to escape the idea that this deterrent effect is partially what is intended. The government does not appear to have given thought to the possibility that the result may be more NGOs, charities, and other public interest organisations being forced to act as claimants in judicial review proceedings.

b. Second, if the government is genuinely concerned about upholding the principle of parliamentary sovereignty, the idea of prospective-only remedies is logically and fundamentally problematic. A prospective-only remedy in judicial review proceedings relating to, for example, statutory instruments, would quite literally involve judges ordering Parliament how to draft future legislation, as opposed to scrutinising legislation that has already been drafted.

c. Third, as outlined in our answer to question 15, the current system of declaratory relief being available in judicial review proceedings, with the courts then leaving it to Parliament to re-draft any offending legislation, works reasonably well in terms

[10] See, e.g., https://publiclawforeveryone.com/2021/04/06/judicial-review-reform-i-nullity-remedies-and-constitutional-gaslighting/



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of providing accountability for past wrongs (i.e. unlawful decisions), vindication for affected individuals, and flexibility for legislators in how to address the courts' concerns. In other words, 'Parliament-focused solutions' are already available.

d. Fourth, we also note that the proposal makes no reference to how prospective-only remedies would interact with the right of access to an effective remedy, as per Article 13 of the ECHR. In our view there would be no access to an effective remedy either by reference to the Convention or to the common law in circumstances where past unlawful action by the state was allowed to stand.

e. Fifth, in our view, with respect to challenges relating to the lawfulness of statutory instruments, prospective-only remedies would not provide legal certainty or uphold the rule of law. Nor is it correct that statutory instruments are subject to any greater level of scrutiny than other aspects of public law decision-making. Among others, the Hansard Society has highlighted how little Parliamentary time is given to scrutinising statutory instruments, with an increasing trend in 'skeleton' primary legislation being supplemented by regulations.[11] The vast majority of statutory instruments are passed using the 'negative resolution' procedure – which means that the vast majority are never debated and subjected to zero scrutiny.[12] No statutory instrument has been rejected in the House of Commons since 1979.[13] All of which means in practice, increasingly often it is only when a statutory instrument is scrutinised by a judge that proper attention is given to its lawfulness and efficacy.

134. Further, research conducted by the Public Law Project has shown that very few cases brought – whether the Human Rights Act is engaged or otherwise - challenging the lawfulness of a statutory instrument result in a quashing order. This demonstrates clearly that the courts are already conscious of their constitutional boundaries and that the executive is already given significant leeway.[14]

[11] See, e.g., Hansard Society, *End of session SI debate spree highlights shortcomings of scrutiny process as a check on ministerial powers*, 27 April 2021, available at: https://www.hansardsociety.org.uk/blog/end-of-session-si-debate-spree-highlights-shortcomings-of-scrutiny-process.
[12] Public Law Project, *Plus ça change? Brexit and the flaws of the delegated legislation system*, 13th October 2020, available at: https://publiclawproject.org.uk/resources/plus-ca-change-brexit-and-the-flaws-of-the-delegated-legislation-system/
[13] *Ibid*.
[14] UK Constitutional Law Association, *Does judicial review of delegated powers under the Human Rights Act 1998 undult interfere with executive law making?*, 22 February 2021, available at: https://ukconstitutionallaw.org/2021/02/22/joe-



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135. Finally, it is difficult to avoid the conclusion that the government wants to avoid finding itself in situations akin to the aftermath of cases such as *UNISON v Lord Chancellor* [2017] UKSC 51; [2020] A.C. 869 and *R (RF) v SSWP* [2017] EWHC 3375 (Admin); [2018] P.T.S.R. 1147, both of which involved reviewing several thousands of cases that had been determined under unlawful statutory instruments, and in some cases paying out compensation to affected individuals. While it may be inconvenient for the state to have to pay compensation to individuals subject to unlawful action that does not justify the introduction of a remedy that would in effect disregard that unlawful action.

136. Where a person has been treated in a manner that is unlawful by a public body they are entitled to have that recognised by the courts and to have a remedy for it. That is the essence of the rule of law, and the public is likely to be alarmed by any proposal to erode it, particularly in order to prevent ministers from suffering the consequences of unlawful action taken with the powers of Parliament but little or none of its scrutiny, or where human rights have been breached.

**Remedial orders**

**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 only to remedial orders made under the 'urgent' procedure; or d. abolished altogether?**
**Please provide reasons.**

137. For the avoidance of doubt, we reject at the outset the government's proposals for a Bill of Rights to replace the Human Rights Act. The government's own independent panel

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did not make that recommendation and the government has yet to advance any rational basis for doing so.

138. Section 10, HRA is an example of a 'Henry VIII' power - those that allow Ministers, using secondary legislation, to amend primary legislation -and therefore, in our view, merits some careful scrutiny. As Robert Craig argues, Parliaments cannot normally bind future Parliaments and a power to amend future Acts arguably veers dangerously close to doing that, because in theory it confers on the executive the power to override a later Act no matter what the later Act says.[15]

139. For context, we adopt Liberty's helpful explainer for remedial order powers:[16]

*"If a court has found UK legislation incompatible with human rights, it is up to Parliament to decide whether to amend it.*

*Section 10 and Schedule 2 of the Human Rights Act allow amendments to be made by a remedial order. If a minister thinks there are strong reasons to do so, they can make an order to amend legislation – to remove an incompatibility recognised by the courts.*

*A draft of the order must be laid before Parliament for 60 days and then approved by both Houses before it can be made.*

*The only exception is for urgent orders, which allow for an interim order to be made. This will have no effect if not approved by both Houses within 120 parliamentary days.*

*This is intended to ensure that clear breaches of human rights can be dealt with swiftly, rather than waiting for a legislative slot which can often take months, if not years."*

[15] Professor Robert Craig, UK Constitutional Law Association, *Why remedial orders altering Post-HRA Acts of Parliament are ultra vires*, 21 December 2017, available at: https://ukconstitutionallaw.org/2017/12/21/robert-craig-why-remedial-orders-altering-post-hra-acts-of-parliament-are-ultra-vires/

[16] https://www.libertyhumanrights.org.uk/your-rights/the-human-rights-act/how-the-human-rights-act-works/



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140. Our main concern is related to our answer to question 16 above – the lack of time that Parliament has for scrutiny of statutory instruments. The HRA does at least provide that the affirmative resolution procedure should be followed.

141. We would adopt Option B for that reason.

**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.**

142. Section 19 HRA is a central means by which the HRA is given effect in domestic law. Its purpose (as summarised in the IHRAR Panel's report) was to:

- enhance Government and parliamentary scrutiny of the compatibility of proposed legislation with Convention rights;
- enable courts to assume that legislation was intended to be compatible with Convention rights when interpreting it consistently with section 3 of the HRA
- provide a prompt to Government Ministers to take remedial action where following the making of a section 19 statement of compatibility UK courts had held legislation to be incompatible with Convention rights.

143. In common with the IHRAR Panel, we do not consider that there is any case for change. Section 19 is vital to ensure that Parliament is taking account of human rights issues when preparing and passing legislation. The CP refers to 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". Section 19 does not prevent the government from introducing "innovative" draft legislation, if what is meant by that is draft legislation that is or may be incompatible with the HRA. A statement under section 19(1)(b) that the Government Minister is unable to state that the Bill is compatible with human rights but that the Government wishes it to proceed anyway is an important trigger for enhanced Parliamentary scrutiny of that legislation.



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**Application to Wales, Scotland and Northern Ireland**

**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?**

144. As barristers predominantly practising at the Bar of England and Wales, we cannot comment on the efficacy of the different systems of rights protection that exist across the UK. However, should a Bill of Rights be proceeded with, this will need to give deference to the devolution settlements and mechanisms for bringing and deciding human rights claims agreed by the devolved nations. There are different systems in place across the three legal jurisdictions, which operate effectively to give effect to the respective rights regimes. These must be respected and preserved.

**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.**

145. We welcome the overarching observation that the range of bodies and functions to which the obligations under the Human Rights Act currently apply is broadly right, and the intention to maintain this approach.

146. There is no issue with the way section 6 is drafted. What is missing is a formal definition for what constitutes a public authority.

147. Section 6(3)(b) is drafted so as to encapsulate *any person certain of whose functions are functions of a public nature*. Section 6(5) expressly excludes acts that are private in nature. In most situations the question of whether a function is public or private will be apparent. The grey area involves 'hybrid' public authorities, where a private person is subcontracted to carry out a function for a public authority.



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148. Where this occurs, it is important to ensure that the state cannot absolve itself of responsibility for public law duties by delegating its responsibility to private bodies.

149. In *Aston Cantlow*[17] Lord Nichols observed the diverse nature of governmental functions and the variety of means by which these functions are discharged. In the absence of a formal definition of what constitutes a public authority, he suggested an evaluative approach. This should take into account *the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service* [12].

150. This approach is prevalent through subsequent legal authorities. It can be commended for providing flexibility. However, this comes at the expense of certainty and consistency.

151. The CP highlights the Court of Sessions decision in *Ali v Serco*[18] and contrasts this with the Court of Appeal decision in *LW v Sodexo*.[19] The former involved the provision of asylum accommodation by a private company on behalf of a public authority. This was deemed to be a private function. The latter concerned illegal strip-searches in a privately operated prison which was deemed to be a function of a public nature. It is certainly possible to read and understand each decision in isolation. However – as the consultation highlights – it is difficult to identify common themes which allow one to predict the *exact dividing line between the public and the private spheres*.

152. The difficulty in defining public authorities is exemplified by *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95. The House of Lords was split 3/2 over the question of whether a privately operated care home providing accommodation and care to an elderly resident with Alzheimer's disease was performing functions of a public nature. The scope of the individual judgments highlights the range of different interpretations that can be applied to a specific set of facts.

[17] *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37; [2004] 1 AC 546
[18] *Shakar Omar Ali v Serco Limited, Compass Sni Limited and the Secretary of State for the Home Departmen*t [2019] CSIH 54
[19] *LW and others v Sodexo and Secretary of State for Justice* [2019] EWHC 367 (Admin); [2019] 1 WLR 5654



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153. The detriment of uncertainty is not confined to public authorities. It impacts individual members of the public, who cannot determine with certainty who – if anyone – is responsible for shortcomings that breach their Convention rights.

154. The difficulty in providing a more specific definition of a public authority is that the interactions between and involvement of the public and private sector are extremely are diverse and constantly evolving. It is simply impossible to predetermine the ways in which private bodies may become involved in the provision of state services.

155. As per Lord Nicholls in *Aston Cantlow* at para 160: "*the broad purpose sought to be achieved by section 6(1) is not in doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights.*"

156. It is therefore essential that the courts take a flexible and nuanced approach to the question of when a hybrid authority is or is not exercising public function.

157. An illustrative example of this approach is found in litigation relating to the amenability of private registered providers of social housing ("PRPs") to public law challenge. In the leading case of *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587; [2010] 1 WLR 363, the Court of Appeal held that in deciding the question of whether a PRP was exercising a public function a factor-based approach (per *Aston Cantlow*), and that in that case the relevant factors were that the PRP relied on public finance, operated in close harmony with Local Government, provided a public service in providing subsidised housing, acted in the public interest and had charitable objectives which placed it outside the traditional area of private commercial activity. It was held that the decision by London and Quadrant Housing Trust to seek possession of the Claimant's socially rented home was amendable to public law challenge, including on human rights grounds.

158. The relationship between a social tenant of a PRP and their PRP landlord is not directly mediated by a local authority, either contractually or otherwise. Many such tenants will have been allocated their home through a local authority, but this is by no means universally the case. In either situation the ongoing management of the tenancy is



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no longer linked to a local authority in any way which can be readily defined. However, PRPs generally play a crucial role in the provision of social housing which is itself a key aspect of public policy and social welfare provision. Many local authority areas rely on PRPs as the primary, and in certain cases only source of social housing.[20] It is essential that social tenants of PRPs continue to be treated in law in a manner comparable to social tenants of local authorities, in the sense that they can rely upon their landlords to act in a manner compliant with human rights. On the other hand, PRPs also let to many tenants on a commercial basis in a manner entirely unrelated to the public function of providing social housing.

159. The hybrid nature of PRPs the Courts must in each new context consider the question of public function. For instance the High Court held in R (Macleod) v Governors of the Peabody Trust[2016] EWHC 737 (Admin) that the PRP was not exercising a public function in respect of keyworker housing provided at below market but higher than social rent.

160. While a degree of uncertainty undoubtedly arises in respect of whether, in new contexts, a hybrid authority will be considered to be exercising public function, any attempt to redefine the scope of section 6 is highly likely to simply complicate matters by undermining the existing and well-established approach to this complex and nuanced issue, or worse, to deprive individuals of the right to rely upon human rights in domestic Courts in contexts in which they ought to be so entitled.

[20] See Local authority housing statistics data returns for 2019 to 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1050674/Local_Authority_Housing_Statistics_2019_2020_all_tables_January_2022_revisions.xlsx



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**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.**

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

**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.**

161. We agree that broad public policy decisions should be a matter for Parliament. The Human Rights Act as it currently stands does not detract from this.

162. Before second reading, a Minister in charge of a Bill is required to give a "statement of compatibility" which expressly indicates that the draft legislation is compatible with Convention rights. If they are unable to do this, they must make a statement to this effect but indicate that they would still like the House to proceed with the Bill.

163. Consequently, the requirement under section 6(2)(b) to read or give effect to primary legislation in a way that is compatible with the Convention rights originates with the Minster in charge of a Bill. A Bill needs to be passed by both Houses of Parliament before receiving Royal Assent. Parliament has the ability to legislate in a manner contrary to Convention rights if it so chooses. It can pass legislation without a statement of compatibility. It can tightly draft legislation, limiting the scope for interpretation.

164. To this end, the courts do not compel public authorities to act in a way that is contrary to the clear will of Parliament. The courts facilitate the clear will of Parliament.

165. The section 19 process also facilitates systematic human rights scrutiny of legislation at committee stage. It helps to identify and resolve unanticipated problems with legislative proposals before they receives Royal Assent. We believe that this is something that should be both encouraged and commended.



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Option One

166. For the reasons outlined above, we do not believe that it is appropriate to remove the qualification *"which cannot be read… compatibl[y] with the Convention rights"* from section 6. At several steps along the legislative journey, the executive and the legislature are required to consider whether legislation is compatible with Convention rights and make an express declaration to that effect. The courts uphold the supremacy of Parliament.

167. Parliament is free to pass laws that are incompatible with Convention rights. If it does so – and makes a declaration to that effect that is passed by both Houses – public authorities would not be required to interpret legislation in a Convention compliant manner. The scope for intervention from the courts would be limited to a declaration of incompatibility. This would not strike down legislation.

Option Two

168. As with the proposed amendments to the wording of section 3, it is our view that the amendment of section 6 is neither necessary nor appropriate. We respectfully highlight the various points at which Parliament sets out whether or not it intends for legislation to be compatible with Convention rights. If it does not intend for legislation to be interpreted in a Convention compliant manner – and this is reflected in the legislative process – then such legislation is beyond the oversight of the courts.

**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.**

169. The text preceding this question in the Consultation document refers to uncertainty as to when the ECHR might apply extraterritorially (para. 278). At its core, the question



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posed by the Consultation is whether the approach taken to extraterritorial jurisdiction by the Strasbourg Court should lead the UK to seek to extricate itself from being bound thereby. In our view, the Consultation does not point to any good reason to do so.

170. As noted further below (b), international human rights law generally is consistently applied extraterritorially: this is not an ECHR-specific issue. This is the inevitable response to the growth and complexity of states' spheres of operation and influence in a globalised world, which renders untenable a rigidly territorial approach to human rights obligations. This is necessarily a dynamic factor, which will always give rise to complexity in the application of law to it. To merely observe such complexity does not impugn the efforts of the ECtHR to keep pace with it. Much more is needed to justify rejection of the approach taken to extraterritorial jurisdiction by the ECtHR than to simply observe that it is a complex area of law. In our view, the ECtHR takes an appropriately cautious approach to extra-territorial jurisdiction, from which there is no reason whatsoever for the UK to seek to depart.

171. It is clear from the Consultation document that the real motivation for raising questions about the ECtHR's approach to extraterritorial jurisdiction is a desire to limit the accountability, and the potential liability, of the armed forces. It notes in this regard that "complex legal arguments" have been raised as to "when the Human Rights Act and indeed the Convention apply abroad and in such challenging situations as armed conflict" and "the interaction between the Convention and the law of armed conflict in such situations". However, the question of whether, and to what extent, the ECHR applies in armed conflict is an entirely different issue from that of extra-territorial jurisdiction. It is the question of whether the substance of human rights law is in principle applicable during international armed conflicts or whether it is displaced by international humanitarian law (i.e. the law of armed conflict) as *lex specialis*. This is a much broader issue that is not specific to the ECHR. As further explained below (a), it is now settled as a matter of general international law that both regimes apply in the context of armed conflict, and the ECtHR has shown itself to be capable of careful, context-dependent co-application of IHL alongside the Convention. The only effect of seeking to depart from the ECtHR's approach to extraterritorial jurisdiction in the context of armed conflict (however that might be achieved) would be to deny potential victims the remedies that the ECtHR offers. To do so



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would do nothing to change the legal obligations that apply to the extra-territorial activities of the armed forces in armed conflict.

172. Leaving aside the issue of co-application of IHL with the Convention, we consider that the Consultation says nothing to justify the UK seeking to extricate itself from the Strasbourg Court's approach to extraterritorial jurisdiction. The only other specific criticism mentioned in the Consultation is the assertion that "[i]t is clear from the *travaux préparatoires* to the Convention that the drafters intended the Convention to apply only on States Parties' territories".[21] As set out below (b), a deliberate choice was made to replace the reference to 'territory' with a reference to 'jurisdiction'. In this regard the approach taken by the ECtHR is line with the position at general international law, and more conservative than in some other regional human rights systems.

**a. "The tension between the law of armed conflict and the convention in relation to extraterritorial armed conflict"**

173. The notion that IHL is a regime-wide *lex specialis* has been used by states to avoid oversight and accountability. The myriad examples include the US position on Guantanamo, rendition black sites, Iraq or Afghanistan. They also include Colombia's use of the concept in an effort to avoid accountability before the Inter-American Court of Human Rights. This has been robustly rejected, including by the relevant supervisory courts and bodies, and is a concern of which the public is now well-aware.

174. International authority now overwhelmingly confirms the co-applicability of international human rights law in conflict situations:

- It has been repeatedly affirmed by the International Court of Justice.[22]

[21] Consultation, p.43.
[22] See, for example, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 8 July 1996, ICJ Reports 1996, 226, para. 25; *Legality of the Consequences of the Construction of a Wall*, paras 105-6; *Armed Activities*, para. 216



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- It is also consistently recognised by the United Nations Security Council and General Assembly.[23]

- Similarly, the UN Human Rights Committee in General Comment 31 noted that IHL and international human rights law in armed conflict are "complementary, not mutually exclusive".[24]

- It is further supported by the increasingly consistent view of other international and regional courts, treaty bodies and special procedures[25]

- The proposition enjoys extensive acceptance by states,[26] and is accepted by the ICRC in its analysis of customary international humanitarian law[27]

175. Furthermore, the approach taken by the ECtHR clearly reflects the co-applicability of IHL and international human rights law. It considers the context, and identifies whether there are relevant co-applicable norms to be applied. Where necessary, if norms really do conflict, then greater weight is afforded to those that are more specifically and appropriately directed to the particular context. Even where the Court has not made explicit reference to IHL, it has had close regard to principles of IHL in reaching its conclusions in appropriate cases (those being cases involving armed confrontations of a relatively higher intensity) and has reached conclusions that are plainly compatible with IHL. For example:

- *Ergi v Turkey* and *Özkan v. Turkey*: The ECtHR required "feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view of avoiding and, in any event, minimising the incidental loss of *civilian* life".[28]

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[23] See, for example, SC Resolution 1019 and GA Resolution 50/193 22 December 1995 of 9 November 1995 (Former Yugoslavia); SC Resolution 1653 of 27 January 2006 (Great Lakes); GA Resolution 46/135 of 19 December 1991 (Kuwait under Iraqi occupation)
[24] UNHRC, General Comment 31 (GC31), Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.
[25] See for example IACHR, *Cruz Sanchez v. Peru*, 17 April 2015, IACHR Series C No. 292.
[26] Francoise Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' ICRC Review, vol. 90 no. 871 September 2008, pp.549-50
[27] Jean-Marie Henckaerts & Louise Doswald-Beck, 'Customary International Humanitarian Law', International Committee of the Red Cross (Cambridge University Press 2005).
[28] *Ergi v. Turkey*, Judgment of 28 July 1998, Application No. 23818/94, para. 79; *Ahmet Özkan and others v. Turkey*, Judgment of 6 April 2004, Application No. 21689/93, para. 297.



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- *Isayeva v Russia*: The ECtHR found a violation in light of the failure to assess and prevent "possible harm to civilians who might have been present (…) in the vicinity of what the military could have perceived as legitimate targets". The Court's reference to 'civilians' and 'legitimate targets' is a plain, if not explicit, reference to IHL [29]

176. In *Hassan v. UK*, the ECtHR noted that it "must endeavour to interpret and apply the Convention in a manner consistent with the framework of international law delineated by the International Court of Justice", and it rightly observed that where a state does truly consider that a situation legitimately requires disapplication of the ECHR in favour of IHL, then it can derogate. Nonetheless, the Court explicitly made use of IHL in its determination of the application. Whilst the ECHR itself provides grounds of permissible detention, which do not including security detention, the ECtHR noted the permissible grounds of detention under IHL applicable in international armed conflict (including imperative reasons of security), and found the detention of the deceased to have been lawful on that basis.

177. In our view any 'tension' between the law of armed conflict international human rights law is unavoidable regardless of whether the ECtHR finds the Convention to operate extra-territorially. The Court has proven itself able and willing to seek to resolve such tensions through careful, context-sensitive co-application of IHL and the Convention.

**b. "The issue of extra-territorial jurisdiction"**

178. As to the assertion that the drafters of the Convention intended it to apply only on States Parties' territories, we note that ultimately the drafters deliberately chose the word 'jurisdiction' rather than the narrower 'territory' or 'nationality'.[30] The text prepared by the Committee on Legal and Administrative Questions of the Consultative Assembly of the Council of Europe initially provided, in what became Article 1 of the Convention, that the *"member States shall undertake to ensure to all persons residing within their territories*

[29] *Isayeva v. Russia,* para. 175.
[30] 'Travaux préparatoires' of the European Convention on Human Rights, part III (Strasbourg: Council of Europe 1977), 276.



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*the rights […]"*. However, the reference to "*territories*" was replaced with a reference to *"jurisdiction"*.

179. Furthermore – even if a strictly territorial approach to the obligations of states under human rights law were ever tenable, it is no longer so. Many courts and bodies, including the ICJ, have now found international human rights law applicable extra-territorially (including in conflict situations).[31] The test as set down by the UN Human Rights Committee, in General Comment 31, is whether the person is "*within the power or effective control of that State Party, even if not situated within the territory of the State Party"*. More expansively, the recent General Comment 36 on the right to life includes those whose right to life is "*impacted"* in a "*direct and reasonably foreseeable manner*".[32] The Inter-American system operates an expansive approach, referring to the 'causal effects' of states' conduct.[33] The logic of such an approach was well expressed by the UN Human Rights Committee in *Delia Saldias de López v. Uruguay*:[34]

> *It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.*

180. However, the ECtHR has adopted a very much more cautious approach to states' extra-territorial human rights obligations. The Grand Chamber in *Al-Skeini* summarised the principles applicable to the question of state jurisdiction under article 1, and it began by noting that *"[a] State's jurisdictional competence under article 1 is primarily territorial".*[35] The Court has repeatedly emphasised the exceptional nature of extra-territorial jurisdiction, and it is with reference to the specific facts that the Court carefully

[31] See ICJ, *Legality of the Consequences of the Construction of a Wall* paras. 111, 109.
[32] UNHRC General Comment 36 (2018), para 63
[33] IACtHR 'Environment and Human Rights' Advisory Opinion November 2017 referring to the "authority" or "control" over a person including through cross-border effects, where there is a "causal relationship" between the polluting activities in the state's territory and the cross-border impact on rights.
[34] (1981) ICCPR Comm. No. 52/1979, at §12.3, referring to Art. 2 of the ICCPR. See also *Lilian Celiberti de Casariego v. Uruguay*, ICCPR Comm. No. 56/1979 (1981).
[35] *Al-Skeini v United Kingdom* [GC] (2011) 53 EHRR 18;, at 131, referring to *Soering v United Kingdom* (1989) 11 EHRR 439, § 86; *Banković v Belgium and others* (2007) 44 EHRR SE5, §§ 61 and 67; *Ilascu v Moldova and Russia,* no. 48787/99 (2005) 40 EHRR 46, § 312.



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assesses whether there existed exceptional circumstances justifying a finding by it that the State concerned was exercising jurisdiction extraterritorially.[36]

181. When seen in the context of the approach taken in other jurisdictions, and in general international law, the approach taken by the ECtHR to extraterritorial jurisdiction cannot be accused of over-expansiveness. In our view, attempting to prevent the extra-territorial application of the ECHR would put the UK in breach of international law, which clearly mandates the extra-territorial application of duties under international human rights law, whether they emanate from the ECHR or otherwise.

**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? 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.**

- **Option 1: 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'.**
- **Option 2: 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.**

182. The Consultation identifies two concerns as motivating the suggested reform options. First, that the doctrine of proportionality as presently applied under the Human

[36] See, for example, *Banković and Others*, [GC], no. 52207/99, para. 61; *Al-Skeini and Others*, [GC], no. 55721/07 para. 132; *Hirsi Jamaa and Others* [GC], no. 27765/09, para.172; *Catan and Others v. the Republic of Moldova and Russia* [GC], 43370/04, para. 103.



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Rights Act causes "*considerable uncertainty*". Secondly, that the considered view of the UK's lawmakers on questions of proportionality is being supplanted by the view of the judge or judges deciding a given case. These concerns are of course intertwined insofar as it is suggested that this uncertainty results simply from the prospect of judges disagreeing with a public authority's assessment of proportionality.

183. It is true that the potential for administrative decisions to be challenged as disproportionate to a qualified right creates some uncertainty for decision-makers. They cannot be sure that a judge will disagree with their own assessment. And the question of proportionality will in most cases be complex and multi-factorial.[37] But the problem, insofar as there is one, should not be overstated. Where a decision-maker has considered the question of proportionality sensitively and in appropriate detail, judges will pay heed to this.[38]

184. Nor, on the same issue of uncertainty in the law, is the characterisation of judicial disagreement about the scope of proportionality review at paragraph 288 of the Consultation paper accurate. The statement from Laws LJ in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] Q.B. 728 (at paras 81-87) that the intensity of review must depend on the nature of the issue at stake and the comparative expertise of the court and the relevant decision-maker is uncontroversial, being well-established both in domestic and European jurisprudence.[39] Far from causing damaging uncertainty, this approach is necessary to enable the judiciary to afford appropriate deference to administrative decision-makers, and to remain within their proper constitutional bounds in areas of contested policy.[40] It ought not aggravate the government's concerns but assuage them.

[37] See *AA (Nigeria) v SSHD* [2020] EWCA Civ 1296; [2020] 4 W.L.R. 145 at para 9, in the context of challenges to deportation.
[38] See e.g. *R (Lord Carlile of Berriew QC)* [2014] UKSC 60; [2015] A.C. 945 at paras 31-34, per Lord Sumption.
[39] For the former, see e.g. *R (Animal Defenders International)* [2008] UKHL 15; [2008[ 1 A.C. 1312 at paras 31-37; *SRM Global Master Fund LP* [2009] EWCA Civ 788 at para 75; Lord Sumption in *R (Lord Carlile of Berriew QC)* [2014] UKSC 60; [2015] A.C. 945. For the latter, see recently *MA v Denmark* (App. No. 6697/18, 9 July 2021) at paras 140-163 on the varying width of the 'margin of discretion' afforded to states under the Convention.
[40] Indeed the consensus is now that even traditional common law *Wednesbury* review varies in intensity depending on the subject matter of the decision challenged: see recently *Taj* [2021] EWCA Civ 19; [2021] 1 W.L.R. 1850 at paras 82-83.



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185. Given these considerations, we welcome that the reform proposals under this question focus narrowly on the relevance of the view of Parliament, expressed in legislation, rather than suggesting any broader form.

186. This is reinforced by our disagreement with the government's second concern, namely that under the guise of proportionality the courts are habitually straying into areas of social policy into which they ought not go. We note that the IHRAR reached the opposite conclusion, stating at paragraph 47 of Chapter 3 that "*the great majority of judicial decisions suggest that no, or at least no significant 'shift in judicial attitude' is required*" and that "*[j]udicial restraint is strongly entrenched in judicial decision-making*." At paragraph 53 of Chapter 3 the IHRAR Panel expressed its conclusion that:

> *"...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."*

187. Our experience is that this is correct. The consistent emphasis in domestic authorities is of the need for caution and restraint.[41] In this respect, the domestic courts are aligned with the European Court, which has similarly stressed the need for respect for the conclusions of national authorities, in particular where these are well-reasoned and have democratic legitimacy.[42]

188. As noted, the terms of the proposed reform options indicate that the government's chief concern is that the judiciary is paying insufficient respect to Parliament's intentions. The rhetoric of the judiciary has been highly deferential to Parliament in this respect.[43] The cases cited by the Consultation paper in support of the need for reform do not demonstrate that this rhetoric is not borne out in practice. In *Ziegler* [2021] UKSC 23;

[41] See recently *R (Elan-Cane)* [2021] UKSC 56; [2022] 2 W.L.R.133 and *R (SC and others)* [2021] UKSC 26; [2022] A.C. 223.
[42] *Animal Defenders v United Kingdom* (2013) 57 EHRR 21.
[43] See e.g. *NA (Pakistan) v SSHD* [2016] EWCA Civ 662; [2017] 1 W.L.R. 207 at para 38 and para 22 noting that "*Both the courts and the tribunals are obliged to respect the high level of importance which the legislature attaches to the deportation of foreign criminals.*"



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[2021] 3 W.L.R. 179,[44] for example, the Supreme Court was required to interpret the phrase "*lawful excuse*" in s. 137 of the Highways Act 1980. Parliament having used a broad and open-ended phrase, it was necessarily for the courts to work out the limits of that phrase. The case does not show judicial overreach but the judiciary doing the task given to them by Parliament. If Parliament disagrees with the Court's conclusion and wishes to legislate in greater detail in this area, it is free to do so.

189. To take another example, *Daly* [2016] UKSC 58; [2016] 1 W.L.R. 4550 did not, as the Consultation paper suggests,[45] involve the Court "*rul[ing] against the [housing benefit cap] legislation enacted by Parliament*", but against the application of secondary regulations made under that Act in a limited class of cases. That Parliament by legislation empowers or requires a government minister to pass regulations addressing a particular issue does not mean that Parliament has impliedly approved whatever answer that minister then produces, in particular given that Parliament has also expressed its wish that secondary legislation be controlled by norms of human rights and equalities law.[46] Similarly, *Quila* [2011] UKSC 45; [2012] 1 A,C, 621,[47] involved a challenge to the Immigration Rules, which are not expressly approved by Parliament.

190. In our view there is therefore a mismatch between the terms of the proposed reform options, which focus, perhaps unnecessarily but not harmfully, on respect for the intentions of Parliament, and the rhetoric and evidence employed in support of reform, which suggest that the government's real concern is that the judiciary go too far in interfering with <u>its</u>, rather than Parliament's, views and decisions. We would disagree with any reforms intended to insulate the government from review in this way, and welcome that the CP's proposed reforms do not go so far as its rhetoric might have taken it.

191. As to the proposed reform options, our principal comment is that both are unnecessary, the judiciary already showing great respect to the intentions of Parliament. More than this, we are concerned that the exact ramifications of each suggested clause is

[44] Cited at [135] as "*highlight*[ing] *the problems that the Human Rights Act creates when assessing proportionality in relation to the Convention rights*" and "*enabl*[ing] *a group of protesters to disrupt the rights and freedoms of the majority*".
[45] At para. 157.
[46] Through the Human Rights Act and the Equality Act, respectively.
[47] To which the Consultation paper refers at [286].



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not yet clear. The CP does not explain what is the intended difference in practice between a court giving great weight to Parliament's view of what is necessary in a democratic society and a court giving great weight to Parliament having acted in the public interest in passing legislation. The former is plainly broader than the latter, encompassing the entire proportionality test rather than only the public interest component. To that extent we would prefer option 2; that Parliament's view of public interest is expressed through legislation and must be weighty is uncontroversial, and courts are capable of assessing where Parliament should be taken to have commented on proportionality more broadly, rather than only the public interest side of the balance.

192. It is also not clear what is meant in paragraph 1(b) of both clauses by "*a decision of a public authority made in accordance with a provision of legislation*" (emphasis added). If read broadly, this would seem to act as a broad shield against review of decisions made under powers granted by legislation as defined by paragraph 3 of both options. That Parliament establishes a broad power or obligation does not mean it has considered the issue of proportionality in relation to every possible exercise of that power. To the extent that the proposed clauses would require the courts to pretend the reverse, we would oppose both. At present, due to the vagueness of each clause, it is difficult to foresee exactly their intended effect. Clarification would be welcome.

193. If reform is nonetheless thought necessary, we would recommend that option 1 be pursued over option 2. Option 1 is clearer and more tightly focussed, referring to "*legislation enacted by Parliament*" and the concept of proportionality in general, rather than the more nebulous "*expressed view of Parliament*".



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**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.**

- **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;**

- **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; and/or**

- **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.**

194. We understand that two concerns motivate the reforms canvassed under question 24. First, and principally, that too many foreign criminals are able to resist deportation by relying on their human rights, in particular Article 8 ECHR, with consequences for public safety. Examples of appeals the government considers should not have succeeded are given at pages 37-38 of the Consultation. Secondly, that the scope of Article 8 ECHR "*has created uncertainty in the scope for deporting foreign national offenders*", both for the government and for the judges tasked with deciding human rights appeals in deportation cases.

195. We have considerable sympathy for the second of these concerns. The volume of litigation that has been necessary to clarify the meaning of the Immigration Act 2014 as regards deportation appeals speaks to the opacity of the Act's attempt to bring order to this area.[48] The courts, however, have dealt admirably with semantic confusion caused by

[48] See Lord Carnwath in *KO (Nigeria) v SSHD* [2018] UKSC 53; [2018] 1 W.L.R. 5273, lamenting at para 14 that "[i]*t is profoundly unsatisfactory that a set of provisions which was intended to provide clear guidelines to limit the scope for*



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the Act's drafting.[49] The Consultation does not express any concern about these decisions. To a significant extent, what uncertainty remains is both unavoidable and an intended feature of the 2014 Act. The 2014 Act structures consideration of proportionality by setting thresholds such as 'undue harshness' and 'very compelling circumstances'. These give a qualitative sense of the hurdle appellants must overcome, which the courts have repeatedly and consistently emphasised is difficult to meet.[50] But the application of these thresholds is necessarily a holistic exercise requiring the application of a broad, evaluative judgment.[51] This exercise of judgment is today structured so far as possible by the direction given by the 2014 Act, and by the now-common use of a 'balance sheet' approach whereby the first-instance judge sets out and weights all factors relevant to their decision.[52] As the Court of Appeal has noted, "*[d]ecisions in this area will involve an examination of the many circumstances making up private or family life, which are infinitely variable, and will require a close focus on the particular individual private and family lives in question, judged cumulatively on their own terms*".[53] There is a level of complexity inherent to such decision-making. It is unclear that additional, more detailed guidance would assist decision-makers and judges rather than simply distract from the relatively straightforward thresholds already contained in the 2014 Act.[54]

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*judicial evaluation should have led to such disagreement among some of the most experienced Upper Tribunal and Court of Appeal judges.*"

[49] See e.g. *NA (Pakistan) v SSHD* [2016] EWCA Civ 662; [2017] 1 W.L.R 207 concerning an "*obvious drafting error*" in relation to section 117C(3) and (6) of the Nationality, Immigration and Asylum Act 2002 as introduced by section 19 of the 2014 Act; *Akinyemi v SSHD* [2017] EWCA Civ 236; [2017] 1 W.L.R. 3118; on the meaning of "*very compelling circumstances*" in section 117C(6); *SC (Jamaica) v SSHD* [2017] EWCA Civ 2112; [2017] 1 W.L.R. 4004 on the meaning of "*most of C's life*" in section 117C(4)(a); and *KO (Nigeria) v SSHD* [2018] UKSC 53; [2018] 1 W.LR. 5273 and *HA (Iraq) v SSHD* [2020] EWCA Civ 1176; [2021] 1 W.L.R. 1327 on the meaning of "*unduly harsh*" in section 117C(5).

[50] E.g. *KO (Nigeria) v SSHD* [2018] UKSC 53; [2018] 1 W.LR. 5273 at para 43; *R (Byndloss) v SSHD* [2017] UKSC 42; [2017] 1 W.L.R. at para 55; *Danso v SSHD* [2015] EWCA Civ 596 at para 20 recognising the reasons, including public safety, why the government considers the deportation of foreign criminals to be in the public interest; *Starkey v SSHD* [2021] EWCA Civ 421; [2021] Imm A.R. 1106 at para 93 on the "*very demanding*" test in section 117C(6); and indeed the two Upper Tribunal decisions cited in the CP at page 38.

[51] *Kamara v SSHD* [2016] EWCA Civ 813; [2016] 4 W.L.R. 152 on the idea of "*integration*" employed in section 117C(4); *AA (Nigeria) v SSHD* [2020] EWCA Civ 1296; [2020] 4 W.L.R. 145 at para 38 on the test of undue harshness in section 117C(5), which requires "*fact sensitive decisions*" reached through an "*evaluative exercise*"; *KM v SSHD* [2021] EWCA Civ 693; [2021] EWCA Civ 693 at para 83 contrasting the relatively simpler "*threshold questions*" under section 117C(4) with the more evaluative enquiry under section 117C(6), reflecting "*that Parliament wanted to avoid a hard-edged questions in relation to this potentially more complex category*".

[52] On the latter, see *Hesham Ali v SSHD* [2016] UKSC 60; [2016] 1 W.L.R. 4799 at paras 83-84, and more recently *AA v SSHD* [2019] EWCA Civ 417; [2019] Imm A.R. 759 and *Starkey v SSHD* [2021] EWCA Civ 421 [2021]; [2021] Imm A.R. at para 93.

[53] *AA (Nigeria) v SSHD* [2020] EWCA Civ 1296; [2020] 4 W.L.R. 145 at para 9.

[54] *AA (Nigeria) v SSHD* [2020] EWCA Civ 1296; [2020] 4 W.L.R. 145 at para 42 describes the '*unduly harsh'* threshold, at least following its clarification in *KO (Nigeria) v SSHD* [2018] UKSC 53; [2018] 1 W.LR. 5273 and *HA (Iraq) v SSHD*



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196. Whilst alive to the government's concern that the law should be clear, we are therefore not persuaded, in particular in the absence of any indicative draft text, that introduction of a new legislative scheme will produce this clarity. It may be beneficial for the sections introduced by section 19 of the 2014 Act to be amended to rectify the semantic confusions which have lead to the decisions cited above. But this should be done carefully to reflect those decisions and avoid inadvertently introducing further confusion.

197. We are less persuaded by the Consultation's first and principal concern, namely that under the current law too many deportations are frustrated by human rights appeals, and that this represents by the judiciary a concurrent overindulgence of appellants' interests and a lack of respect for the weighty public interest in the deportation of foreign criminals. First, were they not already aware, the judiciary were reminded forcefully of the public interest in deportations by section 117C(1) and (2) of the Nationality, Immigration and Asylum Act 2002, inserted by section 19 of the 2014 Act. Notwithstanding the view expressed in the Consultation that the 2014 Act has not had its intended effect, the judiciary have been keen to emphasise repeatedly the significance of this public interest.[55] If the government's view is that this judicial rhetoric is not matched by the reality of decision-making, we cannot agree. Neither of the two examples given at page 38 of the Consultation support this contention.[56] Both decisions are tightly reasoned, recognising the seriousness of the offending involved and setting out exactly why deportation is nonetheless disproportionate.[57] Unhelpfully, the Consultation does not explain why it considers these examples were wrongly decided.

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[2020] EWCA Civ 1176; [2021] 1 W.L.R. 1327 as "*a single and straightforward statutory test*"; the Court of Appeal in *HA (Iraq)* suggested at para 53 and para 57 that further exposition of the '*unduly threshold'* would be unhelpful, albeit in the context of judicial, rather than statutory, exposition;

[55] E.g. *NA (Pakistan) v SSHD* [2016] EWCA Civ 662; [2017] 1 W.L.R 207 at para 38 and at para 22 noting that "*Both the courts and the tribunals are obliged to respect the high level of importance which the legislature attaches to the deportation of foreign criminals.*"

[56] We cannot comment on the third example, at page 37, of *Case X*, due to the omission of its specific details.

[57] In *AD (Turkey)* Appeal number: HU/01512/2019, https://tribunalsdecisions.service.gov.uk/utiac/hu-01512-2019, AD had been married and lived in the UK for over thirty years, had no ties to Turkey, and posed a low risk of reoffending. The Judge was clear that the case was "*rare and exceptional*". In *OO (Nigeria)* Appeal number: HU/16908/2018, https://tribunalsdecisions.service.gov.uk/utiac/hu-16908-2018, OO had been born in the UK and had not visited Nigeria since the age of nine.



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198. Second, the interests protected by Article 8 are not minor concerns that may be lightly overlooked. Article 8 embraces individuals' "*physical and psychological integrity*" and "*physical and social identity*".[58] While these interests are broad, at the sharp end a person's basic autonomy and identity may be at stake. The longer the sentence imposed on an individual, the more unlikely it is that these interests, despite their basic importance, will outweigh the public interest in deportation. But it is right that they should at least be considered in all cases, given the consequences of their interference in exceptional cases. The judiciary have shown themselves capable of making these assessments with due respect to Parliament's view of the public interest. Where the interests of children are involved the need for caution is stronger still; a child cannot be held accountable, and should not where avoidable suffer for, their parent's failures.[59]

199. We would therefore oppose, as suggested by option 1, any move to prevent individuals from relying on certain rights to resist deportation on the basis of any hard sentence threshold. Successful resistance of deportation in the cases envisaged is already rare. '*Very compelling circumstances'* are required whenever the sentence imposed was of four years are more,[60] and this test becomes more demanding the more this threshold of four years is exceeded.[61] The Consultation does not present any evidence that the judiciary have been unable to give appropriate weight to the public interest in these cases.

200. Finally, as to option 3, our view is that the judiciary in the Immigration Tribunal are better placed than Home Office decision-makers to finally judge the proportionality of deportation decisions. Home Office decision-makers have the benefit of nearness to the Secretary of State, and hence to the government's concern for public security. But they are nonetheless civil servants, not politicians, and have themselves no greater democratic legitimacy than judges. The judiciary, as noted, and contrary to the position adopted by

[58] *Pretty v United Kingdom* (2002) 35 EHRR 1 at para 61; see also the summary of previous authorities in *van Kück v Germany* (2003) 37 EHRR 973; and the protection of "*moral integrity*" in *Bensaid v United Kingdom* (2001) 33 EHRR 205 at para 47. The significance of family life is recognised in every major human rights treaty: see the Universal Declaration of Human Rights at articles 12 and 16, the International Covenant of Civil and Political Rights article 23, and the International Covenant on Economic, Social and Cultural Rights, which states at article 10(1) that "[t]*he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society*".

[59] As recognised by Lord Hodge *Zoumbas v SSHD* [2013] UKSC 74; [2013] 1 W.L.R. 3690 at para 10. Recognition of the importance of children's interests is international, see article 3 of the UN Convention on the Rights of the Child.

[60] Nationality, Immigration and Asylum Act 2002 (the 2002 Act), section 117C(6).

[61] In line with section 117C(2) of the 2002 Act.



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the Consultation, have proved themselves aware and respectful of the government's concern to realise the public interest in deportations of foreign criminals. So long as this interest is given due weight, which effect is achieved by the Immigration Act 2014, the remainder of the proportionality assessment is better conducted with the political independence and impartiality brought by the judiciary. Our experience is that Home Office decision-makers too easily overlook the significant consequences of deportation on those involved, both the recipients of deportation orders and their family members. The present arrangement of our law on deportation has met with the approval of the European Court of Human Rights.[62] We would be concerned that the third reform option would lead to systematic under-protection of rights, resulting ultimately in an adverse judgment from the European Court and, in the meantime, unjustified interferences with individuals' rights. We would therefore oppose this reform.

**Illegal and irregular migration**

**Question 25: While 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?**

201. The premise of the question is, with respect, misconceived. One major driver of the volume of irregular migration to the UK is that, for the vast majority of refugees and others in need of international protection, there are currently no safe and legal routes to reach the UK in order to claim asylum. Visa requirements and carrier sanctions preclude people coming to the UK for the purpose of making an asylum claim. Most people who are genuine refugees, fleeing persecution, have no option but to either migrate through irregular means, or to obtain visas under false pretences. The system allows them no other options, something which is recognised by Article 31 of the Refugee Convention which places limits on states' entitlement to penalise refugees for unlawful entry and presence.

[62] In *Unuane v United Kingdom* [2021] Imm AR 534 at paras 81-83.



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202. In this regard, the way to tackle the "*challenges posed by illegal and irregular migration"* is to provide safe and legal routes for those in need of international protection to come to the UK directly from their home countries and/or third countries. Such routes should not be limited in terms of numbers and should have widely drawn eligibility criteria. This would not require any amendments to the HRA. Providing safe, legal and easily accessible routes to the UK would eliminate dangerous Channel crossings and would put many human traffickers and smugglers out of business.

203. The Government often argues that people who travel irregularly to the UK via Europe have no need to do so because they should have claimed asylum in a "safe" European country *en route*. However, this ignores the fact that some supposedly "safe" European countries do not consistently protect the rights and dignity of asylum-seekers. For example, in *Ibrahimi v Secretary of State for the Home Department* [2016] EWHC 2049 (Admin) Green J, after a comprehensive review of the evidence, concluded that if the claimants were removed to Hungary, they would be at risk of chain refoulement to their countries of origin. Similarly, in *R (SM & Others) v Secretary of State for the Home Department (Dublin Regulation – Italy)* [2018] UKUT 429 (IAC) a Presidential Panel of the Upper Tribunal concluded that certain asylum-seekers who are *"particularly vulnerable"* may be at risk of treatment in Italy that would breach their rights under Article 3 of the Convention. Had remedies under the HRA not been available in these cases, the result would have been the enforced return of asylum-seekers to countries where their fundamental rights would have been breached.

204. To curtail the right of asylum-seekers to rely upon the HRA to challenge their removal would have catastrophic consequences. First, it would bring the UK out of line with its obligations under Articles 3 and 8 read with Article 13 of the Convention, by failing to provide an effective remedy to those who claim to be at risk of breaches of their Convention rights in the event of expulsion (see *Muminov v Russia* (2011) 52 EHRR 23 and *Al-Nashif v Bulgaria* (2003) 36 EHRR 37 among other authorities). It is likely that this would lead to repeated findings against the UK by the Strasbourg Court. Second, it would create an increased risk of breaches of Article 33(1) of the Convention on the Status of Refugees, which prohibits the refoulement of refugees to countries where their life or freedom are threatened. Third, and most importantly, it would represent a deliberate



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choice to countenance the forcible return of human beings to countries where they will be subjected to serious ill-treatment. This would be a breach not only of the UK's international obligations but of basic standards of human decency.

205. As regards the alleged "challenge" posed by people who overstay their grants of leave to enter or remain, the principal driver of this phenomenon is that the UK simply provides too few, and too restrictive, routes for people to migrate to the UK lawfully, and for people already here to regularise their status. In particular, the restrictive family migration provisions of the Immigration Rules keep many people apart from their loved ones, and give them little choice in reality but to break the law. Similarly, the arbitrary and restrictive Points Based System reflects neither the needs of the British economy nor the aspirations of hardworking migrants, and leads to many people becoming overstayers due to simple administrative errors or the revocation of sponsors' licences. The UK should address this challenge not by amending the Human Rights Act, but by liberalising the Immigration Rules.

**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?**

206. This proposal is incoherent in that there is no evidence base upon which these proposals are made. It is unclear what mischief if any it is aimed at. A large number of compensation claims for compensatory damages are made under domestic law, for example as a result of unlawful detention and false imprisonment or personal injury



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arising out of negligence which provides for compensation out of either intentional or negligent wrongs. These heads of damages would be untouched by the Bill of Rights.

207. It would seem this proposal is aimed at situations where there has been a breach of statutory duty by the public body and the only remedies available to the person are to bring a claim for a breach of a human right, for example Article 2, 3, 8 or Article 5. Most compensatory damages claims for unlawful detention and false imprisonment under Article 5 would be dealt with via common law remedies and damages.

208. Damages are dealt with under section 8 of the Human Rights Act 1998 which deals with remedies. Under section 8(1) the court "*may grant such relief or remedy or make such order within its powers as it considers just and appropriate.*" Section 8(3) provides:

> *"No award of damages is to be made unless, taking account of all the circumstances of the case, including-*
> *(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and*
> *(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.*
> *(4) In determining-*
> *(a) Whether to award damages, or*
> *(b) The amount of an award,*
> *The court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."*

209. What are the principles under which the European Court of Human Rights decides whether it is necessary to afford just satisfaction under Article 41? In its report on "Damages under the Human Rights Act 1998",[63] the Law Commission emphasises the breadth of discretion under Article 41 and says at para 4.43:

[63] Law Commission, 'Damages under the Human Rights Act 1998', October 2000, available at: https://www.scotlawcom.gov.uk/files/3012/7989/6877/rep180.pdf



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*"In practice, the discretion given to the domestic courts under the [Human Rights Act] appears to be no less broad than that of the Strasbourg Court under Article 41."*

210. Para 4.44 says:

*"We have seen that the Strasbourg Court, in deciding whether just satisfaction requires an award of damages, takes into account a wide range of matters which are not referred to in section 8 of the [Human Rights Act]. Thus it may refuse damages altogether, or grant them on a more or less generous basis. Such cases are never expressly identified by the Court as departures from the principle of restitutio in integrum; usually the reasons are simply not articulated. In Part III we attempted to identify the factors which the case-law suggests are taken into account by the Strasbourg court when it assesses damages:*
*(1) A finding of a violation may constitute just satisfaction.*
*(2) The degree of loss suffered must be sufficient to justify an award of damages.*
*(3) The seriousness of the violation will be taken into account.*
*(4) The conduct of the respondent will be taken into account. This may include both the conduct giving rise to the application, and a record of previous violations by the State.*
*(5) The conduct of the applicant will be taken into account."*

211. The guiding principle is restitutio in integrum, a principle which is, for obvious reasons, much easier to apply where there has been pecuniary rather than non-pecuniary loss.

212. The Law Commission's report refers to a paper by Lord Woolf, "The Human Rights Act and Remedies", in which he suggested eight possible principles which might be applied when considering an award of damages under section 8. Those principles included:

*"(2) The court should not award exemplary or aggravated damages…*
*(4) The quantum of the award should be 'moderate', and 'normally on the low side by comparison to tortious awards.'"*



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213. When considering pecuniary loss, the Commission observes at para 4.61:

> *"Lord Woolf's suggestion that awards should be 'on the low [side] in comparison to tortious claims' would seem to require a departure from the principle of restitutio in integrum applied by the Strasbourg Court. As we have noted, like awards in tort, Strasbourg awards are designed to reflect the full amount of the loss."*

214. Having noted in para 4.63:

> *"... that the Strasbourg Court's awards for non-pecuniary losses cover a wide range of intangible injuries. The categories of loss which have been compensated under this heading include pain, suffering and psychological harm, distress, frustration, inconvenience, humiliation and anxiety."*

215. The Commission say this at paras 4.66 to 4.68:

> "*4.66 It may be reasonable to expect awards for non-pecuniary loss under the [Human Rights Act] to be kept to 'moderate' levels, to use Lord Woolf's term. This proposal is consistent with the general experience that the Strasbourg Court 'has not proved unduly generous' in awarding compensation. In Heil v Rankin, the Court drew attention to the observations of the Canadian Supreme Court in relation to the assessment of non-pecuniary loss:*
> *This is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims...*
>
> *4.67 This caution was echoed by the Court of Appeal:*
> *The compensation must remain fair, reasonable and just. Fair compensation for the injured person. The level must also not result in*



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*injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable.*
*Thus:*
*Awards must be proportionate and take into account the consequences of increases in the awards of damages on defendants as a group and society as a whole.*
*This required the court to have regard to factors such as the fact that our decision will have a significant effect on the public at large, both in the form of higher insurance premiums and as a result of less resources being available for the NHS.*

*4.68 Similar considerations will apply under [the Human Rights Act]. However, in this context, as in that of pecuniary loss, it is hard to see why awards under [the Human Rights Act] should be 'on the low side by comparison with tortious awards.' In those cases where there is a close common law analogy, for example wrongful detention, the tariffs established in cases such as Thompson v The Commission of Police and Metropolis, would appear equally applicable, subject of course to account being taken of the facts of particular cases. But there is no reason to think that the courts will find any difficulty in developing appropriate tariffs for standard types of case."*

216. While awards by the European Court of Human Rights have been "moderate" and certainly not "unduly generous" it is difficult to see why damages under section 8 should be "on the low side" by comparison with tortious awards. Equally, it is difficult to see why they should be high by comparison with tortious awards.

217. The present arrangements under s. 8 HRA seek to hold a balance after all between the rights of the individual and the rights of society as a whole.

218. Given what is said at paragraph 4.44, and 4.66. – 4.48 of the above Law Commission Report of 2000 on the scope of Article 41, any concerns identified are addressed in the Strasbourg Jurisprudence on this as clarified by the Law Commission.



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219. It is submitted there is no evidential or legal basis to change s. 8 HRA. There is no evidence or reasons presented that judges, courts or settlements of damages in pure breach of Human Rights in domestic cases under the HRA are inconsistent with the principles applied by the Strasbourg courts. The Government proposals fail to take this into account.



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**Theme 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.**

220. Option 1 is unnecessary. It is already possible under existing law to decline to award damages under the HRA, or to reduce an award of damages, on the ground that the loss suffered was due in part to the fault of the victim. For example, in *McCann v United Kingdom* (1996) 21 EHRR 97, at para 219, the Strasbourg Court declined to award damages where the deceased terror suspects had been in the process of attempting to plant a bomb in Gibraltar.

221. There are some parallels between this and the common law principle *ex turpi causa non oritur actio*. Although the Court of Appeal in *Al Hassan-Daniel v HMRC* [2010] EWCA Civ 1443 [2011] QB 866 held that the *ex turpi causa* defence did not operate to bar a claim under the HRA, it acknowledged at para 11 that the criminality of a victim could enter at the point of gauging just satisfaction.

222. We would oppose any attempt to codify this principle, by way of enacting a list of "responsibilities" which courts are to take into account in deciding whether to make an award of damages under the HRA. To do so would risk bringing the domestic approach to remedies under the HRA out of line with the Strasbourg approach. The current system offers sufficient flexibility to take account of the claimant's conduct in an appropriate case.



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223. We consider that Option 2 would be wrong in principle, and inconsistent with fundamental principles of English law that pre-date the HRA. In English law, damages in tort do not, as a rule, fall to be reduced or eliminated on the ground of the claimant's actual or perceived moral character. For example, a convicted prisoner retains all civil rights which are not taken away expressly or by necessary implication (*Raymond v Honey* [1983] 1 AC 1) and may sue for damages, for example, if assaulted or negligently cared for in prison (*R v Deputy Governor of Parkhurst Prison ex parte Hague* [1992] 1 AC 58).

224. This principle is, therefore, not a recent innovation, nor is it attributable to Strasbourg. It reflects the constitutional role of the English courts as jealous guardians of liberty. As Baroness Hale said at para 61 of *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23; [2011] 1 WLR 1299, a case brought principally under the tort of false imprisonment at common law:

> *"Mr Shepherd Kambadzi may not be a very nice person. He is certainly not a very good person. He has overstayed his welcome in this country for many years. He has abused our hospitality by committing assaults and sexual assault. It is not surprising that the Home Secretary wishes to deport him. But in R (Roberts) v Parole Board [2005] 2 AC 738 , para 84 Lord Steyn quoted the well-known remark of Justice Frankfurter in United States v Rabinowitz (1950) 339 US 56 , 69 that 'It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people'. Lord Steyn continued: 'Even the most wicked of men are entitled to justice at the hands of the state'. And I doubt whether Mr Kambadzi is the most wicked of men."*

225. The case of *R (Downing) v Parole Board* [2008] EWHC 3198 (Admin); [2009] Prison L.R. 327, relied on in the CP is arguably outdated. The leading case on HRA damages awards to convicted prisoners is the House of Lords decision in *R (Sturnham) v Parole Board* [2013] UKSC 47; [2013] 2 AC 254, which does not suggest that the seriousness of the offence committed by the prisoner is a relevant factor in deciding whether to make an award. In any case, *Downing* never reflected a unanimous view at High Court level: even before *Sturnham,* other High Court judges expressly held the



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seriousness of the offence to be irrelevant (*R (Guntrip) v Secretary of State for Justice* [2010] EWHC 3188 (Admin) at para 35; *R (Degainis) v Secretary of State for Justice* [2010] EWHC 137 (Admin); [2010] A.C. 46 at paras 19-20).

226. While there is subsequent case law at High Court level suggesting that a claimant's past criminality could be relevant (*R (MG) v Secretary of State for the Home Department* [2015] EWHC 3470 (Admin); [2016] A.C.D. 26), it is submitted that such an approach is wrong in principle and ought not to be followed. As the learned editors of *McGregor on Damages* (21st edition) state at 50-111:

> *"…there are very strong reasons of principle for rejecting this factor, principally the fundamental principle of equality before the law. This is brought squarely into focus by cases where the judgment reads as a judgement on the claimant's worthiness as a person. This cannot be right."*

227. They go on to note:

> *"…while [McCann] has been relied on to justify taking into account the moral worthiness of a claimant, it can be explained on the alternative ground that damages were denied as the loss suffered was due to the fault of the claimants, suggesting a principle more akin to contributory fault or causation."*

228. In our view, therefore, Option 1 serves no purpose, as the extent of the claimant's own fault for the damage suffered is already a relevant factor under the existing law. Option 2 would be inconsistent with fundamental principles of English law that pre-date the HRA, and would therefore be wrong in principle.



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**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.**

229. We appreciate the government's concern to ensure Parliament is involved in the response to UK-adverse Strasbourg judgments. Where litigation has involved contested social instance, such as the question of prisoners' voting rights, it is right that the UK's response to and engagement with Strasbourg should extend beyond government ministers to elected representatives more generally. And where litigation has resulted from government failures, it is important that these, and the reasons for them, are drawn to Parliament's attention.

230. For this reason we take no issue with the proposal to formalise a power for ministers to schedule Parliamentary debates where necessary in response to UK-adverse Strasbourg judgments.

231. We do, however, have concerns about the proposal to oblige ministers to lay all UK-adverse Strasbourg judgments before Parliament. This is for three reasons. First, not every UK-adverse Strasbourg judgment calls for Parliamentary consideration. Many judgments involve fact-dependent applications of well-established principles, not giving rise to any new issue needing Parliament's comment.[64] Others require UK government action, for instance in the field of international relations, in circumstances where it is not clear what Parliament could meaningfully contribute.[65] Such judgments might nonetheless raise

[64] For instance, *Saadi v the UK* (App. No. 13229/03, 29 January 2008), which found that 7-day detention of asylum seekers at the outset of their claim did not breach Article 5 ECHR, but that there had been a breach of Article 5(2) owing to the failure to explain to detainees the reason for their detention. Also *Othman (Abu Qatada) v the UK* (App. No. 8139/09, 17 January 2012), where Strasbourg and the domestic courts were largely *ad idem* on the relevant principles, which had been established in detail in earlier cases, and Strasbourg's decision turned on a factual disagreement as to the risk of evidence obtained by torture being used in the applicant's trial in the country of return.

[65] Following *Soering v the UK* [1989] 11 EHRR 439, the UK government was able to proceed with deportation after successfully obtaining assurances from the US that the death penalty would not be imposed; similarly *Othman (Abu Qatada v the UK)* [2009] ECHR 855 (26 May 2009), where AQ was eventually deported following ratification of a UK-Jordan treaty guaranteeing that evidence obtained by torture would not be employed in proceedings against AQ; also *Al-Saadoon and Mufdhi v UK* [2010] ECHR 279 (02 March 2010) where the UK was required to take all possible diplomatic steps to ensure that Iraq would not impose the death penalty on the applicants. On a distinct but related note, see *Hode and Abdi v the UK* [2013] Imm AR 28, where the impugned passages of the Immigration Rules had in any event been changed by the time of the ECtHR's judgment, meaning the practical ramification of the judgment largely concerned compensation for the applicants.



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issues of principle that it may be appropriate or desirable for Parliament to consider; but the same is true of many judgments which ultimately decide in favour of the UK, or which do not involve the UK at all, as discussed below. It is therefore questionable what benefit is produced by laying every UK-adverse Strasbourg judgment before Parliament.

232. Second, there is a risk that the proposal will in practice exaggerate the extent of conflict between Strasbourg and UK authorities, by drawing attention only to those instances where the two have disagreed. UK-adverse Strasbourg judgments are not common. While of course such judgments are more practically pressing than decisions approving of, or declining to rule against, UK actions,[66] in that in most cases a UK-adverse judgment will require immediate consideration of the appropriate practical response, it would be counterproductive for the constructive dialogue between Strasbourg and UK institutions for Parliament to be confronted with every UK-adverse judgment to the exclusion of others.

233. Third, domestic human rights decisions, Strasbourg judgments deciding against countries other than the UK, and even Strasbourg judgments ruling in favour of the UK will in some circumstances call for the attention of Parliament just as much as UK-adverse Strasbourg judgments. Strasbourg judgments involving countries other than the UK may have implications for UK practice.[67] A judgment ruling in favour of the UK may do so for factual reasons while making clearer that on different facts, which may well be found in other cases not yet brought, there would be a breach of ECHR rights, so requiring consideration of response and reform in a way similar to a judgment deciding against the UK.[68]

234. It is therefore not clear why UK-adverse Strasbourg judgments should uniquely call for mandatory Parliamentary attention in all cases.

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[66] For a recent example, see *Unuane v the UK* [2021] Imm AR 534, holding that the UK deportation regime is compatible with ECHR obligations. There are numerous examples of Strasbourg judgments friendly to the UK authorities, see for instance *Ndidi v the UK* [2017] ECHR 781 (14 September 2017) where the Court declined to substitute its own assessment of proportionality for that undertaken by the domestic courts.

[67] E.g. *Veermae v Finland* (38704/03, 15 March 2005) where the Court described the correct approach to repatriation where this would effect the sentence served by the repatriated person, on which the Secretary of State for Justice continues to rely when deciding whether to order repatriation.

[68] E.g. *Ahmad and others v the UK* (2013) 56 EHRR 1. Challenges to extradition were unsuccessful on their facts but the Court nonetheless restated principles relevant to extradition generally.



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235. Thus, while we agree with the government's concern to bolster Parliamentary engagement with our ECHR obligations, we are not persuaded that an obligation that all UK-adverse Strasbourg judgments be laid before Parliament is the best way to achieve this. It would be more effective and suitable for the relevant committees[69] and government ministries to keep abreast of and engage with developments in domestic and European jurisprudence, including UK-adverse Strasbourg judgments, with these developments and judgments being drawn to Parliament's attention more broadly as and when appropriate.

236. Our view is therefore that a discretionary power to lay UK-adverse Strasbourg judgments before Parliament adequately meets the government's concern to ensure that Parliament is more involved in our response to such judgments.

237. Lastly, we do not consider that paragraph one of the draft clause would be a necessary or helpful addition. It is uncontroversial that Strasbourg decisions are not part of domestic law and do not affect the sovereignty of Parliament. The clause thus amounts either to an otiose statement of a point well-established and nowhere contradicted, or a piece of political rhetoric. In either case, we would not support its inclusion in any legislation passed following this consultation.

[69] In many cases the Human Rights (Joint Committee) will of course be interested; so too will the Committee relevant to the particular subject matter of a given challenge.



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**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.**
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.**

Likely costs and benefits of the proposed Bill of Rights

238. We consider the likely principal effects of the proposed reforms to be:

- poorer quality of public decision-making; and
- detriment, in particular to vulnerable claimants or appellants, resulting from:
    - increased delay in progressing claims;
    - reduced prospects of success in some cases; and
    - increased legal costs.

239. We do not consider that the CP's overview of costs and benefits (in Appendix III) accurately captures these consequences of the proposed reforms.

*i. Quality of public decision-making*

240. The CP expresses concern to provide administrative bodies and public authorities generally greater freedom to make decisions without the apparently stultifying effect of the potential scope for human rights claims which might presently be brought by those affected by these decisions. Hence Appendix III lists as benefits of the proposed reforms



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cost savings for courts in having to deal with fewer cases; cost savings for government departments having to pay out less in damages; reduced litigation if the scope of positive obligations is reduced; increased operational flexibility.

241. We disagree with this assessment. The proposed reforms will not free decision-makers from onerous and trivial constraints, but insulate them from proper scrutiny. The government wishes for the judge over its shoulder to take a few steps back, to react more often with a forgiving smile than with stern reproach. This might be justifiable if the CP's accusations of (1) judicial overreach and (2) uncertain legal norms leaving decision-makers unable to tell whether their actions are legal or not, were borne out by the evidence. For all the reasons given in our response to the individual reform proposals above, they are not.

242. In particular, the CP raises no powerful evidence justifying its claims that human rights constraints detrimentally interfere with operational decision-making. To the contrary, operational decision-making is enhanced where the relevant decision-makers pay full regard to the human rights of those their decisions effect. A striking recent example of what may happen where this is not done is the John Worboys case,[70] discussed in relation to question 11 on positive obligations above.

243. Appendix III frames its assessment of benefits and disbenefits in terms of monetary savings to public bodies on the one hand, and individuals losing the benefit of successful human rights claims on the other. This indicates a purely adversarial mindset in relation to human rights norms. Such a mindset is wrongheaded. We should not, and hopefully do not, have a public sphere of decision-makers chafing against the restraints of human rights law, eager to roam more widely should those restraints be loosened by the CP's reform proposals. Rather those norms should be internalised as what they are, namely principles worthy of respect and integral to good decision-making.[71] The monetary cost of human rights, in the form of litigation costs, is part of the price for good administration.

[70] *DSD & NBV v Commissioner of Police for the Metropolis* [2018] UKSC 11; [2019] A.C. 196.
[71] This point, in relation to judicial oversight of administrative action, is not a new one. See Dawn Oliver, 'The Judge over your shoulder. Judicial review: balancing the scales' (1994) *Public Law* 514, contrasting the first and second editions of the *Judge over your shoulder* pamphlet. As that pamphlet in its second edition noted, "*the best way of avoiding Judicial Review is to follow the principles of good administration*"; likewise, the best way of avoiding costly human rights litigation is for decision-makers to fully internalise, and act in line with, human rights norms.



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244. Finally on this issue, we note that the claims made in Appendix III regarding cost impacts are in any event not evidenced. The CP presents no reason to presume, for instance, that the introduction of a permission stage will represent a costs saving, rather than increase cost and delay as all human rights claims are required to go through an additional stage.

*ii. Detriment to individuals*

245. Appendix III recognises that the proposed reforms will have a cost to individuals: some formerly good claims will become bad, and the cost of litigation will be increased. But the detriments to individuals extend further than this.

246. First, in line with what is written above, the proposed reforms will reduce the quality of decision-making in general; it is ultimately individuals and groups that are affected by administrative decision-making and government action more broadly, and who will therefore suffer for this. As noted, this extends beyond the litigation-focussed costs to individuals recognised in Appendix III.

247. Second, where good administration has failed and a public authority has unlawfully interfered with an individual's human rights – that is, where there is a good human rights claim – the proposed reforms will in all cases increase cost and delay. Individuals may be deterred from bringing claims in the first place owing solely to their financial position. Should they not be deterred, the arduous and difficult process of litigation will be prolonged. As we note in response to question 10, increasing delay itself reduces the likelihood of a claim succeeding, not because of the merits of that claim but because contemporaneous evidence necessarily becomes more difficult to access as time passes. Similar points are made in relation to question 16, on suspended and prospective quashing orders, above.

248. Those proposals intended to limit the scope of human rights claims which may be successfully brought, or relief which may be obtained, will therefore have a much broader effect than the immediate examples of cases which would previously succeeded becoming



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in law non-viable envisaged by Appendix III. This effect must be taken into account. It is detrimental to individuals, and bears again on the quality of public decision-making generally as discussed above.

Equalities

249. As practitioners we are not in a position to provide statistics on the profile of human rights claimants and those likely to be affected by the proposed reforms more broadly. We note, however, that insofar as the reforms will deter claims being brought for reasons of cost and delay, there is significant correlation between certain protected characteristics, such as race, and economic position.[72] We would urge that these issues be considered fully prior to any reforms being implemented.

Mitigation of negative consequences of reform

250. The best mitigation would be to abandon any reforms likely to have deleterious consequences; we have addressed each reform in detail above.

251. Beyond this, as we have noted throughout, the evidence base underlying the concerns said to motivate the proposed reforms is in large part lacking. It is difficult to say how the government might ameliorate those areas causing it concern whilst mitigating any consequent detrimental effects without it being established to what extent those concerns represent real flaws with the present system. Our criticisms in response to many of the questions above have been that the CP has not done enough to establish its premise, rather than that reform is worthy but carries unacceptable consequences. We would therefore recommend, in relation to those areas where we have been critical of the proposed reforms, that the government return to these issues and state more clearly the reason for its concern, and the evidence justifying its proposed reforms.

[72] See the Social Metric Commission's report *Measuring Poverty 2020*, especially the 'Key Messages' at page 11 noting that poverty rates are higher for Black and Minority Ethnic families, and that half of all people in poverty live in a family that includes a disabled person.



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## Annex 1: P v Chester West and Chester City Council

252. The Court of Protection team at Garden Court are troubled by the CP's misconceived analysis (at para 158-161) of *P v Cheshire West and Chester Council; P and Q v Surrey County Council* [2014] UKSC 19, [2014] AC 896. The analysis draws upon, and footnotes, a commentary by Jon Holbrook from 2014 which, we submit, is not representative of the views of practitioners in the area.

253. The Mental Capacity Act 2005 had its origins in a Law Commission reform project under Mental Incapacity Law Com 231 with a draft bill published in 1995. This report was effectively adopted by the Government in around 2004 to create an Act of Parliament/ The Mental Capacity Act 2005 has been in force since 2007 and applies to England and Wales. The primary purpose of the Mental Capacity Act 2005 was to promote and safeguard decision-making within a legal framework. It does this in two ways:

a. by empowering people to make decisions for themselves wherever possible, and by protecting people who lack capacity by providing a flexible framework that places individuals at the heart of the decision-making process
b. by allowing people to plan ahead for a time in the future when they might lack the capacity, for any number of decisions relating to them that will need to be made.

254. The Mental Capacity Act 2005 applies to everyone involved in the care, treatment and support of people aged 16 and over living in England and Wales who are unable to make all or some decisions for themselves and is designed to protect and restore power to those vulnerable people who lack capacity. The Mental Capacity Act 2005 was designed to codify the common law and to apply five statutory principles which are the benchmark and must underpin all acts carried out and decisions taken under the Act. The Mental Capacity Act 2005 as enacted was declared as compatible with the European Convention of Human Rights pursuant to section 19 of the Human Rights Act 1998.

255. However, the Deprivation of Liberty Safeguards (frequently known as DoLS) were not part of the original Mental Capacity Act in 2005. The present DoLS safeguards were introduced as amendments to the Mental Capacity Act 2005 via the Mental Health Act 2007 in response to the findings of the European Court of Human Rights in the



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*Bournewood* case and enacted in 2009, they are often seen as entirely separate from the rest of the Act.

256. The change in the law introducing the Deprivation of Liberty Safeguards was necessary following the decision of the European Court of Human Rights in *HL v United Kingdom* (45508/99) [2004] ECHR 720 concerning the deprivation of liberty of an autistic man with a profound learning disability. HL had lived at Bournewood hospital for 32 years before being cared for by Mr and Mrs E. in their home under a resettlement scheme, where he lived for three years. In 1997 he was admitted back into Bournewood hospital following an incident in a day care centre, where he had become agitated, hitting himself on the head with his fists and banging his head against a wall. Clear instructions were given that if he attempted to leave the hospital, he should be sectioned under the Mental Health Act 1983, but he never made this attempt, so remained an informal patient. His carers were prevented from visiting him, in case he would want to go home with them. His carers took the case to court, claiming a breach of HL's rights under the European Convention on Human Rights. The European Court of Human Rights held that HL had been deprived of his liberty and that this was contrary to Article 5 of the European Convention on Human Rights. The regulatory structures in effect at that time were insufficiently robust to meet the requirements of Article 5. This lack of regulation has come to be known as the 'Bournewood gap', based on the name of the case in the domestic courts, prior to the Strasbourg reference.

257. Thus, despite the enactment of the Mental Capacity Act 2005 and the declaration by a minister that it was compatible with the European Convention on Human rights the lack of legislation and regulatory structure did not deal with all the requirements of Article 5 in relation to those who lack mental capacity.

258. The need for human rights protections for people deprived of their liberty was further brought to light in the cases of the individuals concerned in *P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor) (Appellants) v Surrey County Council (Respondent)* [2014] UKSC 19. The most fundamental question addressed by the cases were whether the concept of physical liberty protected by article 5 is the same for everyone, regardless of whether or not they are mentally or physically



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disabled. Allied to this was a second question, namely what is the essential character of a deprivation of liberty, and are there permissible and non-permissible deprivations of liberty under article 5? Specifically, the court looked at the criteria for determining when the living arrangements made for a person who lacks mental capacity to make decisions for themselves might constitute a deprivation of liberty and, if they do, whether that deprivation should be authorised by a court or by the "Deprivation of Liberty Safeguards" (DOLS). DOLS are procedures contained in the Mental Capacity Act 2005 (MCA 2005), and introduced after a series of court rulings (*HL v United Kingdom* (2004) 40 ECHR 761 and its earlier domestic incarnation as the "Bournewood Gap" case). The purpose of DOLS is to ensure that there is an independent professional assessment of (a) whether the person concerned lacks the capacity to make their own decision about whether to be accommodated in the hospital or care home for care or treatment, and (b) whether it is in their best interests to be detained. They implement Article 5 procedural rights for the incapacitous person.

259. The European Court of Human Rights had established general principles relating to the deprivation of liberty of people with mental disorders or disabilities. However crucially it had not decided on a case such as those of the individuals in the *Cheshire West* case, who were persons without capacity, who appeared content with their care placement, and which had been initially authorised by a court.

260. The court unanimously allowed the appeal of P, and by a majority of 4 to 3 allowed the appeal of MIG and MEG. All had been deprived of their liberty.

261. The Supreme Court said the test was not that set out by the Court of Appeal, namely that a person's life had to be compared with that of another person with the same characteristics and therefore what was a deprivation of liberty for some people might not be a deprivation for others. This confused the quality of the arrangements made with the question of whether these arrangements constitute a deprivation of liberty. As Lady Hale said 'a gilded cage is still a cage'. People who lack the capacity to make (or implement) their own decisions about where to live may justifiably be deprived of their liberty in their own best interests. They may well be a good deal happier and better looked after if they are. But that does not mean that they have not been deprived of their liberty.



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262. Support for this view was found in the universal character of human rights, such rights as set out in the European Convention, being guaranteed to "everyone" (article 1). They are premised on the inherent dignity of all human beings whatever their frailty or disability. The same philosophy underpins the United Nations Convention on the Rights of Persons with Disabilities (CRPD), ratified by the United Kingdom in 2009. Physical liberty is also the same for everyone, regardless of their disabilities. What would be a deprivation of liberty for a non-disabled person is also a deprivation for a disabled person.

263. In conclusion deprivation of liberty has now been defined without reference to disability, but rather on whether action taken or care provided does, in fact, represent an intrusion and restriction, without their consent, on the lives of individuals. That this may be done in good faith, with the intention of enhancing the dignity, safety and/or wellbeing of others is still a deprivation of liberty. The court considered that the extreme vulnerability of the appellants in this case meant the court felt that they should always err on the side of caution when considering what constitutes a deprivation of liberty in these type of cases. There was a need for periodic checks to ensure that the arrangements remain in the best interests of vulnerable people, but these checks did not need to be as elaborate as those currently provided for in the Court of Protection or in the DOLS.

264. Following the *Cheshire West* case it became clear that many cases of deprivation of liberty of incapacitous persons were not covered by the scope of the statutory DOLS. Further case-law[1] developed a streamlined court process – the "Re X" process to ensure that such cases were accorded Article 5 protections through a proportionate court process in the absence of any other statutory framework. In due course all cases will come under a new wider statutory scheme, the "Liberty Protection Safeguards"[2], providing Article 5 safeguards for some of the most vulnerable people in our society.

265. Thus these key examples involving persons who lack capacity to make decisions for themselves -demonstrate the importance of the European Convention of Human Rights in ensuring that domestic legislation complies with the requirements of Convention and that domestic courts are important in developing Convention rights for vulnerable people

[1] Re X & Others (Deprivation of Liberty) [2014] EWCOP 25
[2] Under the Mental Capacity (Amendment) Act 2019



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lacking mental capacity people when a legislative scheme is introduced to protect those rights and give a domestic remedy.

266. Contrary to the misleading statement of Holbrook – Parliament did debate the issue and in response to the concerns in HL case and introduced amendments to the Mental Capacity Act 2005 and introduced the amendments to the Act in the schedule A1 and these being further amended and reviewed by the introduction of Liberty Protection Safeguards. Persons lacking capacity may have to be deprived of their liberty by was of a standard authorisation and at present they have a right to challenge that by way of an application under s 21A. In order to trigger this there has to be an objection and an objection to the deprivation and then the Standard authorisation is reviewed by the court in respect of specific requirement, namely whether the person has capacity to make decisions as to where to live and whether it is in their best interests to remain at the care home under a specific care plan or whether options for lesser restrictions are available. This is only available in care homes. In other community setting and some care at home the standard authorisation scheme does not apply and particular care plans can amount to a deprivation of liberty which has to be authorised by the court for an incapacitous person under s 16 of the MCA 2005.

267. Thus the premise of the proposal is completely wrong both in law and legislation. The commentary by Holbrook is wrong in law and is politically motivated rather than an accurate description of the law and its development.

268. By comparison on the review of DOLS the new Liberty Protection Safeguards are due to come into force towards the end of the year. All of this is set in an Act of Parliament. These provisions are designed to give access to a court and similar protections to those detained under the Mental Health Act 1983.



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