Human Rights Act Reform:

A Modern Bill of Rights Consultation Response

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Leigh Day, Panagram, 27 Goswell Road, London EC1M 7AJ

Tel: 020 7650 1200

Fax: 020 7329 5055 / Email: info@leighday.co.uk

Website: www.leighday.co.uk

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INTRODUCTION

Leigh Day was founded in 1987 with the ethos of ensuring that ordinary people who have suffered harm have access to the same quality of legal advice as those against whom they seek redress, whether they be state bodies, insurers, or multinational companies. The firm is ranked in the top tier of Chambers and Partners and the Legal 500 in administrative and public law and civil liberties and human rights. It has had a dedicated Human Rights department since 2001. That department includes experts in abuse law, data protection and privacy, discrimination law, the Court of Protection, immigration law and the Windrush scandal, immigration detention law, Inquests, Judicial Review, and prison law.

Our substantial and varied experience of the operation of the Human Rights Act 1998 (the 'HRA') means that we are well placed to comment on the operation of the Act and its central role in preventing overreach by public bodies and ensuring the protection of individual autonomy, dignity and liberty. We have drawn on our wealth of experience in this consultation response.

As is particularised in our responses to the consultation questions, our position (although the question is not even asked in the consultation) is that there is no need for a Bill of Rights to replace the HRA. Since its entry into force the HRA has enabled individuals to bring cases alleging infringements of rights under the European Convention on Human Rights (the 'Convention') directly before the domestic courts, rather than having to look to Strasbourg to vindicate those rights. This has had an enormous benefit not only for individuals but also for the Government in allowing human rights issues to be determined quicker, at lower cost and in a way which takes particular account of the UK context and our values and traditions. The result has been a sea-change in the way thousands of vulnerable people are treated in our hospitals, schools, prisons and care homes. The effect of the Government's proposals would be to weaken human rights protection in the UK by undermining the Convention Rights and making enforcement of those rights more difficult, particularly for the most vulnerable members of our society. It would also result in the stability of the current system being thrown into the air and lead to more individuals having to go to Strasbourg to seek justice which will quite possibly increase the number of judgments against the UK by that Court. At the same time the dialogue which currently exists between the UK Courts and Strasbourg, a robust dialogue which has allowed our Courts to have a significant voice in the development of European human rights jurisprudence, would be significantly undermined.

The justification, to the extent that any is seriously put forward, for replacing the HRA with a Bill of Rights seems little more than base prejudice overlaid with selective anecdotes. Contrary to

what is suggested, the consultation is not a response to the findings of the Independent Human Rights Act Review (the 'IHRAR')[1] and it seems to entirely lack any hard data identifying supposed problems or supporting the need for change. It is striking that the Government prays in aid of its case for reform a number of cases in which claimants have *failed* in their challenges at an early stage, with their claims being struck out.

We reject the premise that there are people who are deserving of human rights and people who are not. This is not only abhorrent but risks creating a "slippery slope" to rights being stripped from wider categories of society. Furthermore, the idea that certain categories of people can arbitrarily be excluded from the protection of human rights law without the rights of all being undermined is absurd; to take just one example, in the field of Inquest law, the investigative duty under Article 2 was first recognised as existing in England and Wales in respect of deaths in prison[2] and has subsequently been recognised as existing in respect of deaths of patients detained under the mental health act[3] and then in respect of the deaths of voluntary mental health patients.[4] Equally, subsequent cases which have restricted the scope of Article 2 in respect of prison deaths[5] apply in other contexts too.

We urge the Government to pay proper regard to these submissions, reflect on its ill-conceived proposals and abandon these plans which will undermine, not strengthen, the values of fairness, justice and equality which underpin our society.

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[1] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

[2] *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182

[3] *Savage v S Essex Partnership NHS Trust* [2009] 1 AC 681

[4] *Rabone v Pennine Care NHS Trust* [2012] UKSC 12.

[5] *Tyrrell v HM Senior Coroner County Durham and Darlington* [2016] EWHC 1892

RESPONSE TO QUESTIONS 1 & 2

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."

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?"

1. On the basis that the draft clauses in Appendix 2 combine the potential amendments to section 2 of the HRA with the need to clarify the position of the Supreme Court, our analysis will consider both questions jointly.

The Government's concerns

2. Under section 2 of the HRA, courts in the UK are required to 'take into account' any relevant Strasbourg case-law.[6] The Government's concerns appear to lie with the uncertainty about how section 2 should effectively be applied in practice and its potential for creating an over-reliance on judgments and decisions coming from Strasbourg to the detriment of any existing domestic law.

3. The Government's proposals are built on the IHRAR which recommended amending section 2 to 'clarify the priority of rights protection'.[7]

4. The Government's draft clauses aim to clarify the approach UK Courts should take when dealing with human rights matters. It is highlighted in the consultation that 'since there is no strict doctrine of precedent in Strasbourg, the case law has at times proved inconsistent and haphazard'.[8] Effectively, the proposals appear to impose an obligation on the UK courts to prioritise domestic statute or common law in resolving a human rights issue before considering the Convention.

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[6] S2(1) of the HRA
[7] Ibid, page 89, Option Five.
[8] Human Rights Act Reform: A Modern Bill of Rights. A consultation to reform the Human Rights Act 1998 (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf). Page 58, para 193.

Presumptions underlying the proposals

5. Appendix 2 of the Consultation document sets out two options for amending the existing section 2.[9] These options are reproduced below for ease of reference. While slightly different, both options reflect the Government's concerns, and in particular the purported need for clarity, certainty, and a prevalence of domestic jurisprudence. We will aim to demonstrate that the Government's proposals are based on two interrelated, erroneous presumptions. First, that section 2 as currently drafted prioritises the Strasbourg court and jurisprudence over domestic law and courts; and second that UK Courts are following Strasbourg presumptively (i.e. looking to Strasbourg as their primary guide and applying its jurisprudence as opposed to domestic case law).

Option 1

Interpretation of rights and freedoms

(1) The meaning of a right or freedom in this Bill of Rights is not determined by the meaning of a right or freedom in any international treaty or repealed enactment.

(2) In particular, it is not necessary to construe a right or freedom in this Bill of Rights as having the same meaning as a corresponding right or freedom in—
(a) the European Convention on Human Rights, or
(b) the Human Rights Act 1998.

(3) The following provisions of this section apply where a court or tribunal is deciding a question in connection with a right or freedom in this Bill of Rights.

(4) The court or tribunal must follow a previous judgment or other decision given in relation to this Bill of Rights by—
(a) that court or tribunal, or
(b) any other United Kingdom court or tribunal,
if the judgment or other decision is a precedent in relation to the question being decided.

(5) The court or tribunal may have regard to a judgment or other decision of a judicial authority made under—
(a) the law of a country or territory outside the United Kingdom, or
(b) international law,
so far as the court or tribunal considers that it is relevant to the question being decided.

(6) The court or tribunal is not required to follow or apply any judgment or other decision of the European Court of Human Rights.

(7) Evidence of a judgment or other decision to which regard may be had under subsection (5) is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(8) For the purposes of this section a judgment or other decision is a precedent in relation to the question being decided if, or to the extent that, the court or tribunal is required by any law to follow it in making the decision.

[9] Ibid. Page 95.

Option 2

Interpretation of rights under this Act

(1) The Supreme Court is the judicial authority with ultimate responsibility for the interpretation of the rights and freedoms in this Bill of Rights.

(2) The following provisions of this section apply where a court or tribunal is deciding a question in connection with a right or freedom in this Bill of Rights.

(3) The court or tribunal must have particular regard to the text of the right or freedom, and in construing the text may have regard to the preparatory work of the European Convention on Human Rights.

(4) The Court or tribunal must follow a previous judgment or other decision given in relation to this Act by—
(a) that court or tribunal, or
(b) any other United Kingdom court or tribunal,
if the judgment or other decision is a precedent in relation to the question being decided.

(5) Other matters to which the court or tribunal may have regard, so far as it considers them relevant to the question being decided, include—
(a) the development of any similar right or freedom under the common law in the United Kingdom;
(b) a judgment or other decision of a judicial authority under the law of a common law jurisdiction outside the United Kingdom in connection with a similar right or freedom;
(c) a judgment of the European Court of Human Rights.

(6) The court or tribunal is not required by any enactment, rule of construction or other law to follow or apply any judgment or other decision of the European Court of Human Rights.

(7) For the purposes of this section a judgment or other decision is a precedent in relation to the question being decided if, or to the extent that, the court or tribunal is required by any law to follow it in making the decision.

(8) Evidence of—
(a) the preparatory work of the European Convention on Human Rights;
(b) a matter to which regard may be had under subsection (5)(b) or (c);
is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

6. In order to illustrate why the presumptions underlying the proposals are incorrect, it is necessary to briefly look at how the interpretation of section 2 has evolved over time.

7. The Courts' initial approach to section 2 is reflected in two main cases *R (Alconbury Developments Ltd) v Environment Secretary* and *R (Ullah) v Special Adjudicator*. The main statement on the interpretation Courts should give to section 2 is contained in *Ullah*, where Lord Bingham explained that '*the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less*.'[10] It has been argued that this 'creates a presumption that in interpreting and applying Convention rights, the UK Courts will look at the ECtHR case law as their primary guide.'[11]

8. While any 'mirroring approach' stemming from such an interpretation might justify the Government's concerns, it is essential to note that the 'Ullah principle' has subsequently been qualified, offering a more nuanced approach to section 2.

[10] The IHRAR, chapter Two, Section 2 of the HRA, Page 39.
[11] Ibid. Page 41, paragraph 41.

9. Over time, domestic courts have shown greater confidence and a greater willingness to depart from Strasbourg. This was notably the case in *Kay v Lambeth BC* where the House of Lords reaffirmed the domestic doctrine of precedent, by which Courts are bound, despite any inconsistency with Strasbourg case-law.[12] Subsequently, in *Manchester City Council v Pinnock*, it was restated that the '*UK Supreme Court was not bound to apply every ECtHR decision*'[13]. These cases were both decided by the UK Supreme Court and offer a more balanced approach to section 2. This goes against the Government's presumption that the UK courts are following Strasbourg presumptively and that the status of the Supreme Court, as a final arbiter, has been undermined or threatened by the Convention: it is for the Supreme Court to decide whether it will follow particular Strasbourg jurisprudence and the court has shown its willingness to depart from it, where it considers this to be necessary.[14]

10. It is worth noting that it is well understood by parties to legal proceedings and lower courts that the domestic appellate courts and in particular the Supreme Court have the 'final say'. This is reflected in the fact that it is unusual for arguments based on Strasbourg jurisprudence to be developed in any detail in the lower courts. Any arguments as to whether Strasbourg jurisprudence should be followed is often reserved for the appellate court and specifically the Supreme Court level. For example, after the UK Supreme Court's decision in *R (on the application of DA and others) v Secretary of State for Work and Pensions*[15], the ECtHR handed down a judgment in *JD and A v UK*[16] which appeared to be at odds with the approach set out by the Supreme Court as to the test for objective justification in Article 14 discrimination analysis. The 'manifestly without reasonable foundation' test as articulated by the Supreme Court in *DA* was more restrictive than the approach taken by the ECtHR in *JD.* However, Parties to proceedings in which Article 14 issues arose were bound by the decision in *DA* until the Supreme Court itself provided guidance on whether and how the Strasbourg decision in *JD* might affect the approach to 'objective justification' in Article 14 cases and how that fit with guidance in previous

[12] Ibid. Page 46. Para 56.
[13] Ibid. Page 48. Para 60.
[14] *R v Horncastle & Others* [2009] UKSC 14 ; [2010] 2 AC 373]; [2010] 2 WLR 47] is a case in which the Supreme Court did not follow ECtHR jurisprudence on the basis that the ECtHR had misunderstood the specificities of the UK criminal law. Following *Horncastle,* the ECtHR reviewed its position in Al-Khawaja v The United Kingdom; Tahery v The United Kingdom 2228/06, [2008] ECHR 2, 26766/05 to reflect the reasoning of the UKSC, thereby acknowledging the UK Supreme Court's 'final say' on the issue.
[15] **[**2019] UKSC 21; [2019] 1 WLR 3289
[16] 32949/17 [2019] ECHR 753 (24 October 2019)

domestic precedents. The Supreme Court subsequently reviewed both the Strasbourg and the domestic jurisprudence on the issue and carefully set out its own position on objective justification in the case of *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions*[17]. It looked to what Strasbourg had done but formed its own view on how the jurisprudence should shape the test applicable in the domestic courts. This is abundantly clear from Lord Reed's analysis of the case law of both the ECtHR and domestic courts on the matter.[18]

11. It is clear from the above that while the 'Ullah principle' is the first port of call when interpreting section 2, courts have been able to form their own views on how to apply guidance from the ECtHR and it is well known and recognised by Parties in proceedings that it is the domestic court's jurisprudence that will take primacy. They have also been able to take a more 'context-specific' approach to Convention rights, as illustrated by the case of *R v Horncastle* referred to above. It is and will of course remain necessary for the domestic courts to have regard to guidance of the ECtHR as to the meaning and scope of Convention rights in order to enable Convention rights to be properly enforced domestically and not only by recourse to Strasbourg, but it is clear that the Supreme Court seeks to formulate its own guidance by reference to the ECtHR jurisprudence, rather than unquestioningly following it.

12. It is also important to highlight the case of *Osborn v Parole Board*, which clarifies the question of priority and effectively confirms that 'there is an order of priority of assessing rights: domestic statute; the common law; and then, finally, Convention rights.'[19]

13. There currently is a functioning equilibrium and fruitful judicial dialogue between the UK courts and Strasbourg. Some of the fundamental elements of the Convention which are criticised by the Government, including the fact that Convention is a living and flexible instrument, actually provide essential leeway to domestic courts in their interpretation of Convention rights.[20]

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[17] [2021} UKSC 26; [2021] 3 WLR 428
[18] See for example paragraphs 143, 158 and 181 of Lord Reed's Judgment.
[19] Ibid, page 64, para 105.
[20] See JUSTICE's response to the IHRAR (available at https://files.justice.org.uk/wp-content/uploads/2021/03/08164531/Response-to-IHRAR-March-2021.pdf)

14. The Government proposals are based on the idea that the order of priority, as well as the position of the Supreme Court, need to be reaffirmed. However, if this is already happening in practice and 'if the system ain't broke', then why fix it?[21].

15. As highlighted by JUSTICE in its response to the IHRAR, 'in many cases, the UK has spoken first and Strasbourg has listened.'[22] JUSTICE's submission also lists a number of cases where the Supreme Court has effectively been the ultimate judicial arbiter of UK law. It appears that the Government's reform would impair an effective system, which is the product of a long-lasting dialogue and collaboration.

Analysis of the proposals

General comments

16. It does not appear to be the case that the draft clauses contained in Appendix 2 intend to prevent UK Courts from having regard to and/or applying Strasbourg jurisprudence altogether. Indeed, any suggestion to that effect would be entirely at odds with the obligations that arise under the Convention. However, both proposals seek to prioritise domestic law and courts over the Strasbourg court and its decisions, albeit in different ways[23] and without clearly confronting the inescapable fact that domestic case law has developed by reference to the Convention and Strasbourg jurisprudence.

17. The intention behind the draft clauses was summarised by Lord Wolfson of Tredegar QC as follows: '*We are saying that the court should start by saying what the position is under domestic law, and then the courts can, so to speak, raise their eyes and look around the world, including to Strasbourg jurisprudence, for helpful precedents*.'[24]

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[21] Joint Committee on Human Rights, Oral Evidence, 2 February 2022 per Baroness Ludford (available at: https://committees.parliament.uk/event/6985/formal-meeting-oral-evidence-session/)
[22] Ibid.
[23] Human Rights Act Reform: A Modern Bill of Rights. A consultation to reform the Human Rights Act 1998, Appendix 2 (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf). Page 96.
[24] See Lord Wolfson of Tredegar's submission, Joint Committee on Human Rights, Oral Evidence, 2 February 2022 (available at: https://committees.parliament.uk/event/6985/formal-meeting-oral-evidence-session/)

18. The first proposal appears to encourage domestic courts to depart from Strasbourg decisions, by suggesting that 'the court or tribunal is not required to follow or apply any judgment or other decision of the European Court of Human Rights' (the 'ECtHR'). As set out at paragraphs 11-13 above, domestic courts already have the ability to depart from Strasbourg decisions, and to form their own views on the ECtHR's guidance, but the wording and context of the proposal suggests that the intention is to go further than this. It is difficult to see how an approach which goes further and more actively encourages departure from the interpretation of Convention rights by Strasbourg could be reconciled with the need for Convention rights to be properly enforced domestically and not only by recourse to Strasbourg.

19. It is important to recall at this point that the starting point of the HRA 1998 was to 'bring rights home' by allowing claimants to access and enforce their rights in domestic courts.[25] The Government clearly stated in its consultation document that it intends to remain a party to the Convention.[26] This intention was reiterated in the evidence submitted to the Joint Committee on Human Rights on 2 February 2022, when Lord Wolfson of Tredegar mentioned that there was no contradiction between the reform proposals for section 2 and remaining fully committed to the Convention rights.[27] Yet, it is difficult to see how an approach which encourages domestic courts to take approaches at odds with the ECtHR's interpretation of Convention rights could be reconciled with that commitment. The ECtHR is the court with authority on the meaning and scope of Convention rights – enabling proper enforcement of Convention rights domestically therefore necessarily involves having regard to its interpretation of those rights. The more the interpretation of Convention rights in the domestic courts diverges from the interpretation of the same rights in Strasbourg, the more likely it is that the UK will need to be taken to Strasbourg to defend its interpretations of the rights there.

20. It is worth noting that there are currently very few cases brought against the UK in Strasbourg. This is in part due to the margin of appreciation, i.e. the level of discretion

[25] Joint Committee on Human Rights, Third Report, The Government's Independent Review of the Human Rights Act, Page 9, para 6 (available at https://committees.parliament.uk/publications/6592/documents/71259/default/)
[26] Human Rights Act Reform: A Modern Bill of Rights. A consultation to reform the Human Rights Act 1998, Foreword (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf).
[27] Joint Committee on Human Rights, Oral Evidence, 2 February 2022 (available at: https://committees.parliament.uk/event/6985/formal-meeting-oral-evidence-session/)

afforded to parties to the Convention, which is subject to the supervision of the ECtHR. The existing balance and ongoing dialogue between UK courts and Strasbourg have allowed domestic courts to make the most of their margin of appreciation and to raise concerns and look to Strasbourg when necessary, as to the correct interpretation of Strasbourg jurisprudence in the national context.[28] The Government's proposals for reform (particularly in Option 1) could damage this equilibrium and lead to Strasbourg reducing the domestic courts' margin of appreciation. It could also lead an increase in the number of adverse findings against the UK in Strasbourg.

21. The second option offers a more nuanced approach by proposing that the court or tribunal 'may have regard' to other matters, including judgments of the ECtHR (without specifically requiring such regard or encouraging departure from ECtHR jurisprudence) but it is difficult to see how this proposal differs meaningfully from the approach currently adopted by the domestic courts which is set out in detail above, and indeed (as set out further below) the wording introduces further potential uncertainty as to what courts should and shouldn't be taking into account (and how much weight should be given to each potential source of law).

22. We will now consider the proposed options in more detail by reference to the specific wording of the proposals, with the caveat that the proposed provisions need to be read as a whole and our comments below are subject to the background set out above.

Option 1

23. S(1) and (2) in Option 1 provide that the meaning of a right or freedom is not to be determined on the basis of any international treaty and in particular on the basis of corresponding right or freedom in the Convention or the HRA 1998.

24. One of the reasons given for the need to reform Section 2 of the HRA is to reinforce legal certainty. It is unclear how s(1) and (2) would bring further certainty. As pointed out by Lord Mance in his oral evidence to the Joint Committee on Human Rights on 26 January 2022 introducing a 'first this, then that' approach could be detrimental and introduce

[28] See JUSTICE's response to the IHRAR (available at https://files.justice.org.uk/wp-content/uploads/2021/03/08164531/Response-to-IHRAR-March-2021.pdf)

further uncertainty: 'if a point of common law is very uncertain, do you have to compel the lawyers to argue it over two days when there is an obvious Convention point?.' [29]

25. It is also not clear how the proposals in s(1) and (2) can be reconciled with the position that domestic precedents have defined and developed the meaning of rights or freedoms by reference to the Convention and the HRA, and, in some cases, international treaties for many years. It seems both unrealistic and impractical to suggest that carefully developed case law which defines rights and freedoms by reference to those sources of law should be disregarded / overtaken by the proposed provisions. Domestic case law has been carefully developed by domestic courts to reflect obligations under international Conventions and Treaties, and where appropriate, has set out its own guidance in relation to those sources of law – it would introduce significant uncertainty to call the authority of that case law into question and would be at odds with the well-established principles of the common law and indeed with s(4) of Option 1, which seeks to reiterate the principle that courts must follow domestic precedents.

26. S(4) in Option 1 simply reiterates the existing principle of common law, by stating that courts must follow domestic jurisprudence. We do not see the added value to such a clause, considering that UK courts are already bound by domestic precedents.

27. We appreciate that s(4) must be read in conjunction with the remainder of the proposed provision, including s(5), meaning that courts ***must*** follow domestic jurisprudence and ***may*** then have regard to judgments or decisions from foreign judicial authorities. However, as previously mentioned, embedding a hierarchy of sources into statute may be actively unhelpful. This is because it suggests that the sources of law can easily be separated into distinct categories (which is not necessarily the case because domestic case law will often apply and interpret both domestic legislation and international treaties) and because a particular source may in fact provide more straightforward answers and therefore be preferable.

28. Additionally, s(5) could in its broad interpretation also create an 'opportunity for judicial creativity' or lead to lengthy and convoluted litigation as a result of introducing the

[29] See submission of Lord Mance, Joint Committee on Human Rights, Oral Evidence, 26 January 2022 (available at https://committees.parliament.uk/event/6876/formal-meeting-oral-evidence-session/)

provision that such sources made be referred to 'if the court considers them relevant'. What one court may consider relevant may differ substantially from what another might consider relevant and it is unclear what the test for 'relevance' would be. One could expect UK lawyers, in light of this proposal, to seek out any applicable/related case from any jurisdictions arguing that it is relevant.[30] As with s(1) and (2), s(5) could therefore bring further legal uncertainty.

29. S(6) of Option 1 provides that 'the court or tribunal is not required to follow or apply any judgment or other decision of the European Court of Human Rights'[31]. While we welcome the Government's support of the Convention and its clear intention to remain party to it[32], for the reasons above (see paragraph 20-22), it is difficult to see how this proposed provision can be reconciled with the aim to remain fully committed to the Convention and/or how it differs from the existing status quo which already allows for some flexibility where needed.

30. Our overall view is that Option 1 contains problematic clauses which could cut across both the goal of increasing legal certainty and the aim of reinforcing the position of domestic courts (which have carefully developed their own lines of case law to be followed over many years).

Option 2

31. S(1) of Option 2 aims to re-affirm the position of the Supreme Court as the final arbiter for the interpretation of the proposed Bill of Rights. We already covered in detail that the UK courts and in particular the Supreme Court do ensure that they offer their own interpretation and guidance on rights (albeit whilst looking to Strasbourg in providing it, where appropriate). The Supreme Court is, in practice, the ultimate arbiter and the ongoing dialogue between the Supreme Court and Strasbourg is proving to be effective.

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[30] See presentation by Professor Alison Young, 39 Essex Chambers Webinar 'The Human Rights Act Reform', 23 February 2022 (available at https://www.39essex.com/the-human-rights-act-reform/)

[31] Human Rights Act Reform: A Modern Bill of Rights. A consultation to reform the Human Rights Act 1998, Appendix 2 (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf). Page 96.

[32] Human Rights Act Reform: A Modern Bill of Rights. A consultation to reform the Human Rights Act 1998, Foreword (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf).

As such, it is not clear s(1) would be needed and therefore its introduction risks disturbing what is currently a carefully balanced approach.

32. S(3) provides that UK courts 'must have particular regard to the text of the right or freedom' and in construing the text 'may have regard to the preparatory work of European Convention on Human Rights'. The provision appears to aim to prioritise a textual approach to interpretation but it is not clear how this would interact with existing case law on particular rights and freedoms. It thereby introduces further uncertainty. An approach which discourages regard to Strasbourg jurisprudence but does encourage reference to the preparatory work on the Convention also introduces potential complications and uncertainty – it is conceivable that domestic courts might interpret the meaning of a right differently by reference to the preparatory work than the Strasbourg court, and it might then be necessary for cases to be taken to Strasbourg for the meanings to be reconciled.

33. S(4) is identical to s(4) in option 1. We do not have any further comments.

34. S(5) sets out the different sources courts *may* refer to, including but not limited to, judgments of the ECtHR. We welcome the inclusion of the ECtHR's decisions in this list of potential sources (which stands in contrast to s(5) of Option 1) – as a member of the Convention, the UK should clearly look to the ECtHR on questions of interpretation of Convention rights. However, once again, we note that the provision could lead to greater legal uncertainty as well as complex litigation (on the basis set out at paragraph 30). It is also worth noting that the addition of Strasbourg's judgment as a *potential* source of law is further qualified by s(6) which provides that UK courts are not *required* 'to follow or apply any judgment or other decision of the European Court of Human Rights'. As with s(6) in Option 1, it is difficult to see how this differs from the current status quo (on a narrow reading), or if it does go further than the position as it currently stands, how such a statutory detachment from Strasbourg could not impact the existing equilibrium and question the UK's commitment to remain party to the Convention.

Conclusion on questions 1 and 2

35. While the IHRAR itself recognises the various points raised above, confusingly, it does not recommend the status quo option, on the basis that it maintains that in its current state, section 2 is still the source of uncertainty and has led to Courts neglecting domestic

law.[33] However, neither of those assertions have been properly evidenced and on the contrary, the examples referred to above suggest the opposite.

36. Our analysis would not be complete without mentioning additional risks brought by the reform proposals. The impact on claimants also needs to be taken into account. The first logical consequence of the UK Courts distancing themselves from Strasbourg case-law could be that more claimants would have to go directly to the ECtHR to seek redress. This potentially creates an important access to justice issue, including because of the limited options for costs recovery and protection.[34]

37. Following on from this, asking UK Courts to depart from Strasbourg could prevent claimants from even accessing the ECtHR. Indeed, in one of its recent cases[35], the ECtHR suggested that domestic courts have to have considered Convention rights if claimants later want to seek redress in Strasbourg. If not, Strasbourg could argue that not all domestic remedies have been exhausted and their case could be found to be inadmissible.[36]

RESPONSE TO QUESTION 3

38. We have opted not to prepare answers to this question and to instead focus our consultation response on matters where we feel, by virtue of our particular experience and expertise as outlined in the introduction to this response, we can add particular value.

[33] The IHRAR, page 84, part (16)

[34] Public Law Project, Human Rights Act: 5 concerns with new consultation https://publiclawproject.org.uk/latest/human-rights-act-5-concerns-with-new-consultation/. Some experts have also highlighted that the correlation between amendments to section 2 and an increase in the number of cases brought to Strasbourg is not necessarily so clear cut.

[35] *Lee v the United Kingdom,* 18860/19, ECHR [2021]

[36] See submission of Dr Helene Tyrrell, Joint Committee on Human Rights, Oral Evidence, 26 January 2022 (available at https://committees.parliament.uk/event/6876/formal-meeting-oral-evidence-session/)

RESPONSE TO QUESTION 4

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

39. We see no evidence for the need to strengthen section 12 of the HRA. Whilst recognising the importance of the right to freedom of expression, we would be concerned at any change that seeks to give an Article 10 right to freedom of expression priority over an Article 8 right to respect for private and family life. As is the case at present, we consider that it is for the Court to consider, on the facts of each particular case, where this balance lies where these articles may conflict.

RESPONSE TO QUESTION 5

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

40. Again, we would be concerned at any attempt to give Article 10 rights pre-eminence over Article 8 or other rights. In reality, we consider that it would be extremely difficult to issue meaningful guidance on the issue given that neither are absolute rights and therefore require a balancing exercise, on the facts of the individual case, to be performed. Any diminution of Article 8 rights in relation to individual privacy in the domestic setting, and therefore a divergence with the protections provided for by the Convention, would lead to an increase in the number of applications to Strasbourg.

RESPONSE TO QUESTION 6

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

41. We see no evidence of this being a particular problem, either in the consultation document or elsewhere. We note that the cases of *Goodwin v UK and FT v UK*, stress the importance of journalists being able to protect their sources. If the Government is concerned to provide stronger protection for journalists' sources we would suggest that it would be more fruitful to consider that within other areas of legislative reform such as the Official Secrets Act where the Law Commission has recommended adding a specific public interest defence.

RESPONSE TO QUESTION 7

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

42. For the reasons set out in the answers to questions 4 – 6 above, we see no need for a Bill of Rights to strengthen the protection for freedom of information, certainly where it attempts to give Article 10 rights pre-eminence over Article 8 rights and would inevitably lead to a divergence with the protections provided for by the Convention.

43. It is not without a certain sense of irony that this consultation seeks to champion the need to increase the right to freedom of expression while at the same time, through the Police, Crime, Sentencing and Court Bill seeking to significantly weaken the right to protest.

RESPONSE TO QUESTION 8

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."

44. No, we do not 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 the courts focus on genuine human rights matters. We are strongly opposed to the introduction of any permission stage in human rights claims and disagree with the underlying premise. The courts already have the power to strike out claims where the claimant fails the victim test under section 7 HRA and in judicial review there is an existing permission stage. There is no such legal term as a "genuine" human rights claim. Our position is that every individual who meets the victim test should be able to bring a human rights claim. Introducing a further filter, such as a "significant disadvantage" test, would not be compatible with section 6 HRA. We consider that the existing victim test under section 7 HRA is adequate in counteracting the mischief caused by the issue that the Government asserts in this consultation.

45. The proposal offends the principle of access to justice and would not be effective, because:

    a. These sorts of claims are incredibly fact-sensitive, meaning that a significant amount of work is completed before the claim is even issued and that it is highly unlikely that a sensible or usable working-definition of "significant disadvantage" could be achieved. A claimant's legal representatives are likely to have sufficient instructions from their client to assess victim status under section 7 HRA 1998 in order to complete this work. However, there is likely not to be sufficient disclosure received from the defendant, before a claim is issued, to enable legal representatives to assess "significant disadvantage". Therefore, a huge amount of lawyer time and court resources could be expended unnecessarily.

b. Unless the bar for a “significant disadvantage” is set relatively low, then there is likely to have to be more court time dedicated to resolving these claims, not less. That is because, if the test is set too high, then a large number of claims may be refused permission, which will lead to a large number of claims renewing applications for permission (see further below). Our experience of the paper permission stage in judicial review is that a significant number of applications for permission that are renewed are eventually granted permission (either at an oral hearing in the Administrative Court, or on paper by the Court of Appeal). This invariably wastes court resources. Instead, any claim should be taken at its highest in order for any such permission stage to be most effective.

c. The Government’s proposal is that, in the case of mixed causes of action, the other non-HRA causes of action should be completed first. However, that is likely to mean many claimants are then out-of-time to bring a HRA claim due to the limitation period. This will have the knock-on effect of increasing court time, because there will need to be court resources dedicated to resolving whether an extension of time should be granted to those follow-up HRA claims. That is additional court time that would otherwise be spent more effectively on resolving the substantive issues in the claim. Moreover, if different legal tests for standing are applied between a HRA claim and non-HRA claims, then this proposal is doing the opposite of what the Government wants to achieve, because it will increase the courts’ caseloads (rather than reducing them) because there will be duplicative, parallel litigation.

d. Also, additional court time will be wasted in dealing with disputes over costs, either from a claimant’s perspective (where they successful defeat any argument from the defendant that the claimant can’t show “significant disadvantage”) or vice versa. This will cause a chilling effect, and result in fewer “genuine” claims (although we do not agree with the use of that term – see below) coming before the court, which is the antithesis of what the Government wishes to achieve in this consultation. Plus, what happens to those claimants in receipt of legal aid? Does the Government intend to make changes to legal aid for HRA claims, like in judicial reviews, where payment is withheld if permission is refused? If so, that will lead to an increase in wasted lawyer and public body time. A further complication is as follows: how can the Legal Aid Agency (and lawyers representing claims for that

matter) be able to properly assess whether the cost benefit ratio is met for damages claims if there is too much uncertainty over the application of a "significant disadvantage" test? We consider that this proposal will cause more problems than it will solve.

46. If, contrary to the above, the Government is intending that there is no right to renewal an application for permission (if those applications are going to be considered on the papers in the first instance and are refused due to the new "significant disadvantage" test) then we consider that such a proposal would be incompatible with a right to a fair hearing under Article 6 of the Convention.

RESPONSE TO QUESTION 9

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."

47. If there is to be a "significant disadvantage" test, then (for the reasons set out above in respect of question 8) a low bar should be applied. The test should be equivalent to "particular disadvantage" under the Equality Act 2010, where "substantial" means "more than trivial". In order not to offend the principles of access to justice, we are of the opinion that the courts should interpret "significant" in the same way as they interpret "substantial" under the Equality Act 2010.

RESPONSE TO QUESTION 10

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

48. This question appears to be premised on the notion that there is a problem that cases currently before the courts are, in large, not genuine human rights abuses. However, the selective examples of "vexatious" cases contained within the consultation document in our experience comprise a very small minority and do not take into account the various

important cases that succeed. For example, we act for clients who have been abused in care homes, children who have been neglected and harmed and patients who have died whilst in state custody. These important cases are only possible by bringing claims under the HRA.

49. The court system in England & Wales is robust and the courts already have processes in place to ensure that claims that are bought are genuine and have sufficient merit. This does not mean that a claim that is eventually unsuccessful is wrongly bought (in the same way that the Government will often defend claims that go onto be successful). Claims that are vexatious can be stuck out by the court at an early stage and with costs orders attached (including wasted costs orders). As such we do not see the real detriment to the public authorities involved in relying on the current systems in place. We consider the courts are well equipped to deal with the cases put before them.

50. It is already very difficult to bring HRA cases to court due to funding constraints and the threshold already imposed by the HRA mean that only the most severe breaches will be capable of meeting the high bar for a viable claim. The availability of legal aid and insurance required to bring these claims already acts as a check to "weed out" unmeritorious claims where it would not be proportionate to seek redress via litigation. For example, the Legal Aid Agency imposes both merits tests and proportionality checks when considering whether to grant funding. It is therefore simply not the case a large number of vexatious claims are issued as they would not get over this initial hurdle.

51. The ability to bring genuine cases under the HRA acts as an important check and balance on the power of state authorities and so the Government (who is in some cases the defendant in these matters) should be cautious in seeking to overreach the power of the executive and prevent genuine claims from coming before the courts, which allow for scrutiny of the decisions of public authorities. We consider that it is a matter for the judiciary and not the executive (who could be perceived as being conflicted in this, being the defendant in certain cases) to ensure that the court focusses on genuine cases.

RESPONSE TO QUESTION 11

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".

52. This question proceeds on a number of false and/or unevidenced premises:
    a. That the Bill of Rights *should* seek to address the "imposition and expansion" of positive obligations;
    b. That the Bill of Rights *could* seek to address the "imposition and expansion" of positive obligations without undermining the cogency and effectiveness of the State's negative obligations;
    c. That public service priorities are unhelpfully impacted by human rights litigation;
    d. That that litigation is costly.

53. This response addresses each of the above but focusses primarily on the first of these false premises.

A. The Bill of Rights should seek to address the "imposition and expansion of positive obligations."

54. It is submitted that the current approach to positive obligations is necessary to secure individuals' Convention rights and without it there is a real risk of such rights becoming illusory, particularly for the most vulnerable members of our society. It is notable that the consultation says it will "*protect essential rights… like the right to life*" when in reality "reform" of the approach to positive obligations will significantly undermine this right.

55. The consultation paper states that there is no proposal at this time to withdraw from the Convention and that the Bill of Rights will not create any fundamental conflict with the Convention.

56. Article 1 of the Convention is the obligation to respect human rights. It states:

> *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.*

57. Through application of the Convention by the courts, positive and negative obligations have been imposed on states to secure the rights of the individual. This is entirely appropriate. It is not sufficient for the state merely to refrain from interfering in the rights or liberties of an individual. To secure a right the state must not violate that right and must take proactive steps to protect it when it is at risk. The existence of positive obligations is of particular importance to the most vulnerable members of our society (for example patients suffering from severe mental illness and children) who are least able to protect themselves and so are most dependent on the State to take steps to ensure their rights are safeguarded.

58. To the extent the courts have recognised positive obligations, their approach has been cautious and modest, with positive obligations only being recognised in a very narrow set of circumstances. We consider this point further below, with reference to Article 2 (the Right to Life) and Article 3 (the Prohibition on Torture) in respect of which we have particular knowledge and expertise.

Article 2

59. The cautious approach of the courts is clearly illustrated by the judgment of the Supreme Court in *Rabone,* which is referred to at paragraph 134 of the consultation. In this case hospital staff authorised home leave for Melanie Rabone, a 24-year-old suffering from a severe recurrent depressive disorder. Melanie had been admitted to hospital as an emergency following a suicide attempt and was assessed as being at high risk of a further suicide attempt. Despite her parents expressing repeated concerns to the hospital that she was not improving she was granted 2 days leave, during which she hanged herself in a local park.

60. The Supreme Court held that, in certain limited circumstances, a positive duty exists which requires a Trust to take reasonable steps (by no means all available steps) to protect a voluntary psychiatric patient from a "real and immediate" risk of death of which it knew or ought to have known. The Court was clear that a "real and immediate risk" to life is a "*necessary but not sufficient condition for the existence of the duty.*"[37] Something

[37] *Rabone* [2012] 2 AC 72 per Lord Dyson at paragraph 21

further was required; an assumption of control[38] and/or exceptional vulnerability on the part of the victim.[39] In addition, the nature of the risk was relevant – it had to be an "exceptional" risk, rather than a risk of the kind individuals in the relevant category should reasonably be expected to take.[40] In so finding the Court noted that voluntary mental health inpatients are in a unique position; the state is able to exercise coercive powers over them[41], knowledge of the existence of these powers may itself have a coercive effect on this vulnerable cohort[42] and their mental disorder is likely to impair their capacity to make a rational decision to end their life as a result of which they need to be protected from a risk of death by those means.[43] As the Court stated, "*The very reason why she was admitted was because there was a risk that she would commit suicide from which she needed to be protected.*" In the absence of a positive obligation any stated commitment to protecting very vulnerable individuals such as Melanie from a real and immediate risk of death is hollow.

61. The consultation paper states that this decision placed "*an obligation on the hospital which did not exist under previous case law*". The approach which the Court adopted is squarely in line with our common law traditions, which the consultation purports to respect.[44] As Lord Dyson noted, "*the common law of negligence develops incrementally and it is not always possible to predict whether the court will hold that a duty of care is owed in a situation which has not previously been considered.*"[45] The judgments of Lord Dyson and Lady Hale referred mainly to the earlier Supreme Court case of *Savage*[46] and, having carefully evaluated the differences between detained and informal patients, which it found to be "*more apparent than real*" for the reasons set out at paragraph 28 of the judgment, the Court incrementally developed the positive obligation under Article 2 by analogy.

62. Since *Rabone* there has been a wealth of judgments from this jurisdiction, from European jurisdictions and from the ECtHR which have considered the state's obligations under

[38] *Ibid* at paragraph 22
[39] Such as in the case of a child who the state knows is at risk of abuse, see *Rabone* at paragraph 23 referring to *Z v United Kingdom* (2001) 34 EHRR 97
[40] *Rabone* at paragraph 24
[41] *Ibid* at 28
[42] *Ibid* at 29
[43] *Ibid at 30*
[44] *Consultation Paper para 6, para 8.*
[45] *Rabone* at para 25
[46] *Savage v S Essex Partnership NHS Trust* [2009] 1 AC 681

Article 2. It is not accurate to say, as paragraph 133 of the consultation paper implies, that Article 2 obligations have incrementally expanded in each case. There are many examples of the courts holding that Article 2 is not engaged and indeed key judgments which contract rather than expand the positive obligations on public services to uphold Article 2.

63. For example, in the case of *Lopes De Sousa Fernandes v Portugal* the ECtHR Chamber found that there had been a violation of the substantive or general obligation under Article 2 because it considered that the lack of coordination between hospital departments had deprived the applicant's husband the possibility of accessing appropriate emergency care. This decision was overturned by the Grand Chamber which distinguished between mere medical negligence and denial of access to life saving treatment and provided conditions which must be met to trigger the substantive duty under Article 2, thus narrowing the obligations on the state. This approach was upheld by the UK courts in *Parkinson v HM Senior Coroner for Kent & others*[47].

Article 3

64. Another area in which the courts have recognised that in limited circumstances a positive obligation exists is in respect of Article 3. Such positive obligations may include, for example, a duty to conduct an appropriate enquiry into behaviour amounting to a breach of Article 3, such as rape. As noted in *Commissioner of Police of the Metropolis v DSD and another*[48] (the 'Black Cab Rapist' case), there are sound policy reasons for this:

> "*In order to be an effective deterrent, laws which prohibit conduct constituting a breach of article 3 must be rigorously enforced and complaints of such conduct must be properly investigated.*"[49]

65. To this end it can be seen that, far from undermining public service priorities, the existence of positive obligations *complements* priorities, such as the pressing societal need to ensure the investigation and where appropriate the prosecution of cases of rape,

[47] [2018] EWHC 1501
[48] [2018] UKSC 11
[49] *DSD* per Lord Kerr at paragraph 24

both to safeguard victims and potential victims and to tackle the "*crisis of public trust in the criminal justice response to rape and crimes of violence against women and girls.*"[50] Even so, it is notable that the Supreme Court in *DSD* held that only "*conspicuous or substantial*" or "*egregious and significant*" errors in an investigation would amount to a breach of the positive obligation under Article 3.

66. As with Article 2, we have seen recent moves by the courts to contract rather than expand the state's positive obligations under Article 3. For example, in the recent case of *AB v Worcestershire County Council and Birmingham City Council*[51] the Judge found that an operational duty to protect a child from Article 3 ill-treatment cannot be owed unless the child is in the *"care and control"* of the State, or there exists *"an assumption of responsibility and the capacity to control the immediate risk, for example by arresting or detaining or otherwise removing the source of the risk*".

67. It is submitted that the judgment of *AB* is wrong and is unlikely to survive scrutiny by a higher court. The alternative prospect, that the state owes no duty pursuant to Article 3 to protect a child who it knows is at real and immediate risk of suffering torture or inhumane treatment, is chilling. It is worth noting that the effect of the Court's judgment in *AB* is to align the test for when a duty is owed under Article 3 with the test for when a duty of care exists in negligence. Following the decision of the Supreme Court in *CN v Poole Borough Council*[52] and the narrowing of the circumstances in which a social services authority will owe a common law duty of care in discharging its child protection functions, claims under the HRA have increasingly become the only viable civil route for abused children to seek legal recognition of their suffering. Any move, either by the courts or by the legislature, to contract or remove the positive obligation under Article 3 and thereby restrict these children's ability to seek justice must be strongly resisted.

[50] Forward by Max Hill, DPP, to the Crown Prosecution Service Rape Strategy Update, February 2022: https://www.cps.gov.uk/publication/rape-strategy-update
[51] [2022] EWHC 115 (QB)
[52] [2019] UKSC 25

B. The Bill of Rights *could* seek to address the "imposition and expansion of positive obligations"

68. It is unclear how a Bill of Rights *could* seek to address the "imposition and expansion" of positive obligations without undermining the cogency and effectiveness of the State's negative obligations. There is no binary distinction between positive and negative obligations. The right to a fair trial under Article 6, for example, can be categorised as negative (the state should not impose an unfair trial on a person) or positive (a duty to provide an independent court, including a paid, professional and well-qualified judge).

C. Public service priorities are unhelpfully impacted by human rights litigation

69. The suggestion that public service priorities are unhelpfully impacted by human rights litigation has been touched on above, by reference to *DSD.* Far from undermining the achievement of public service priorities, the existence of positive obligations complements them. The consultation acknowledges as much as paragraph 229, which states the positive obligations imposed by the Courts "*can make for common sense policy and guidance to operational decision making*".

70. It is not entirely clear whether the suggestion is that public services should be able to pick and choose the responsibilities that fit best at any time within their fluctuating policies and budgets. We would argue that this approach, if it is being proposed, would cause confusion. It would also strip the Convention rights of their inherent, inalienable quality and there is a particular risk that those with the quietest voice and most need of protection (such as children at risk of abuse) would suffer most harshly as a result.

71. We note paragraph 231 of the consultation paper which states:

> *We would like to consider how we can restrain the imposition and expansion of positive obligations, allowing the government and those delivering public services to take appropriate decisions for everyone in society, in order to avoid such decisions and priorities becoming distorted by the outcomes of individual litigation.*

72. This paragraph seems to fundamentally misunderstand the way in which our legal system and the common law works.

73. As outlined in the consultation paper, the UK has made a significant contribution to the development of rights and civil liberties over many centuries. The common law is at the heart of our successful and internationally admired legal system. It allows the law to adapt to changes in society whilst upholding the principles and traditions most valuable to us. Far from *distorting* the decisions and priorities of government, individual litigation allows for the evolution of law leading in some cases to the expansion, but in others to the contraction, of rights and responsibilities as society evolves. It is always open to Parliament to act where it feels the Courts may have gone wrong (as occurred, for example, in response to the decision of the House of Lords in *YL v Birmingham City Council & Others*[53], which was swiftly overruled by section 145 of the Health and Social Care Act 2008). However, the value of the courts in being able to act much more quickly than Parliament to remedy injustices, subject to Parliament being able to override court decisions as and when it sees fit, should not be dismissed and is a critical part of our constitutional arrangements.

74. Furthermore, as stated above, there is a risk that the implementation of the utilitarian approach advocated for in paragraph 231 will in practice result in fundamental rights being stripped of all meaning for those most in need of the protection currently conferred by them.

75. This is not to say that potential impacts on public services are not a relevant consideration, they are and the caselaw makes clear that the Courts afford this consideration very significant weight. Numerous cases have found that positive obligations should "*not impose an impossible or disproportionate burden on the authorities.*"[54] This must be correct. However, and as stated above, the burden on public services is not the only relevant policy consideration, there are also imperatives pointing the other way, in particular the need to ensure that the rights enshrined in the Convention are "practical and effective."[55]

76. We would further note that judicial consideration of positive obligations does not solely arise in the context of human rights litigation. This firm has significant experience of

[53] [2007] UKHL 27

[54] *Osman v United Kingdom* [1999] 1 FLR 193, para 16 as referenced, for example, in *Watts v United Kington* (2010) 51 EHRR 66 at para 83, *Rabone* at para 12 and *DSD* at para 92, 98 and 112.

[55] See, for example, *Oneryildiz v Turkey* (2005) 41 EHRR 20 at para 69.

representing bereaved families in inquests where the enhanced procedural obligation under Article 2 is triggered as a result of a suspicion that a positive obligation under Article 2 has been breached. Such *Middleton*-inquests[56] differ from the more typical *Jamieson*-inquests[57] as Coroners, and where relevant juries, are obliged to consider not just "how" the deceased died but "in what circumstances". The investigation into the wider circumstances of a death leads, in many of the inquests in which we act, to Coroners making "Prevention of Future Deaths Reports" identifying matters which, in the Coroner's opinion, mean there is a risk of future avoidable deaths. There is no obligation on public bodies to act on these reports but in our experience they often find these reports invaluable in providing guidance as to ways they can adjust their service provision to improve individuals' safety.

D. The cost of litigation

77. It is striking that the consultation provides no sound evidence or data for its claim that the HRA has promoted 'costly human rights litigation' through 'the imposition and expansion of positive obligations'. Rather than provide specific costings or even ball-park figures, the consultation makes generic assertions with reference to a small number of academic works that also provide no specific costs assessments.

78. Accepting for the sake of argument (whilst not conceding the point) that the "imposition and expansion" of positive obligations has resulted in "costly human rights litigation", for the reasons set out above it is difficult to conceive of a Bill of Rights that could be drafted in such a way that the obligations on public services were immutable, whilst also securing individuals' Convention rights. A Bill of Rights which did not encompass positive obligations would be of such little value as to be pointless. A Bill of Rights which could not be interpreted in the light of societal developments would quickly atrophy. Our view is therefore that, in order to secure the rights enshrined in the Convention, the imposition of positive obligations on public services cannot, and should not, be restrained by use of the blunt instrument of legislation.

[56] R (Middleton) v Coroner for the Western District of Somerset [2004] UKHL 10
[57] HM Coroner for North Humberside and Scunthorpe, ex parte Jamieson [1995] QB 1

79. We suggest instead that the solution is one which is in line with a recommendation made by the IHRAR, namely to develop an effective programme of civil and constitutional education concerning human rights. We can see no reason why public services could not be provided with regular training regarding human rights and up-to-date information about their positive obligations. It is unusual for individual litigation to result in such a significant change in the obligations of a public body that any policies or operational strategy would need to be drafted again from scratch or even to be radically updated. We suggest that this training, and the occasional limited change in approach to decision making to ensure that the rights of the individual are secured, would cost far less than litigation.

RESPONSE TO QUESTION 12

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."

Option 2A

Interpretation of legislation

(1) Where the words used in a provision of legislation can be given more than one interpretation which—
  (a) is an ordinary reading of the words used, and
  (b) consistent with the overall purpose of the legislation,
  the interpretation to be preferred is one that is compatible with the rights and freedoms in this Bill of Rights.

(2) In this section 'legislation' means—
  (a) primary legislation, and
  (b) subordinate legislation (within the meaning of the Interpretation Act 1978).

Option 2B

Interpretation of legislation

(1) Legislation must be interpreted in a way that is compatible with the rights and freedoms in this Bill of Rights, but only if that interpretation is both—
  (a) an ordinary reading of the words used in the legislation, and
  (b) consistent with the overall purpose of the legislation.

(2) In this section 'legislation' means—
  (a) primary legislation, and
  (b) subordinate legislation (within the meaning of the Interpretation Act 1978).

80. We do not support the view that section 3 should be repealed or reformed and reject the changes proposed to section 3. The IHRAR report provides significant evidence on the use of section 3 and demonstrates that there is no case for reform.

81. We agree that there is *"no real evidence to suggest that UK Courts have adopted an approach that arguably misuses section 3 and the intention underpinning it".*

82. The evidence demonstrates that the Courts do not use section 3 excessively and, when used, do not do so in such a way as to amend the intention underpinning legislation. To the contrary, the Courts are alive to that intention and take a measured and cautious approach.

83. The evidence compiled for the IHRAR demonstrates that the system as it currently stands works and there is no evidence to suggest that it needs to be changed.

84. The Courts are aware of matters that are for Parliament alone and where they should not intervene. The Courts consider legislation consistently with its overriding purpose. An example of this is in a case Leigh Day were instructed in, the case of A & B. The case turned on whether excluding A and B, who are victims of human trafficking, from compensation under the Criminal Injuries Compensation Scheme (CICA) unjustifiably discriminates against A and B, in breach of Article 14 taken with Article 4.

85. The Appellants are twin brothers and Lithuanian nationals. A was convicted in Lithuania of burglary on the 6th June, 2010 and was sentenced to 3 years' imprisonment. B was convicted in Lithuania of theft on the 11th December, 2011 and was sentenced to 11

months' imprisonment. In 2013 the Appellants were trafficked from Lithuania to the United Kingdom. The Appellants applied to the CICA for compensation under the Scheme in 2016.

86. The CICA wrote to each of the Appellants, refusing to make an award of compensation for criminal injuries under paragraph 26 of the Scheme which sets out the circumstances in Annex D where an award will be withheld. This includes where an applicant has unspent convictions as was the case here.

87. The Appellants contended that the relevant provisions of the Scheme were unlawful on the basis that they contravened Article 17 of the European Directive 2011/36/EU, which directed member states to afford special protection to victims of trafficking and for discrimination against the Appellants (on the ground of their "other status" of having unspent convictions for offences which resulted in a custodial or community sentence) contrary to Article 14, read with Article 4.

88. The Court of Appeal held that this exclusionary rule within the Scheme was justified, that the Scheme had been approved by Parliament and called for judicial restraint. They took the view that the Court should not intervene.

89. The Appellants appealed to the Supreme Court (*A and B (Appellants) v Criminal Injuries Compensation Authority and another (Respondents) UK SC 2019/0055*). The appeal was dismissed, the Court finding that the exclusionary measure *"has the legitimate objective of limiting eligibility to compensation to those deserving of it".*

90. The Supreme Court found that:

> ***…***
>
> ***The question whether and, if so to what extent, the state should pay compensation to victims of crimes of violence who have themselves committed crimes is essentially a question of moral and political judgement. Furthermore, it requires the exercise of political judgement in relation to the allocation of finite public resources. This is, therefore, a field in which the courts should accord a considerable degree of respect to the decision maker." [83]*** *(our emphasis)*

> *"Secondly,* ***the reasons for judicial restraint are greater where, as in the present case, the statutory instrument has been reviewed by Parliament****. In Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 39; [2014] AC 700 Lord Sumption expressed the matter in the following terms at p 780, para 44:*
>
> *"… [****W]hen a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful*** *on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy." [84] (our emphasis)*

91. The above case demonstrates the Court exercising judicial restraint. They found the Scheme to be proportionate and therefore did not engage with section 3.

92. We strongly resist the proposal that section 3 be reformed/repealed and there is no evidence to support amendment or repeal of section 3. If a change is absolutely necessary then we submit that the most appropriate choice would be Option 2B. However, the IHRAR report considers that the solution is *"…not to alter the operation of section 3 and 4, but rather to put Parliament in the best possible position to scrutinise judgments that involve section 3…".* We agree with this proposal and strongly reject any change to the current regime.

RESPONSE TO QUESTION 13

Question13 : "How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?"

93. We believe a database as addressed below would assist in such a process and would enhance Parliament's role and that of the Joint Committee on Human Rights in scrutinising judgments.

RESPONSE TO QUESTION 14

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

94. The IHRAR report sets out that *"there is no definitive record of the UK Courts' use of section 3*". We agree that such decisions should be more accessible and that the absence of this may have led to the misconception of the use of section 3. We agree that such a database would increase transparency so that section 3 is better understood and any negative perceptions of its use quashed. However, any such database would have to have appropriate resources to ensure that it is adequately maintained and kept up to date.

RESPONSE TO QUESTION 15

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?"

95. We unequivocally oppose this proposal which would reduce government accountability and weaken protection for human rights.

96. Where secondary legislation is incompatible with human rights, the Courts have a range of remedies available to them under the common law and the HRA, and their powers should not be reduced to declarations of incompatibility.
97. Neither the IHRAR nor the Consultation paper provide any justification for this proposal, which would effectively elevate the status of executive-made secondary legislation to the status of Acts of Parliament.

98. One of the main stated intentions in the Consultation paper is to give effect to the will of Parliament. The current mechanism in the HRA does this by providing for declarations of incompatibility for primary legislation and secondary legislation where the incompatibility arises from the underlying primary legislation. This respects the will of Parliament and the separation of powers.

99. The vast majority of secondary legislation is passed by the executive without ever being debated by Parliament at all and therefore subject to very little if any parliamentary oversight. Secondary legislation is in reality no different to any other decision of the executive and where it is incompatible with Convention rights, the Courts should not be limited to a declaration of incompatibility (which would leave the secondary legislation in place up to and until the Minister decides to take action).

100. The role of the Courts in providing oversight of secondary legislation is working well and does not require reform. Secondary legislation often deals with high levels of detail. It is only when individual injustices arise, following the implementation of the secondary legislation and its interaction with other regulations, that illegalities can be identified and therefore the Courts (rather than Parliament) are best placed to provide this scrutiny on the power of the executive.

101. The IHRAR Report provided a detailed and careful analysis of the reasons, both practical and theoretical, why the Courts must retain the power to quash secondary legislation. The Report found that there was no case for change to section 4 and the Consultation has failed to provide any proper rationale for this proposal. In fact, the evidence presented to the IHRAR Panel was that the Courts exercise this discretion carefully and have rarely quashed secondary legislation on HRA grounds and have not done so unless it is incompatible in all or nearly all cases.

RESPONSE TO QUESTION 16

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."

102. We unequivocally oppose any proposal that there be a presumption for quashing orders to be suspended or prospective-only as this would reduce access to justice and weaken the protection of human rights.

103. There are some, limited, circumstances where it could be justifiable for the Court to make a suspended quashing order, where there is clear evidence that a quashing order with immediate effect would for example cause severe hardship to members of the public, which outweighs the ongoing violation of human rights. However, in such cases, it would be preferable for the public authority to have made contingency arrangements which could be introduced as soon as practicable after the order is made.

104. We would oppose any widespread or presumed use of suspended quashing orders in cases involving Convention rights, as where the Courts have identified that human rights have been breached by a Government decision, that decision should be remade as soon as possible in accordance with the law.

105. With regard to prospective-only quashing orders, we cannot conceive of any circumstances where these could be appropriate in cases involving Convention rights. If quashing orders were prospective-only, the consequence would be that where the executive acts unlawfully, and individuals suffer, then individuals affected up until that point would have no recompense. Claimants affected by a one-off decision, or a decision no longer in place at the time of the hearing, would have no remedy at all. Claimants would therefore have no personal incentive to challenge decisions which were incompatible with their Convention rights, which would result in a significant reduction of government accountability.

RESPONSE TO QUESTION 17

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."

106. We unequivocally oppose the repeal of the HRA or any of the reforms as set out in this Consultation paper on the basis that the Government's proposals will reduce protection for human rights.

107. In respect of Remedial Orders, our view is that given the extremely limited circumstances in which they have been used, and the lack of evidence or analysis provided in the Consultation paper, we do not consider there is any basis or particular urgency for statutory reform.

RESPONSE TO QUESTION 18

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."

108. Section 19 HRA requires the Minister proposing a new Bill to Parliament to make a statement before the Second Reading of the Bill in each House about whether or not they consider the proposals are compatible with the Convention.

109. The Consultation document sets out that the purpose of the procedure under section 19 is "to demonstrate to Parliament that the relevant minister has considered, and come to a view, as to the compatibility of the Bill with Convention rights".

110. We consider section 19 to be an important procedural requirement that ensures Ministers have considered the impact of any new legislation on rights protected by the Convention before Parliament is asked to debate that legislation. In our view, the section 19 process is an important mechanism to ensure transparency in the process of passing new legislation. It also seems to us that the requirement for a Minister to make such a declaration is likely in practice to result in departmental staff responsible for drafting new legislation taking account of the Convention at an early drafting stage, thereby minimising the prospect of time-consuming redrafting stages as the Bill passes through Parliament. That section 19 has such an impact can perhaps be seen by the practice of Government departments responsible for new Bills publishing human rights assessments, despite this not being a strict requirement of section 19. In our view, section 19 appears to function well as a mechanism for ensuring that level of transparency and accountability.

111. We cannot see how this procedural requirement, as is suggested in the Consultation, gives rise 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*". First, under the section 19 procedure it is open to the Minister to declare under section 19(1)(b) that, even though they are unable to make a statement that the new Bill is compatible with Convention rights, the Government nevertheless wishes Parliament to proceed with the Bill (section 19(1)(b)), such that, regardless of the statement under section 19, Parliamentary sovereignty is unimpeded by the Government's position. Second, we do not believe that a procedural requirement to consider enforceable Convention rights when drafting new legislation could in any meaningful way impinge on the Government's ability to develop "innovative policies". A breach or curtailment of Convention rights through primary legislation is, of course, not synonymous with innovation, and we strongly oppose the suggestion that it might be. Further, and in any event, the section 19 process is a procedural one only, and, as stated above, Parliament retains sovereignty to pass primary legislation regardless of the Minister's section 19 statement.

112. We note that the IHRAR considered various options to amend section 19 in order to increase the scope of its potential application, yet the IHRAR decided that such amendments were not necessary. In the view of the IHRAR:

"*there can be no doubt that [the section 19 process] has had a major, transformational and beneficial effect on the practice of Government and Parliament in taking account of human rights issues when preparing and passing legislation."* (Chapter 5, page 244)

113. The Government's consultation document provides no evidence to suggest that, contrary to the position of the IHRAR, reform of section 19 is necessary.

RESPONSE TO QUESTION 19

114. We have opted not to prepare an answer to this question and to instead focus our consultation response on matters where we feel, by virtue of our particular experience and expertise as outlined in the introduction to this response, we can add particular value.

RESPONSE TO QUESTION 20

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."

115. The definition of *public authority* in the Act is that it includes:

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.[58]

116. Further:

In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.[59]

[58] Section 6(3) HRA
[59] Section 6(5) HRA

117. That wording elegantly and carefully circumscribes the bodies exercising the functions of the state in respect of which the rights under the Act bite.

118. As the consultation paper notes, the definition settled on by the parliamentary drafters with great prescience, is particularly neat, practical and efficient because it has allowed the application of the Act to evolve in line with changes in how public functions are delivered.

119. We agree with the Government's opening observation that "*the range of bodies and functions to which the obligations under the Human Rights Act currently apply is broadly right*."

120. Indeed, we would go further and question whether it is sensible, or even possible, to amend the current definition of public authority in section 6 of the Act to amend the current approach and definition.

121. The only explanation advanced for making any change to the definition is a purported lack of certainty. The narrative preceding the question maintains that there is no intention to alter the application of the obligations under the Act.

122. Taking that at face value, it is difficult to conceive that it would be possible to amend the definition in the Act in any manner which would provide further certainty without fundamentally limiting or narrowing the current application of the obligations under the Act/Bill. It is noteworthy that the Government has not even attempted to do so and simply posits an open question.

123. Not only is the current definition succinct and elegant, it is also now supported by twenty years of interpretation and application in case law. Any change in approach or definition will throw all that up in the air and lead to many years of increased uncertainty, increased litigation and increased costs which could easily be avoided by sticking with the current drafting.

124. Furthermore, any changes to the definition would require other statutory amendments (not to mention consideration of the ramifications of those amendments) to, for instance, the Equality Act 2010.

125. Logically and rationally that should really be the end of the matter.

126. It might perhaps prudent however to consider further what lies behind this question being asked at all.

127. As we have observed in our introduction, and throughout our responses to the consultation questions, there is an absence of any evidence led thread of reasoning throughout the consultation paper. Rather what we seem to have been presented with a disjointed jumble of grievances as to the impact of the Act. A significant proportion of those grievances appear to be entirely unfounded (though apparently keenly felt), pleading in reliance numerous examples where the Courts have rejected claims made under the Act.

128. As we highlight, the common thread appears not to be whether the Act is working as parliament intended, or whether it could work better, but rather an aversion by the executive to being challenged at all.

129. That is a matter of deep constitutional concern and represents a significant erosion both of the rights of the citizen and of the democratic principle of the separation of powers. Our system is already skewed in favour of the executive due to the imperfect separation of powers between the executive and the legislative. The Government's actions of late seem set on further weakening the foundation of our democracy by eroding the powers of the judicial pillar both directly (eg: the judicial review reforms) and, in this instance, by seeking to limit the rights which can be enforced in the courts.

130. This context would give the cynically minded pause for thought when responding to this question. The grievance that appears in the narrative relating to this question would seem to be that the Courts had the audacity, in the case of *LW,* to hold the Ministry of Justice responsible for the failings of its private contractor.

131. But what is the alternative? That the Government can simply contract away its legal obligations? Leaving a citizen to access services from a corporate entity on the basis of rights that would extinguish with that entity? Clearly that would be unlawful and fly in the face of parliament's intentions when enacting the powers and duties of public bodies.

132. The Act defines *public authority* by the nature of the function being undertaken. But the ultimate obligation to perform a public duty or exercise a public function remains with the public body. The purpose of defining public authority more broadly (i.e.: than public body) is to ensure that the individual citizen can access direct remedies against the contracted provider of that public function or service. That is clearly sensible. However, there will always be circumstances where it is necessary or appropriate to take a claim directly against the relevant emanation of the Government. For instance, where the public body has failed to contract services on the correct legal basis, the private contractor cannot be held to account beyond the terms of its contract. In other instances, it may not be clear precisely where the fault lies and it may be necessary to name both the service provider and the responsible public body; and in some cases, no doubt, it will be appropriate for relief to be levelled against both.

133. From a legal perspective the only realistic alternative to the current application of the Act would be to make the responsible public body liable alone, irrespective of the actions or failings of the contractor. However, that would be far from satisfactory both from the point of view of the victim (who would have to take indirect action against the public body to resolve the situation) or to the public body who would find themselves in court on account of the failings of the contractor.

134. For all these reasons it is neither necessary, appropriate or desirable to alter the current definition of public authority.

RESPONSE TO QUESTION 21

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.

135. We are of the opinion that section 6(2) does not need to be changed or replaced. By allowing public authorities to rely on an ordinary reading of legislation in their actions, section 6(2) in its current form provides confidence to public authorities to perform their functions within the bounds of human rights law.

136. Given question 21's reference to the potential replacement of section 3 in question 12, we would refer the reader back to our response to question 12 on replacing section 3. In accordance with our response to question 12, it is neither necessary, appropriate or desirable to replace section 6. *However, if a change must be made, we would hesitantly prefer Option 2B in the alternative to no change being made at all.*

RESPONSE TO QUESTION 22

Question 22: "…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."

137. The consultation document correctly identifies that Article 1 of the Convention provides that contracting states shall secure to 'everyone within their jurisdiction' the rights and freedoms set out in the Convention. The question of jurisdiction is not directly addressed by the HRA. It has instead been determined progressively by the courts, in response to specific cases where acts of Convention States abroad have ostensibly resulted in violations of Convention rights.

138. The consultation document supposes that this "*domestic and Strasbourg case law has created uncertainty for our armed forces, with complex legal arguments developing around when the Human Rights Act and indeed the Convention apply abroad and in such challenging situations as armed conflict, and about the interaction between the Convention and the law of armed conflict in such situations*".

139. In our view, and as explained below, we do not consider that uncertainty has been created through the development of the extraterritorial jurisdiction of the Convention. While we recognise that Parliament may not have predicted the precise nuance of subsequence expansion of the Article 1 jurisdiction at the time of enacting the HRA in 1998, the very nature of the Convention as a "living document" means that its development in caselaw was inevitable (see further our submissions in respect of section 2 HRA and *Ullah*). Such development has, in our view, been limited and made only in response to very specific circumstances in which Convention States have acted abroad.

The development of Article 1 jurisdiction

140. Article 1 provides that State Parties to the Convention "*shall secure to everyone <u>within their jurisdiction</u> the rights and freedoms defined in [the Convention].*" [emphasis added]. The scope of the Convention has long been recognised by the Courts as "primarily territorial".

141. Indeed, in *Bankovic v Belgium* [2001], the Grand Chamber held that "*Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case*." One such exception includes the situation where a State exercises effective control of a territory and its inhabitants abroad "as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government" (para.71). In *Bankovic*, the Court held that a NATO airstrike on the Radio Televizije Srbije in Belgrade during the Kosovan conflict in 1999 did not constitute 'effective control' and was therefore not within the extra-territorial scope of the Convention.

142. That approach has subsequently been expanded in case law, but in a manner which we consider to be incremental, careful and only in response to specific factual circumstances. The history of the development of this case law is explicated in Chapter 8 of the IHRAR report and we therefore do not rehearse it here. By way of summary, however, we note the following:

143. In *Al-Skeini v The United Kingdom (*2011) the ECtHR Grand Chamber held that the Convention applies in circumstances where a Convention state exercises physical power and control over an individual situated on foreign territory. As stated at [137]: "*It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.*" The Grand Chamber thus made clear in *Al-Skeini* that what mattered was the UK armed forces' power and control over the individuals in question.

144. The ECtHR Grand Chamber's approach was adopted and followed by the English Supreme Court in *Smith v Ministry of Defence*, which related to the deaths/injuries of British soldiers serving in Iraq between 2003 and 2006. The Supreme Court correctly concluded that a state's extra-territorial jurisdiction over local inhabitants exists because of the authority and control that is exercised over them, as a result of the control a state has over its own armed forces. *'It would seem to follow therefore that an occupying state cannot have any jurisdiction over local inhabitants without already having jurisdiction over its own armed forces, in each case in the sense of article 1 of the Convention'* (para.50).

145. More recently, in *Hanan v Germany* (App. No. 4871/16, Judgment of 16 February 2021), a case not considered in the consultation document or in the IHRAR report, the Grand Chamber confirmed that the existence of "special features" in a case can also give rise to extraterritorial jurisdiction under the Convention. In Hanan, as a result of the presence of those "special features", Germany had extraterritorial jurisdiction which gave rise to an obligation to conduct an Article 2-compliant investigation into deaths caused by German forces operating as part of ISAF in Afghanistan.

146. The special features that existed in Hanan to create the necessary jurisdictional link were:

a. Germany was under an obligation under customary international humanitarian law to investigate the deaths wherever there is a question of "individual criminal responsibility" for war crimes arising in respect of members of national armed forces (Hanan, §137).
b. The Afghan authorities were, for legal reasons, prevented from instituting their own criminal investigation in respect of the actions of German personnel involved in the Incident (Hanan, §138); and
c. The German authorities had jurisdiction under domestic law to prosecute a war crime committed outside Germany by a person subject to German service jurisdiction. The UK authorities similarly have such jurisdiction pursuant to section 51 of the International Criminal Court Act 2001. The Grand Chamber noted that "*in the majority of those Contracting States which participate in military deployments overseas, the competent domestic authorities are obliged under domestic law to investigate alleged war crimes or wrongful deaths inflicted abroad by members of their armed forces, and the duty to investigate is considered as essentially autonomous*" (§141).

147. In *Hanan*, the Grand Chamber considered that these three circumstances amounted to "special features" giving rise to a sufficient jurisdictional link to satisfy Article 1 (there, in relation to the procedural duty to investigate under Article 2) (Hanan, §142).

148. Thus, while jurisdiction under Article 1 is "primarily territorial" the ECtHR caselaw has shown it to also apply in circumstances where a State exercises effective control over an area outside its territory, or physical control or authority over a person (and irrespective of whether the armed forces in question are also subject to international humanitarian law), or where "special features" are present.

149. The suggestion in the consultation document that the ECtHR has taken an unduly expansive approach in its interpretation of Article 1 is, in our view, simply not supported by the careful and incremental development of the law in response to specific circumstances. In each of the cases outlined above, the Convention State in question had either exerted control over the individuals whose rights were breached or "special

features" were present. That is a limited and cautious expansion to Article 1 extraterritorial jurisdiction and not one which gives rise to the "uncertainty" suggested by the consultation document. Indeed, notably, the current position is so confined that it would not result in a finding that an incident fell within a Convention State's jurisdiction where that State had exerted force resulting in harm but where it did not have control and no special features were present. The current position also falls far short of the more expansive protection proposed by the UN Human Rights Council with regards to the International Covenant on Civil and Political Rights (ICCPR); namely, that control over a person's "enjoyment of their right to life" is the key consideration in whether they are subject to a State's jurisdiction (Human Rights Committee, General Comment 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, para 63).

150. The IHRAR report itself notes that of the submissions it reviewed relating to extraterritorial application, there was "*a strong view that no change was necessary*" and that any clarifications could be made through case law development.

151. We strongly oppose any weakening of the Convention's extraterritorial application. The Convention currently applies to acts abroad in only very limited circumstances, but that is critical in ensuring that those who exercise the powers of Convention States abroad do so in ways compatible with the Convention.

Domestic changes

152. We note that the consultation document appears to accept "*the extraterritorial application of the Convention*" and proposes that "*this issue would need to be addressed in Strasbourg*" rather than through a "*unilateral domestic legislative solution to this issue and drafting the Bill of Rights to apply only on a restricted territorial basis*". We welcome the recognition within the consultation document that, to the extent that it is considered that there is an issue with extraterritorial jurisdiction (which for the reasons set out above we do not accept), this is not a matter which can possibly be resolved on a unilateral domestic basis. We note that while a duty to consider derogating from the Convention in 'significant' overseas operations was proposed as part of the Overseas Operations Act, the Act was subsequently passed without that provision last year.

153. We are of the firm view that any domestic reform seeking to limit the HRA's extraterritorial jurisdiction would result in an unacceptable divergence between the protection of fundamental rights available in the UK courts and that in the ECtHR (and other Convention States). A domestic solution such as restricting the extraterritorial scope of the Bill of Rights, would, furthermore, not only require other significant domestic legislative reform but would also, contrary to the apparent concerns expressed in the consultation document, likely result in an expanded role for the ECtHR in matters of national security.

154. We note that the IHRAR also opposed a unilateral domestic solution, stating that a "*unilateral solution, for instance by legislative amendment of the HRA, would not resolve the position under the Convention, which would remain binding on the UK internationally and would risk damaging vital UK interests (particularly in the Military and Intelligence spheres) in cases before the ECtHR*." (IHRAR, p337).

155. Thus, while we consider that the caselaw developments have not created uncertainty for UK military operations overseas and instead have precisely defined limited circumstances in which extraterritorial jurisdiction may arise, to the extent that the UK nonetheless wishes to engage further in this issue, we support the view that this cannot be done as a unilateral domestic matter. As such, we do not consider that the issue of extraterritoriality is one that falls within consideration for a new Bill of Rights.

On the "tension between the law of armed conflict and the Convention"

156. The so-called "tension" between the law of armed conflict (LAC) and the Convention has been the subject of numerous discussions over the years and has been examined and dealt with at length by both the European and English courts. We do not intend to repeat these arguments in the context of this consultation, but instead refer to two key cases in which the English Courts have been able to properly deal with and adequately reconcile this tension between LAC and the Convention.

157. In the case of *Al-Waheed and Mohammed v Ministry of Defence* [2017] UKSC 2, the Supreme Court considered the legality of the UK detention regime in post-occupation Iraq and Afghanistan, in the light of recent ECtHR jurisprudence. In January 2017, the Supreme Court held that UK armed forces had the power to detain the claimants pursuant

to the relevant UN Security Council Resolutions, provided this was “necessary for imperative reasons of security”; and that Article 5(1) should be read so as to accommodate, as permissible grounds, detention pursuant to that power.

158. The Supreme Court also considered the procedural safeguards applicable in armed conflict, and unanimously held that British forces had a duty, under Article 5(4), to provide adequate procedural safeguards to detainees at all times, as also required by international humanitarian law, in order to avoid detention becoming arbitrary.

159. Having ruled that a State’s obligations under Article 5 could be modified by a UN Security Council Resolution, it was essential that the law lords recognised the fundamental importance of adequate procedural safeguards when detaining in the context of an armed conflict. The Supreme Court upheld the UK’s continuing duty under the Convention to ensure that detainees, whether they are detained on British soil or in the context of a military operation abroad, are afforded adequate procedural rights and detained in accordance with the law.

160. The case of *Alseran and others v Ministry of Defence* [2017] EWHC 3289 (QB) concerned the case of four Iraqi claimants who alleged that they were unlawfully detained and ill-treated by British armed forces during the UK’s military intervention in Iraq between 2003 and 2009. The claims were advanced on two legal bases—under the general law of tort and under the HRA 1998 for alleged violation of Articles 3 (prohibition of torture) and 5 (protection of liberty). It was common ground between the parties that any individual detained by British forces in Iraq was within the jurisdiction of the UK for the purpose of Article 1, such that the UK was bound to secure to that individual rights under the Convention.

161. Applying the principles developed by the Supreme Court *in Al-Waheed*, Leggatt J (as he was then) held that the four Claimants were unlawfully detained and ill-treated by British soldiers, in violation of their rights under both the Convention and the 1949 Geneva Conventions.

162. It is important to note that the HRA has not lowered any threshold. What these cases brought under the HRA have shown is that Ministry of Defence’s own policies and procedures about the treatment of detainees and Prisoners of War violated the Geneva

Conventions during the Iraq conflict. Cases such as *Alseran* have highlighted the institutional failures at the MOD to prepare for the war and ensure that British soldiers were provided with training that was compliant with international standards. The issue was not, and has never been, about a so-called "uncertainty" about, or "tension" between, the applicable legal standards.

RESPONSE TO QUESTION 23

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.

We would welcome your views on the above options, and the draft clauses after

paragraph 10 of Appendix 2."

Option 1

Assessment of what is necessary in a democratic society

(1) This section applies in any case where a court or tribunal is required to consider what is necessary in a democratic society for the purpose of determining whether—
  (a) a provision of legislation, or
  (b) a decision of a public authority made in accordance with a provision of legislation,
  is compatible with one or more of the rights and freedoms in this Bill of Rights.

(2) The court must give great weight to Parliament's view of what is necessary in a democratic society (and the fact that Parliament has enacted the legislation is for these purposes determinative of Parliament's view that the legislation is necessary in a democratic society).

(3) In this section 'legislation' means—
  (a) primary legislation, and
  (b) subordinate legislation (within the meaning of the Interpretation Act 1978) which has been approved by a resolution of either or both Houses of Parliament.

Option 2

Assessment of public interest in determining rights compatibility

(1) This section applies in any case where a court or tribunal is required to consider the public interest in deciding whether—
  (a) a provision of legislation, or
  (b) a decision of a public authority made in accordance with a provision of legislation,
  is compatible with one or more of the rights and freedoms in this Bill of Rights.

(2) The court or tribunal must give great weight to the fact that Parliament was acting in the public interest in passing the legislation.

(3) In this section 'legislation' means—
  (a) primary legislation, and
  (b) subordinate legislation (within the meaning of the Interpretation Act 1978) which has been approved by a resolution of either or both Houses of Parliament.

163. This question goes to the heart of the balance between the rule of law and parliamentary sovereignty. The consultation makes it explicit that in the current Government's view, the Courts (when deciding whether an interference with an individual's right is proportionate) are failing to respect their proper constitutional role.

164. It is important to keep in mind that a proportionality review is a legal test and requires legal analysis. Whilst the legal decisions that the courts make in relation to the proportionality assessment may sometimes *feel* political, or may have political *consequences*, this does not mean that the courts are engaging in political decision-making or judicial overreach. The substance of their decision-making remains legal, despite what the consequences for the Government might be. As per Lord Bingham in *A v Secretary of State for the Home Department* (2004) UKHL 56; [2005] 2 AC 68 ("Belmarsh") [§42]:

> *"the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic."*

165. The principle of proportionality forms a vital part of the way human rights are protected. It comes into play when balancing the rights of the individual with those of the wider community. It dictates that the Courts consider the facts of each specific case, as opposed to taking a more formulaic blanket approach in the assessment of human rights breaches. In doing so, its aim is to lead to a fairer outcome for both the individual and the Government. Furthermore, when the Court is considering whether an individual's rights have been restricted, the principle of proportionality ensures that the Court also considers the magnitude of that restriction and whether a lesser restriction could have been used in its place.

166. We note that the IHRAR did not identify any concerns with the manner in which the Courts were applying the principle of proportionality. Moreover, we do not agree with paragraph 285 of the Consultation Document which states that: *"when assessing questions of proportionality, the courts have recognised to some degree the importance of giving due weight to the views of Parliament."* Rather than the views of Parliament being recognised *"to some degree"* It is our experience that the Courts are extremely conscious not to step outside their remit. As IHRAR concluded: *"The UK Courts have, over the first twenty years of the HRA, developed and applied an approach that is principled and demonstrates proper consideration of their role and those of Parliament*

and the Government."[60] This is particularly the case when the Court is considering an issue which Parliament has previously considered. A good example of this is found in the case law concerning assisted dying. The Supreme Court decided against making a declaration of incompatibility in *Nicklinson v Ministry of Justice* [2014] UKSC 38 relying heavily on the fact that this was a matter which Parliament had previously considered and was due to so again in the near future.

167. Neither do we agree with the sentiment expressed in paragraph 289 which states: *"We consider that the application of the principle of proportionality by the courts has created considerable uncertainty and impinged on the ability of elected lawmakers to balance individual rights with due respect for the wider public interest."* Courts and judges will always have differing opinions and different approaches to interpreting the law and that is no different here. There is no more uncertainty around the application of the proportionality test than in the application of other legal tests in other areas of law. Furthermore, we think that further legislation on the issue will lead to more, not less, clarity and therefore litigation.

168. We are concerned that any attempt to direct the Court to take greater account of the views of Parliament (which is de facto controlled by the Government of the day) is an attempt to restrict the ability of the courts to undertake the carefully considered balancing exercise required by the principle of proportionality. The current Government should also be reminded that our constitution also has other ways of maintaining a good constitutional balance. Parliament can, if it wishes, enact legislation in response to decisions of the courts and indeed has done so.

169. Should the Government require the courts to behave in the manner in which this consultation question suggests, there is only one outcome: when the courts are required to balance rights, they will have no choice but to find in favour of the Government of the day more frequently than they currently do. Far from the courts failing to recognise their proper constitutional role, this question strongly suggests to us that it is the Government which is failing to respect the legal and political limits placed on it by the UK's uncodified constitution.

[60] Pg 95 of IHRAR

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'.

170. As we have set out in some detail above, we do not agree that a change as per Option 1 and the proposed draft clause would produce positive benefits to the protection of human rights.

171. Should the law be changed in this way, the Court would in most cases be required to find that anything that Parliament, the Executive or a public authority has done should be viewed as "necessary in a democratic society". Therefore, the only way in which the Court could find the interference was not justified was if it did not have a legitimate aim, which is not a difficult test for the Government to meet and does not seem to have the same interplay with the protection of human rights. This Option would severely undermine the protection offered by the qualified rights in the HRA.

172. Indeed, we consider that should a change be implemented in such a way, one significant likelihood is that more individuals will be forced to appeal to Strasbourg and in turn, that the Strasbourg Court will more frequently find that the UK is in breach of the Convention.

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.

173. As above, it is our firm view that the courts do already take into account the importance of the constitutional balance between their own, the Executive's and Parliament's remits. This is evidenced clearly in the area of social and economic policy in which the Courts must find a measure to have been "manifestly without reasonable foundation" before it can decide it is unjustified; an extremely high threshold. As above, in the case of *Nicklinson*, the courts give particular deference to Parliament when it has previously considered a matter. This Option and proposed draft clause will only result in more, rather than less, confusion and uncertainty.

RESPONSE TO QUESTION 24

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."

174. The executive summary to the consultation states as follows:

> *"The Bill of Rights will protect essential rights, like the right to a fair trial and the right to life, which are a fundamental part of a modern democratic society."*

175. The formulation of this question implies that laws governing deportations can be amended to avoid being "frustrated by human rights claims." This is fundamentally problematic. If one objective of a Bill of Rights is to retain protections for essential rights – including*, inter alia*, Articles 2, 4, 6, 7, 8, 14, 17 and 18 of Schedule 1 to the HRA – then absent an alternative, positive description of "essential rights", any measure which will have the end effect of curtailing the rights currently enshrined in the Act will destroy, not protect, essential rights.

176. Per Dicey, the constitutional principle of parliamentary sovereignty prevents Parliament from binding its successors and being bound by its predecessors. It is uncontroversial that it *is* a matter for Parliament if it wishes to scrap the substance of the HRA, including the definition and scope of the rights themselves. However, the consultation operates on the false premise that all the Convention rights can be

maintained *whilst* achieving the end effect of the proposals it contains[61]. Without grappling with this inconsistency, this question, and the three options described, are fundamentally unacceptable. At the very least, Government should be prepared to demonstrate *how* these proposals will maintain Convention rights, or else offer an alternative set of "essential rights".

177. Even leaving that aside, the question and options presented are perverse. The practice of deporting people from a country where they were born, grew up or have settled is dehumanising with long term negative psychological impacts on not just the person removed, but on family members, including tens of thousands of children. In some cases, the damage is irreparable. Dr Melanie Griffiths of the University of Birmingham described this in a report she co-authored, Deportability and the Family: Mixed-immigration status families in the UK:

> "*Insecure immigration status has significant and wide-ranging impacts on families, including family members with British citizenship. Children are especially harmed by separation from a parent through immigration policies, with serious damage to their wellbeing, education and feelings of Britishness. Such harm is regularly underplayed or ignored by decision-makers, with the Home Office allowing for what their own deportation policies call 'cruelty' to be committed to these UK families.*"[62]

178. The rights provided to people facing deportation, already extremely limited, must be safeguarded. There are credible arguments too that these rights should in fact be strengthened, such are the consequences. In the very worst cases, people have been subjected to torture and/or murdered in the countries they have returned to. An example of this was brought to the attention of the Government by a *Guardian* report of May 2019 which provided details of 5 men killed in Jamaica after being deported there in the preceding 12-month reporting period.[63]

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[61] See paragraph 9 of the executive summary, which opens: "Specifically, the Bill of Rights will: retain all the substantive rights currently protected under the Convention and the Human Rights Act 1998."

[62] https://www.birmingham.ac.uk/documents/college-les/gees/research/deportability-families-report-2021.pdf

[63] https://www.theguardian.com/uk-news/2019/may/09/revealed-five-men-killed-since-being-deported-uk-jamaica-home-office

179. The notion that deportation is unconscionable is not just the thinking of activist organisations and lawyers but is echoed across civil society, NGOs and faith groups. As early as 1993, Pope John Paul II condemned deportation in his encyclical Veritatis Splendor:

> "*The encyclical not only repeats the list from Gaudium et Spes of actions that denigrate life, but the pontiff further heightens their moral gravity by labelling them as intrinsic evils.*" [64]

180. Deportation is also a highly unjust and discriminatory practice coming as it does at the end of a custodial sentence for which the subject has already been punished. Its effect is tantamount to a double punishment. The practice disproportionately impacts on non-white people or those, even if settled in the UK, who have not been able to avail themselves of British citizenship or documentation to prove such status as was the case of some victims of the Windrush scandal who had been deported.

181. To illustrate the injustice described above, consider a case handled by a solicitor at this firm, of three bothers born within a few years of each other. All three were co-defendants in a case involving an assault during a nightclub fight; they were first time offenders. The brothers' grandparents and father are of the Windrush generation, having first arrived in the UK, from the Caribbean, in the 1950s and 1960s respectively. Two of the brothers were registered as British citizens; the third was not because he was born to a non-British mother shortly before the siblings' parents got married. An attempt to get him registered as a British citizen was thwarted by the Home Office because of incomplete paperwork. When he lost his deportation appeal, he was removed to a country, in his 30s, that he had left at the age of two – in the UK he was a homeowner, had a partner and worked as an engineer. This deportation has caused untold psychological harm to him, his siblings who were convicted with him but not deported, another much younger sibling who suffers from an autoimmune disease, and their parents; their mother was diagnosed with depression because of these circumstances.

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[64] John Paul II, Veritatis Splendor, par. 80. http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor.html.

Under no circumstances can this be a just result in a society which prides itself on upholding justice and safeguarding human rights – but this is what happened, under the law as it *currently* exists, and there will be similar and worse examples were the safeguards to be lessened.

182. How then are we in 2022 trying to find ways to make deportation easier, when we should instead be working towards restricting deportation to only the rarest of cases given its harmful impact on individuals, families and wider society? Its consequences are so egregious that it can be neither fair nor just to posit deportation within the context of public interest – this cannot be a populist matter. For the public interest to be immutable, there would have to be significant impact on the public caused by people who would otherwise have been deported. There is no evidence that this is the case. In fact, the threat of deportation usually acts as a salutary lesson to many former offenders who, like others in society, should be given the opportunity to rehabilitate and have a second chance. The public interest argument is nothing more than a political construct, intended to appeal to people who harbour racist and xenophobic views – a constituency that the Home Office and other Government departments evidently think is sizeable.

Option 1

183. Option 1 is arbitrary and unjust. Each deportation case should be examined on its own merits against a backdrop of criteria and safeguards. We cannot countenance a system where someone fighting for the right to family and private life, as enshrined in Article 8, or for the freedom from torture and inhuman and degrading treatment as enshrined in Article 3 can be prevented from doing so because of an arbitrary sentence length. Similarly, there should be a right to a fair trial as enshrined in Article 6 and there should be no punishment without law, Article 7. This is particularly so given the existing evidence of discrimination in the criminal justice system, which shows that non-white people receive disproportionately higher sentences, and are more likely to be convicted, than white people. This was found to be the case in the extensive review undertaken by David Lammy MP culminating in his report, An independent review into the treatment of,

and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System.[65]

Option 2

184. Option 2 refers to the strong public interest but does not define this or provide any explanation as to why this should override individual human rights. The automatic deportation provisions in the UK Borders Act 2007 compelled courts to attach a greater weight to the public interest in deportation cases with changes to the immigration rules and the Immigration Act 2014. The Court of Appeal in *Akinyemi v SSHD* [No 2][66] looked at the case of a man who faced deportation. He was born in the UK in 1983 and had lived here all his life. The Court examined the nature of the public interest in the deportation of foreign national offenders and found that the weight to be given to the public interest, on the facts of this case, could lead to a lower weight being attached to the public interest. It also cited the opinion of Lord Kerr in the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department*:

> "*The strength of the public interest in favour of deportation must depend on such matters as the nature and seriousness of the crime, the risk of re-offending, and the success of rehabilitation, etc. These factors are relevant to an assessment of the extent to which deportation of a particular individual will further the legitimate aim of preventing crime and disorder, and thus, as pointed out by Lord Reed at para 26, inform the strength of the public interest in deportation. I do not have trouble with the suggestion that there may generally be a strong public interest in the deportation of foreign criminals but a claim that this has a fixed quality, in the sense that its importance is unchanging whatever the circumstances, seems to me to be plainly wrong in principle, and contrary to ECtHR jurisprudence*."[67]

[65] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf
[66] [2019] EWCA Civ 2098
[67] [2016] UKSC 60 at paragraph 164

Option 3

185. Option 3 appears to be an interference in the judicial process and the process of natural justice. It appears to be a form of ouster clause that would preclude a certain type of legal decision from challenge, for example, those subject to challenge by way of judicial review, effectively locking swathes of people out of access to justice, on issues engaging their fundamental rights.

RESPONSE TO QUESTION 25

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 tacking the challenges posed by illegal and irregular migration?

186. The question presupposes that the UK faces a serious challenge of irregular and illegal migration. Given the lack of information and data on what these challenges are, a reasonable assumption to make is that the question refers mainly to those migrants who access the UK by crossing the channel.

187. Through practice, we know that there are people in the UK without valid immigration status. These are not illegal migrants and in the main, did not enter the UK illegally. The Government has not provided data on the size of this cohort nor on the challenges they present. We know that many within this cohort are people who were on regular routes to settlement but who have not been able to extend their leave due mainly to the prohibitive Home Office fees and the Immigration Health Surcharge payable; the fee waiver system continues to exclude those who are in employment but without adequate means. Many people cannot afford to meet costs in excess of £10,000 for a family of 4, to be repeated 4 times in a ten-year period prior to being eligible to apply for settlement. The system is unfair and inaccessible, and many people become undocumented because of this unfairness. The Government may or may not be describing this cohort as irregular migrants.

188. The UK is, based on which measure used, the 5th, 6th or 7th richest economy in the world. Most of the people who avail themselves of routes which the Government describe as irregular are people who seek asylum, and they mostly have an absolute protection under the Refugee Convention of 1951.[68] Many arrive by boat, but the majority do not. Article 31[69] exempts refugees 'coming directly from' a country of persecution from being punished on account of their 'illegal entry or presence', provided that they present themselves '*without delay to the authorities and show good cause for their illegal entry*', and Article 33[70] provides that "*No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion…*"

189. As we understand it, 98%[71] of people arriving in boats claim asylum meaning they are in the system and seeking to regularise their status. The question therefore is not evidence based. It is fuelled by political dogma and seeks to appease those sections of society and those institutions which the Government perceives as racist and xenophobic.

190. The recent crisis in Syria and Afghanistan and the current crisis in Ukraine highlight that the Government is completely at odds with the international community and is failing to meet its international obligations. Any challenges faced by the Government, and these are likely to be more inconveniences rather than significant challenges, should be posited within the context of the global position.

191. Worldwide there were 84 million people who were displaced and 26 million refugees in 2021.[72] The top five source countries for refugees were the Syrian Arab Republic, 6.8 million, Venezuela, 4.1 million, Afghanistan, 2.6 million and growing daily, South Sudan, 2.2 million and Myanmar, 1.1 million. These represent 68% of refugees worldwide.[73]

[68] https://www.unhcr.org/uk/3b66c2aa10
[69] Ibid p 201
[70] Ibid p 233
[71] https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/
[72] https://www.unhcr.org/refugee-statistics/
[73] Ibid

192. The top receiving countries, representing 39% of refugees worldwide were Turkey, 3.7 million, Columbia, 1.7 million, Uganda 1.5 million, Pakistan, 1.4 million and Germany, 1.2 million. All these countries, bar Germany, are significantly poorer than the UK. Trinidad and Tobago, a small Caribbean Island with a population of less than 2 million, has received over 350,000 refugees from Venezuela.[74]

193. The Refugee Council works closely with the Government to compile statistics on asylum seekers and refugees in the UK. They report that by the end of 2018, there were 123,720 refugees in the UK with 45,244 pending cases and 125 stateless persons. This is around 0.26% of the UK's population. In the year to December 2019, there were 34,566 asylum applications in the UK, down from a peak of 84,000 applications in 2002.[75] 28,431 people crossed the channel in 2021.[76]

194. The Government overstates its challenges on irregular and illegal migration. Instead of trying to limit its humanitarian and international obligations to some of the most vulnerable people in the world, it should place itself within the context of the global situation and begin to play a greater part in offering protection. It should not be seeking to derogate from its obligations prescribed in international treaties and in the HRA. Attempts to do this are already evident by the Nationality and Borders Bill[77] which the UNHCR, UN Special Rapporteurs, lawyers and NGOs have all warned, in response to sections on refugees, are likely to put the Government in breach of international law.

195. Of the relatively low numbers of people seeking asylum in the UK, the percentage of these deemed to be genuine applicants is high. In 2004, 88% of applications were refused. In 2020, the refusal rate was down to 28%. And of those who were refused, 75% lodged appeals of which 33% were successful. Overall, almost 80% of asylum applications are successful and applicants can rely on international treaties and the HRA to prove their claims.[78]

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[74] https://www.refugee-action.org.uk/about/facts-about-refugees/
[75] Ibid
[76] https://www.bbc.co.uk/news/uk-england-kent-59861376#:~:text=Figures%20compiled%20by%20the%20BBC,and%20introducing%20tougher%20asylum%20rules.
[77] https://bills.parliament.uk/bills/3023
[78] https://commonslibrary.parliament.uk/research-briefings/sn01403/

RESPONSE TO QUESTION 26

Question 26: "We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:

a. the impact on the provision of public services;

b. the extent to which the statutory obligation had been discharged;

c. the extent of the breach; and

d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

Which of the above considerations do you think should be included? Please provide reasons."

196. We think that the concept of "just satisfaction" already provides sufficient discretion to a judge to take relevant factors into account when determining if and what damages should be awarded to a claimant where a breach of human rights has been found.

197. Of the factors outlined above, we think that (c) (the extent of the breach) is the only relevant factor that should be taken into account, but, as we have already said, this is already provided for by the concept of "just satisfaction" and, as such, does not need to be expressly provided for. We think that the other factors outlined above are contrary to the purpose of the HRA/Bill of Rights and should not properly be within the role of a judge to determine in any event.

198. Given that such claims can only be brought against public authorities (or those bodies carrying out public functions), it would then defeat the purpose of the HRA/Bill of Rights if those authorities could be found to have breached a claimant's human rights but then public resource or policy factors could be taken into account, which could then deprive them of damages in "just satisfaction" of that breach. It would change the mindset of Government and public authorities, as laws could be created and acts or omission taken which ignore or disregard their duties not to act incompatibly with Convention rights as they would be safe in the knowledge that even if breaches of human rights were found then it is likely that no damages would be awarded.

199. In effect, by limiting the effectiveness of the remedy available, the effectiveness of the HRA/Bill of Rights itself would be limited, and its purpose of protecting individuals from incompatible acts by public authorities would be defeated.

200. In any event, such factors relating to public resources or policy should not properly be within the role of the judge to determine. It is an issue for Government as to how public services are provided. If a breach of human rights is found, it is for Government to increase provision for public services, rather than to decrease the effectiveness of the HRA/Bill of Rights. Again, it changes the mindset of Parliament and public authorities and defeats the purpose of the HRA/Bill of Rights if a defendant's own decision-making plays a role in determining if and what remedy is available to a claimant where their human rights have been breached.

201. Similarly, if a public authority is found to have breached a claimant's human rights having carried out its statutory obligation or giving effect to legislative provisions, then it is an issue for Government as to whether it repeals, amends or maintains those obligations or provisions, not for a judge.

202. Moreover, if these factors are aimed at taking into account the extent to which a public authority has breached a claimant's human rights in the process of trying to carry out its statutory obligation or giving effect to legislation but have nonetheless caused a breach, then that is still a breach and it then becomes a matter as to the extent of the breach, which is a relevant factor for a judge to take into account when determining if and what damages should be awarded, but, as we have already said, is already provided for by the concept of "just satisfaction".

RESPONSE TO QUESTION 27

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."

Option 1

203. It is our position that this is not a factor which needs to be given statutory footing. Firstly, an award of damages is made only where the award is "necessary". This would imply two things – firstly, not every HRA claim will result in the award of damages and secondly, where it does, financial compensation is an integral part of the remedy that is needed in that case. Any measure seeking to reduce or remove damages therefore risks eroding the efficacy of the law.

204. Reducing or removing damages on the basis of conduct would also render principles for the award of damages under the Bill of Rights inconsistent with recovery under other areas of law such as tort. For example, foreign national offenders subject to immigration detention are often awarded damages in tort claims. It would be inconsistent to create an arbitrarily distinct principle that would prevent the recovery of damages for an equivalent breach under the Convention.

205. If conduct were to be taken into account there must, at the very least, be a direct connection between the claim and the unlawful conduct complained of, in that the claimant ought to be relying on that conduct in bringing a claim. Conduct which is incidental to the case, should not be a factor in the determining or quantifying the award of damages.

206. Furthermore, as implied above, that conduct would have to be recognised as having been unlawful and in the form of criminal convictions. Anything less would make the process inappropriately subjective and open to abuse and inconsistent application.

207. In any event, it is unclear what underlying evil this approach would be seeking to remedy. The consultation document refers to the need to emphasise the importance of responsibilities, but this is extremely vague and the document does not explain how such an approach will lead to a greater assumption of responsibility by the public.

208. Further, some groups of individuals will be disproportionately impacted by this approach than others. Prisoners and immigration detainees are amongst the most vulnerable groups in society especially due to their confinement by the State, and yet they would be least likely to obtain appropriate financial redress for breaches of their fundamental rights.

209. It is also worth pointing out that damages awarded under the HRA are of a much lower scale than those awarded in common law. It is hardly the case that public funds are being depleted due to award made in HRA claims. There does not therefore appear to be any great financial need for this proposal.

210. It is also worth noting that in some instances the law already allows for unlawful conduct to be taken into consideration. In case law involving Parole Board delays, damages have been denied on the basis of the original offence. The concept of taking account of the individual's conduct in the award of damages is not a new one and one which judges are well acquainted with. The principle therefore does not require statutory footing.

Option 2

211. We do not consider that wider conduct should be taken into account in the award of damages in any circumstances. Factors in the consideration of the award of damages should be limited to those which are relevant to the breach and act complained of. To take account of wider conduct would allow a public authority or government to escape

accountability for its errors by relying on matters which are completely irrelevant to the breach and may have occurred many years ago. It would encourage public bodies to act with impunity.

212. There does not appear to be any proper justification for taking into account conduct which is of no relevance to the matter at hand. It would also risk undermining the fundamental principle of equality before the law; clearly those accused of bad conduct would become less equal. While the 'moral worthiness' of a claimant may be a factor which the ECtHR does take into account into the award of damages, this is not in this instance a good enough reason to incorporate this principle into English law. As pointed out in McGregor on Damages, 21st Edition:

> *"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[79]. This cannot be right. Strasbourg jurisprudence ought not to be followed to the extent this would involve undermining basic principles of the English legal system:*
>
> *"… under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication[80]."*

213. Such an approach would result in a tiered system dividing society according to criteria that cannot be properly measurable. It would undermine confidence in the law and the ability of individuals to use it for appropriate redress. If damages may be reduced to zero, the implication is that the breach does not matter. This undermines the principle of holding public authorities to account. It also undermines confidence in the need to uphold the underlying rights which have been breached, where they are going effectively unpunished.

214. It is also unclear what wider conduct could be taken into account and how far back a court could go. Would it be restricted to criminal offences only or a broader range of conduct? Operation Nexus for example, is a collaboration between Police and the Home

79 *R. (MG) v Secretary of State for the Home Department* [2015] EWHC 3470 (Admin).

80 *Raymond v Honey* [1983] 1 A.C. 1 at 10.

Office in the context of seeking to deport foreign national offenders. Immigration authorities frequently rely on intelligence reports consisting of unproven allegations and conduct which falls far short of criminal activity (such as arrests, or where there has been a refusal to cooperate with police after being a victim of crime) to inform their approach towards deportation. It would be completely inappropriate and arguably unlawful if the Bill of Rights were to define conduct so widely to allow for such allegations to be included.

215. It is also the case that assessment of such conduct, especially if the scope is to extend to conduct wider than criminal convictions would be too subjective. Rather than rely on clear legal principles, the law would be applied on the basis of subjective opinions assessing the character of an individual. This in turn risks inconsistent application and greater uncertainty within the law.

216. It is also the case that individuals who may have committed offences previously have rehabilitated or are taking steps towards rehabilitation. This approach of bringing up past conduct would risk ignoring that.

217. Where the conduct complained of is a criminal offence, those individuals would have been given an appropriate punishment, whether in the form of a fine, community order or prison sentence. To reduce damages on account of that conduct would be tantamount to punishing them twice for the same offence.

RESPONSE TO QUESTION 28

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."

Judgments of the European Court of Human Rights

(1) The Bill of Rights affirms that the judgments and decisions of the European Court of Human Rights—
  (a) are not part of the law of any part of the United Kingdom, and
  (b) cannot affect the right of Parliament to legislate or otherwise affect the constitutional principle of Parliamentary sovereignty.

(2) If the European Court of Human Rights finds, in its final judgment in a case to which the United Kingdom is a party, that the United Kingdom has failed to comply with an obligation arising under the Convention (the 'adverse judgment'), the Secretary of State must lay notice of the adverse judgment before each House of Parliament during the notification period.

(3) In order to facilitate debate in the House of Commons or House of Lords on an adverse judgment, a Minister of the Crown may exercise any power that he or she as a member of that House to table a motion in that House.

(4) In this section "notification period" means the period of [30] days beginning with the day on which the adverse judgment—
  (a) is given (if it is final when it is given), or
  (b) becomes final in accordance with the provisions of Article 44, paragraph 2 of the Convention (in any other case);
and for the purposes of calculating that period, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which either House is adjourned for more than four days.

218. The consultation document requests that responses are given to a proposed option (above) on the assumption that there exists a serious issue that needs to be addressed. However, in our view, this proposal seeks to address a problem the existence of which is not supported by any evidence.

219. The consultation document states that the proposed clause in paragraph 11 of Appendix 2 "*affirms Parliamentary sovereignty in the exercise of the legislative function, in the context of adverse Strasbourg rulings*" and "*provide a clear and explicit democratic shield to defend the dualist system in the UK by making clear that Parliament, in the exercise of the legislative function, has the last word on how to respond to adverse rulings*".

220. We note as a preliminary matter that findings by the ECtHR against the UK are very rare indeed, amounting to no more than a small handful of cases in any given year. In 2021, there were 215 applications concerning the UK, of which 205 were declared inadmissible or struck out. The ECtHR delivered seven judgments (concerning 10 applications) in respect of the UK, only five of which found at least one violation of the Convention. The figures for 2020 are similar – of 284 applications concerning the UK that were determined, 280 were declared inadmissible or struck out, with only two applications resulting in a finding of a violation of the Convention.[81]

221. No evidence has been presented – and we are not aware of any – that the manner in which the UK currently responds to these limited number of findings against the UK in any way impinges on the sovereignty of Parliament. Parliament is already responsible for responding to negative judgments from the ECtHR if it chooses to do so. The HRA does not contain any provisions compelling the Government or Parliament to take any particular course of action following a finding against the UK by the ECtHR. It is already entirely open to Parliament to respond as it sees fit.

222. In these circumstances, we do not see how a provision that "*the Secretary of State must lay notice of the adverse judgment before each House of Parliament during the notification period*" does anything in practice to bolster Parliamentary supremacy. Further, we also cannot see how the provision would in any meaningful way reinforce the primacy of the UK "*Supreme Court in exercising the judicial function in interpreting rights in the UK*", or why a specific provision is required in circumstances where it is already open to the Government to propose legislative responses to any adverse finding from the EctHR.

223. It appears to us that the purported issue here does not arise out of the HRA. This is, rather, a matter concerning the UK's relationship with the ECtHR. There is no proposal to remove the UK from the Convention within the current proposed reforms. We do not see any justification for the provisions in paragraph 11 of Appendix 2. Likewise, the IHRAR did not identify any concerns regarding the process for the UK to respond to adverse findings from Strasbourg. The IHRAR noted that formal dialogue, including

[81] https://echr.coe.int/Documents/CP_United_Kingdom_ENG.pdf

where the UK is party to ECtHR proceedings, should continue to "develop organically" (chapter 4, p134).

RESPONSE TO QUESTION 29

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."

224. We note that this exercise ought properly to have been undertaken by the Government. Nevertheless, we have set out our consideration of each of these questions below.

Q29(a)

225. The costs of the consultation proposals are set out in our answers to the earlier questions in this response. People with protected characteristics or statuses inherently disproportionately rely on the protections afforded to them by the Convention meaning the costs of the proposals, which restrict people's rights and access to justice, will be disproportionately higher.

226. We cannot identify any benefits.

Q29(b)

227. We note that the consultation paper admits that the MoJ does not hold statistics about who brings human rights cases and has not done an EIA. It is therefore impossible to properly understand the impacts of the proposals. Consideration of these proposals should be immediately paused while statistics from the MoJ are collated and an EIA undertaken. It is not sufficient to rely on consultation responses to attempt to understand the impact on protected groups.

228. We are also puzzled by the consultation's assessment [p109, para 16] that you "*have identified the broad groups that may potentially be disproportionately impacted by specific aspects of the proposed changes, such as ethnic minority individuals, children and men*." While we agree that ethnic minority individuals and children do rely on the protections in the Convention, the omission of disabled people, women, sexual orientation, religion/belief and gender reassignment within the paper demonstrates a blatant misunderstanding of the main groups whose human rights are breached. It is not our experience that men disproportionally rely on their Convention rights.

229. Finally, while you appear to acknowledge that these proposals will indirectly discriminate against protected groups, you assert that these impacts "*arise as a consequence of the proposed measures being a proportionate means of achieving the legitimate aim of balancing the rights of individuals with the wider public interest*." This bare assertion is made at the same time as admitting that there are no statistics on the potential impact on protected groups, and without giving any evidence about how the proposals are said to be proportionate to the proposed aims.

230. While the exact extent of the impact is not known, it is self-evident, however, that the proposals will have a disproportionate effect on people with protected characteristics, given these groups are more likely to need to rely on their Convention rights (particularly Articles 3, 8 and 14), and may already encounter difficulties accessing their rights and justice. For example:

a. Q8-10: **Permission stage and 'genuine human rights' abuses** - both public and private law claims already have mechanisms in which unmeritorious claims are

filtered out (the permission stage and strike out procedure respectively). There is no evidence that these systems do not work. Furthermore, it is well-known that people with protected characteristics already experience barriers to accessing justice. Creating new barriers will entrench these problems, with disproportionate effects on people with protected characteristics.

b. Q12: **Section 3** - section 3 of the HRA has been vital in the protection of rights for people with protected characteristics, for example relating to sexual orientation and religion and belief.
c. Q23: **Qualified and limited rights** – people with protected characteristics rely particularly on Article 8. The undermining of Article 8 could, therefore, in particular deprive many people with protected characteristics of necessary protections. For example, our clients routinely rely on Article 8 (either read alone or with Article 14) when pleading discrimination claims on the basis of disability, race, religion/belief, gender reassignment and sexual orientation. We have acted in three cases on behalf of Muslim prisoners who were subjected to religious discrimination (not being granted access to food, drink and medications at times which allowed their observance of Ramadan and not being allowed to wear clothing which reflected their faith) in breach of their rights under Articles 8, 9 and 14. Each of these cases was successfully settled. Vulnerable children, who have not been protected by local authorities, also rely on their Article 8 rights; this has become even more important due to recent judgments significantly curtailing children's ability to bring claims in tort against social care departments (see *CN v Poole* for example).
d. Q24/25: **Deportations and asylum** – these proposals will have a disproportionate impact on people with protected characteristics. Not only do these proposals explicitly target people with people with protected characteristics, for example, people of colour; they will also have secondary effects, such as the further entrenchment of the hostile environment.
e. Q27: **Claimants' conduct** - linking rights to responsibilities and limiting remedies for claimants on the basis of their conduct is likely to disproportionately impact individuals from disadvantaged groups who are more likely to be in the prison population or in our asylum system. From our experience, this could result in highly undesirable consequences, for example, a disabled prisoner being unable to hold authorities to account for an inaccessible cell.

Q29(c)

231. These impacts cannot be mitigated.