Amnesty International UK

Consultation submission to: Human Rights Act Reform: A Modern Bill of Rights

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Amnesty International UK
Amnesty International UK is a national section of a global movement of over seven million people who campaign for every person to enjoy all rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. We represent more than 670,000 supporters in the United Kingdom. We are independent of any government, political ideology, economic interest or religion.

Introduction

1. The Human Rights Act ('HRA') has been a major legislative achievement, essential to modernising the UK's legal system and in promoting and protecting human rights in the UK. The Independent Review of the Human Rights Act found that, "*there was an overwhelming body of support for retaining the HRA"*[1] domestically, while internationally the HRA has become 'a leading model and influence on global constitutionalism, especially the "new Commonwealth" constitutional model.'[2]

2. Despite this, the Ministry of Justice's Human Rights Act reform consultation proposes what amounts to an extremely serious attack on the HRA and human rights protections in the UK. These proposals seek to upend the UK's existing model of rights: from universal and in line with the international legal framework, to contingent and nationalist under a proposed replacement 'Bill of Rights'.

3. In doing so these proposals would dramatically weaken people's ability to hold the executive to account, access their rights under the European Convention on Human Rights ('the Convention') and protect themselves from violations by the UK state. The proposals would concentrate power in the Executive, particularly in times where it has a large parliamentary majority, and would put those who are less powerful or influential in society in a deeply vulnerable position. The regression in the enjoyment of rights, including as accessed in Scotland, Wales and Northern Ireland since 2000, would also have profoundly negative consequences for devolution and risk undermining the Belfast / Good Friday Agreement.

4. Despite heavy reference to the integral place of rights in British legal tradition, the consultation overall is couched in terms that misrepresent and denigrate the roles that rights litigation, and human rights more generally, play in society. It talks of "*a 'rights culture' that displaces personal responsibility and the public interest*" and claims that the democratic process is being usurped by 'judicial legislation' and an undemocratic expansion of rights by the courts. Notwithstanding the repeated references to 'fundamental rights' in the paper, the effect of the proposals would be to undermine the place of rights as basic standards that constrain government action. Instead, the proposals suggest that government should be released from its obligations in international law, watering those down to a point that would permit violation of human rights standards when legislating or taking other actions.

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

5. At the domestic level, the cumulative effect of these proposals would be dramatic. These are not minor tweaks, or tidying up, but taken together, represent a wholesale gutting of the rights protective framework in the UK. From cutting out Convention rights altogether (replacing them with something else) to reducing who is bound by human rights duties and what the nature of those duties is, to imposing new procedural obstacles to people getting their case heard when those have been violated, to in some situations and for some classes of people preventing them from being permitted to bring a human rights case at all, to imposing new obstacles to them being able to put their case fully and effectively, these will leave victims facing an uphill struggle, and public authorities increasingly insulated from challenge.

6. Even if a victim manages to surpass all those hurdles and bring a challenge at all, the proposals then make the rights themselves less effective – constraining rights protective legislative interpretation by the courts, tilting the balance away from rights protective analysis, having parliament legislate to reduce their scope and constrain their application, and cutting out the role of Strasbourg Court jurisprudence in encouraging a general minimum floor of protection. As if that were not enough, the proposals then go on to neuter the legal remedies available to any claimants who do manage to succeed, providing for judges to validate unlawful legislation, and imposing severe restrictions on damages awards for just satisfaction, bringing factors such as a victim's general behaviour into play in deciding what remedy they get for a violation.

7. For all those victims of human rights abuses who have therefore been denied justice at any one of these pinch points, the only route to an effective remedy will be the Strasbourg Court. Returning the UK to pre-HRA days by creating a rights gap will inevitably lead to an increase in cases against the UK in Strasbourg, something the government says it does not want to see. While such an increase appears highly likely, the time, cost and other practicalities involved will mean that for many people human rights violations will simply go unresolved.

8. Concerningly, there is an additional proposal of some kind of so-called 'democratic shield' between the UK and the need to implement those judgments. If this leads to those victims who have had to go to Strasbourg, and somehow found the time and resources to do so, still not getting what they are entitled to under the Convention, and to the UK not abiding by its international obligations to implement in full all cases against it, this would take us in to entirely new and dark territory – not just for the UK, but for the entire international human rights protection architecture and those in other countries who rely on it, and whose governments would see an example to follow in the UK's approach.

9. All this, and the general impact of such measures as severing the interpretation of Bill of Rights (BoR) rights from Convention rights, and cutting out positive obligations, will also negatively affect good administration and weaken any human rights compliant culture in public decision making.

10. Regarding the UK's relationship with the European Convention on Human Rights, while it is welcome that the consultation commits the UK to remaining a member of the Convention system, the proposals in practice seek to sever the domestic ties with that

system, willfully create conflicts with the Strasbourg Court and, as above, potentially place the UK at risk of violating its international commitments under the Convention. The consultation goes as far as to attack the interpretative framework that the Strasbourg Court applies to Convention rights, claiming that it is illegitimate despite it having been in place for nearly 50 years.

11. This denigration of rights, and the nature of the proposals taken as a whole has worrying implications for human rights internationally. If the UK government is seen to be curtailing rights domestically and raising doubts about its commitment to its international obligations, this would set a dangerous example to other governments and be a significant blow to the protection and promotion of human rights around the world, particularly across Europe. That is particularly the case if it continues to dress those moves up as somehow beneficial for society.

12. Amnesty International UK therefore opposes the thrust of these proposals in general, and indeed any replacement of the Human Rights Act 1998. We consider that the Act works well, provides a careful compromise between competing interests and an effective human rights protective framework for all – one which encourages good decision taking and law making. We do not consider that any proper evidenced justification has been provided for these proposals, and are further concerned by the misleading way in which many of its questions have been formulated. We hope to see them dropped, and instead for the government to move to a rights-positive, constructive approach to domestic protection laws.

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

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

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

13. It is difficult to understand from the wording of this question (and that of the draft clause) what the actual purpose is of this proposal, or what it is expected to achieve – let alone what the evidence is for why any change is needed. If the intent, as the wording of the draft clauses suggests, is to sever the link between the domestic courts and Strasbourg (with the two sets of rights the same in wording only but with different interpretations) then the inevitable result will be an increase in violations of Convention rights and corresponding increase in the number of cases against the UK. Amnesty International is opposed to the draft clauses proposed, and does not consider them either a 'means to achieve' the aim the question lays out, or in any way justified. We believe they will, inter alia, (i) strip Convention rights out of the domestic rights framework, replacing them with 'Bill of Rights' rights, intended to be interpreted differently at best and less protectively at worst, (ii) sever the link between the Strasbourg Convention and the domestic framework, leading to a protection gap and (iii) result in an increase in domestic human rights violations, and an increase in cases against the UK in Strasbourg.

14. If the purpose of the proposed draft clauses is merely, as set out in the wording of the question (but not matched by the wording of the accompanying draft clauses), to enable the courts to '*draw on a wide range of law'* when assessing human rights issues, then it is wholly unnecessary. The judiciary already can and do consider relevant authority from a wide range of jurisdictions[3]. However, what they have high in mind, guided by the section 2 duty to 'take into account' relevant jurisprudence from the Strasbourg Court, is that the rights in the HRA are Convention rights. As the Independent Human Rights Act Review Panel ('IHRAR') noted[4], the clear intent in section 1 and schedule 1 HRA was "*to enable Convention rights to be given effect in UK law"*[5]. These are rights provided for in an international treaty to which everyone within the jurisdiction is entitled, and which the UK government has committed to protect and give effect to within that jurisdiction. As such, while jurisprudence from elsewhere may well be helpful in determining whether a right in the HRA has been breached, it is entirely right and logical that guidance from the guardian court of that treaty should be considered in making that decision.

15. The Convention explicitly extends the jurisdiction of the Strasbourg Court to all matters concerning the interpretation and application of the rights therein, and grants the Court full discretion to decide on any disputes. "*Consistency was a necessary aim*"[6]. This requirement ensures that in general, the victim does not receive less protection than the Convention guarantees them, while also enabling the domestic courts to give a lead to Strasbourg on where to go (the Strasbourg jurisprudence is not a '*straightjacket*' preventing the UK going further).

16. One of the key functions of the HRA was to bring Convention rights home, ensuring victims of rights violations do not have to spend years and money going all the way to a Court in Strasbourg to secure what they are entitled to, instead being able to invoke those protections in the domestic courts. While it is indeed the case that there is "*no express requirement"* in international law to "*follow all Strasbourg case law*" as the Consultation paper sets out, there is of course an obligation in Article 1 of the Treaty to "*secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*" (and, in Article 13, there is a clear right for victims to have "*an effective remedy before a national authority*" for violations of those rights). The Strasbourg Court is the final arbiter of what those rights are, with space for appropriate national divergence and policies (as agreed by member states). The UK Courts can depart from Strasbourg case law where justified, and if this places the UK in breach of its international obligations, that will then be dealt with in the Strasbourg Court and on the international plane. Section 2, however, sought to ensure broad consistency and effective remedies for rights violations in the UK without the need for that process.

17. As such, section 2 ensures that proper attention is given to what the guardian Court says that Convention rights provide, and thus what protections victims can expect in general to have in the UK without having to go all the way to Strasbourg itself.

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[3] See Helene Tyrell, 'Human Rights in the UK and the Influence of Foreign Jurisprudence' (Bloomsbury 2018) and Helene Tyrell, 'Foreign jurisprudence as a persuasive authority: Judicial comparativism at the UK Supreme Court' (Law Research Briefing No. 15, February 2020). Available at: https://www.ncl.ac.uk/media/wwwnclacuk/newcastleuniversitylawschool/files/HT_

[4] The Independent Human Rights Act Review, December 2021 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

[5] Ibid, p.34 at [27]

[6] Ibid, p.35 at [28]

International law obliges the UK to secure those rights in the UK, and section 2 is a key part of the architecture ensuring those are real and effective in the domestic legal framework.

18. The wording of the draft clauses here, and the consultation text surrounding them, suggests that there is far more behind this proposal than the question suggests. Indeed, the concern appears to be less to provide domestic courts with a clearer statement that they may look to other jurisdictions to assist them in making decisions compatible with Convention rights (as section 6 requires), than to push them towards a narrower concept of human rights - falling short of what the Convention provides.

19. That can be seen from the Consultation paper, which goes on to discuss the *"risk"* that a domestic court could take a "*more expansive interpretation than Strasbourg*" [194] (something which has nothing to do with the existence of section 2) - without any apparent concern for what the outcome would be if they took a narrower interpretation. Plainly, the concern is with a (misplaced) perception of judicial activism, and the scope of Convention rights themselves, rather than the order in which domestic courts consider relevant case-law. The ability to develop rights protections beyond the Convention, under the common law or statute, as the IHRAR noted, already exists and is wholly compatible with Article 53 ECHR.

20. This consultation repeatedly states that the UK will remain a member state of the European Convention, while setting out lengthy complaints about – inter alia - the living instrument doctrine, which is applied to ensure that the Convention rights are not frozen in the 1950s. However, whatever changes are made to section 2, they will not (and cannot, as an international treaty), affect the meaning of a Convention right today – those rights will continue to develop and support the lives of the people in 2022. Changing domestic law will not change Convention law. The Strasbourg court is and will remain the guarantor of those rights, and the final arbiter of what they mean.

21. It is therefore unclear what is really intended by these proposed clauses, other than to change the position in domestic law so that what is provided and protected by the language of a right is something narrower in scope than the ECHR provides. The intent of this proposed change seems to be to encourage the domestic courts to provide less (certainly not more), *different*, protection than those Convention rights. If it were to encourage or explicitly permit a wider interpretation, then presumably the Panel's different recommendation would have been put forward. If there is no intent to change scope, then the wording of the draft clauses would not be as it is, and there would be no need to replace section 2. Most concerningly, it seems that in fact, the intent may be to replace the existing Convention rights in domestic law with something that looks the same, but is actually something entirely different.

22. The consultation papers says that "*Under these proposals, the UK would remain party to the Convention, with the rights in the Convention sitting at the heart of a Bill of Rights*" [183]. However, in the draft clauses here suggested, quite the opposite is the case – it is specifically proposed to replace the Convention rights protected in the HRA with a Bill of Rights that may look the same in wording, but mean something very different. That can be seen from the explicit proposed wording of 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.

23. This is a marked contrast to the existing section 2, which specifically refers to questions around 'Convention rights', those being what are incorporated into domestic law through the HRA as per section 1. Instead, this proposal seems intended to create a new species of domestic rights, replacing the Convention rights in the HRA with 'Bill of Rights' ('BoR') rights – an option specifically rejected by the IHRAR. It is hard to see how the government can claim to be proposing to have rights in the Convention at the heart of the new Bill of Rights while at the same time explicitly stating in this draft clause that the rights it contains will no longer have the same meaning as those in the Convention.

24. The IHRAR were concerned that removing the link with the Convention in s.2 might "*give rise to unintended and adverse consequences, not least due to the possibility that it may create legal uncertainty concerning whether the content of the rights is the same*"[7] – under this proposal it seems they would not be.

25. That is further confirmed by the introductory wording, which says "*Option 1 makes clear that the courts are not required to follow or apply any judgment or decision of the European Court of Human Rights and that the meaning of a right in the Bill of Rights is not necessarily the same as the meaning of a corresponding right in the European Convention on Human Rights*"[8].

26. If option 1 were to be introduced therefore, it would explicitly divorce the rights in the BoR from the rights in the Convention. This breaking of the formal link, as the IHRAR explained *"has nothing to commend it*"[9].

27. Option 2, while less explicit in divorcing the rights in the Bill from the Convention, is just as troubling in that it seeks to introduce a form of originalism into domestic law. Under this approach, the construction of a right in the BoR, rather than keeping pace with society and the needs of people today, would be tied to the original wording and the intent of a narrow group of authors in the early 1950s. This would be deeply regressive. It would also introduce huge uncertainty. As the Independent Panel explained, *"it is fanciful to suppose that, even if desirable to do so, the living tree element of the Convention could be stripped out, leaving the Convention to be interpreted in its 'original' form (whatever that would now be taken to mean*)"[10].

28. Both Options seek further to separate future rulings from existing case-law under the HRA, with Option 1 discouraging any reliance on the considerable existing body of human rights jurisprudence under the HRA by noting that "*in particular*" it is "*not necessary*" to construe the rights in the BoR as having the same meaning as those in

[7] IHRAR p.29 at [16]
[8] Ibid, Annex 3 at [3], underlining added.
[9] Ibid, p.79 at [145]
[10] Ibid, at p.81 [154]

the HRA - and Option 2 requiring adherence to precedent on the BoR but giving no mention to precedent from the HRA.

29. As Lord Carnwath described this proposal, "*The court is invited in effect to set aside the jurisprudence developed over the years since the HRA came into effect as to the meaning of the various rights, and to start again.*"[11] This seems to fly in the face of the warning of the IHRAR that "*care will be needed to limit the scope for the development of a significant gap between UK and ECtHR rights protection. Any such gap would undermine the HRA's aims and lead to an increasing number of applications, including successful applications, brought against the UK before the ECtHR*"[12].

30. Section 2 as it exists today in the HRA (as is well known to the point of being considered trite law by human rights law experts) requires Strasbourg case law to be taken into account, but not always to be followed - it is context specific. Since *Horncastle*[13], in 2009, it has been abundantly clear that there is no 'slavish adherence' to the Strasbourg court. The general starting point, as Lord Neuberger explained in Pinnock[14], is that, while not bound to follow every decision of the Strasbourg Court:

> '*Where…there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.*'

31. UK courts can and do depart from Strasbourg decisions where necessary[15], and also speak where the ECtHR has not yet spoken. As the IHRAR put it, "*The UK Courts can fairly be said to have continued to develop a more confident and flexible approach to ECtHR case law."* Lord Carnwath, retired now from his post on the Supreme Court, recently summarised in extra judicial writing the section 2 'take into account' duty helpfully, as follows[16]:

> *"The domestic courts have interpreted that it a practical way, so that they will normally follow a clear and constant line of decisions, provided that its effect is "not inconsistent with some fundamental substantive or procedural aspect of our law", and its reasoning "does not appear to overlook or misunderstand some argument or point of principle". That approach seems to me an entirely logical reflection of the status of the Strasbourg court, as the final arbiter of the meaning of the Convention, to which the Act gives effect, while recognising that not all its decisions have the same weight, and also the margin of appreciation allowed to the member states. So long as we remain parties to the Convention, and subject to the Strasbourg court, as is intended under the current proposals, the same logic must surely apply".*

32. He went on to criticise the replacement of section 2 here proposed, in the following terms:

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[11] Lord Carnwath, Lecture on Human Rights Act reform – is it time for a new British Bill of Rights?, 9 February 2022, https://constitutionallawmatters.org/2022/02/lord-carnwath-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights/#_ftn1.
[12] IHRAR p.78 at [140]
[13] *R v Horncastle* [2009] UKSC 14; [2010] 2 WLR 47,
[14] *Pinnock v Manchester City Council* [2010] UKSC 45 at [48]
[15] See for example, *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2; [2020] AC 279
[16] https://constitutionallawmatters.org/2022/02/lord-carnwath-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights/#_ftn1

"The proposed replacement of section 2 in the consultation paper compounds the problem. The court is invited in effect to set aside the jurisprudence developed over the years since the HRA came into effect as to the meaning of the various rights, and to start again. In doing so it is not required to give particular weight to decisions of the Strasbourg court, or even of the UK courts, on the meaning of the Convention rights, but can draw as it thinks fit from the case law of countries round the world and from international law. The court is given no assistance as to which if any it should prefer, or by what criterion. I confess that, as a judge trying to interpret the will of Parliament, I would come close to despair. Nor can I see how offering that degree of choice to the courts is expected to curb the judicial activism of which the paper complains, still less to advance the stated objective of promoting greater certainty. That particular proposal must surely not be allowed to get off the ground".

33. Presumably, the intent behind the proposed change must be to encourage decisions where the Courts interpret BoR rights in a way that is less protective, or at best different, than Strasbourg. This is not only regressive, but deeply troubling, and likely to increase confusion and uncertainty, rather than improve it. Moreover, while the UK remains a member of the Convention and there is therefore still an international obligation on the UK to guarantee those rights in its jurisdiction, and a right of individual petition, it is likely to return us to the pre-2000 position with increased applications against the UK in Strasbourg, and a reduction in effective rights standards in the UK. Without the clarity of section 2, as Caolifhionn Gallagher QC explained to the Joint Committee on Human Rights, while the UK remains a member of the Convention:

    "*you will be back to the pre-2000 route of individuals having to spend many years, sometimes decades, enforcing their rights in Strasbourg, the UK having the international embarrassment of losing a case in Strasbourg in those circumstances, and then a long period of delay before there is implementation. That is not certainty or coherence and does not respect the rights of victims and others who are entitled to human rights."*[17]

34. There is an incoherence at the heart of these proposals and this one in particular. They appear designed to seek a way to remain in the Convention (given the appalling international consequences withdrawal would have and its impact on, inter alia, the Belfast/Good Friday Agreement and EU agreements) while avoiding having to actually abide by it. Regression, uncertainty and a weakening of the protections guaranteed to all within the jurisdiction of the UK appear the likely impact of these proposals for section 2.

35. We are therefore wholly opposed to the proposed changes to section 2.

The position of the Supreme Court

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

[17] Joint Committee on Human Rights Oral evidence: Human Rights Act reform, HC 1033 Wednesday 9 February 2022 https://committees.parliament.uk/oralevidence/3436/pdf/ p.15

36. Again it is difficult to discern the true intention of the question (which again appears misleading). The UK Supreme Court is already the ultimate judicial arbiter of our laws in the implementation of human rights. The authority and certainty of that position is clear. The UKSC does not slavishly follow Strasbourg, and departs from its judgments where there is good reason to do so. The suggestion that this approach has *"resulted in the supremacy of the UK Supreme Court being undermined by Strasbourg"* is simply wrong, and no evidence to this effect is provided.

37. The true underlying concern here appears, from paragraph 201, to be less with Strasbourg binding the Supreme Court, than with the government's belief that the domestic Courts are overstepping their institutional competence – with the intent being to legislate for certain areas of policy making to be protected from review. In that paragraph, views are invited on a proposal (not referenced in the consultation question) that there should be statute setting out matters that "*fall outside the institutional competence of the UK courts*". As the consultation notes, this was considered and specifically rejected by the IHRAR. It discussed a so-called 'margin of discretion' – the space where the domestic Courts recognise that in some matters in an individual case, particular deference should be paid to the view of the executive, or questions left to parliament[18]. In *A v Secretary of state for the Home Department*, for example, the Court described this as follows:

> "*The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.[19]"*

38. Lord Hoffman, however, was clear that this is perhaps better conceived of as the proper observance of legal principles[20]:

> *"although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening...[The courts'] allocation of decision-making power is [not] a matter of courtesy or deference...The allocation of...decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle...On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law."*

39. Further guidance as to the approach of the Courts on competence is set out in *Nicklinson*[21]. It is not the case, however, that there are fixed areas outside the

[18] See for example the decision *in R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428
[19] *A v Secretary of State for the Home Department [*2004] UKHL 56; [2005] 2 AC 68 at [29].
[20] *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, [75]-[76], underlining added
[21] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657.

institutional competence of the courts, and that is as it should be. An automatic and total deferral to the Executive on such matters as national security would risk very severe human rights consequences. Even where significant deference is considered to be appropriate, the Courts must still carefully consider the issues before it and decide what weight to give the Executive's view. The IHRAR specifically considered and rejected the recommendation of Policy Exchange, for example, that the HRA should be amended to say that legislation or state acts could not be held incompatible with rights if the Strasbourg court was likely to hold that they fell within the UK's margin of appreciation. It also specifically considered and rejected the precise proposal put forward here to legislate for matters falling outside the competence of the courts (in effect, an ouster clause). It noted that there is:

> "*nothing remarkable with regard to concern as to individual decisions. From time to time, that is bound to happen – and, in a democracy, a degree of tension between the Branches of the State is not necessarily unhealthy. It is, indeed, inherent in a common law system. It does not at all follow from such concern that the legislative solution canvassed in the recommendation under consideration* rights *is an appropriate response*[22]
>
> *…That Parliamentary Sovereignty means that Parliament can legislate as it chooses, does not make it wise to do so. By (at the least) appearing to promote a curtailment of the powers of the Courts in favour of the other two Branches of the State, the proposal risks damage to the UK Justice System91. Moreover, no persuasive case has been advanced that UK Courts have been routinely or even frequently determining matters within the UK's margin of appreciation that should best have been allocated to the other Branches of the State. To the contrary, as discussed above and in Chapter Two, the Courts have overall (if, inevitably, not always) demonstrated caution in drawing the line between matters that are for them to determine and matters best left to Parliament and Government as a matter of relative institutional competence*[23]
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> …*Removing specific areas from the ambit of the HRA would, however, tend to do no more than increase applications against the UK to the ECtHR. It would thus frustrate the central aim of the HRA, and Convention itself: to have Convention rights determined in the UK. It would also ensure that any analysis carried out by the ECtHR of the UK's approach to the issue was not fully informed by the UK Courts' analysis of it, a factor which plays an important role in determining the ambit of the margin of appreciation. This version of the option thus has no positive benefit and serious drawbacks of the same nature as those found in the proposal for statutory reform rejected above*" (p130 at 56)

40. That is a wholly unsurprising conclusion. It is one Amnesty International UK agrees with. The judiciary already exercise considerable restraint. To seek to place entire areas of policymaking outside the reach of the courts would be a wholly improper tipping of constitutional power towards the Executive.

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

41. Amnesty International UK has no strong view on this proposal.

[22] *(p.126 at44)*
[23] (p.129 at 53) underlining added here and throughout

42. As an international human rights organisation Amnesty International does not have a particular position on jury trials. States are entitled to operate different criminal justice systems. What matters is that trials are conducted within minimum standards of fairness.

43. While there is no express right to a jury trial in the ECHR, jury trials as operated in the UK have been found to be in accord with the Article 6 fair trial standards by the ECtHR.[24]

44. If the government wish to further promote or protect jury trials it is of course free to do so. However, we would note that the HRA/ECHR does not in any way impede jury trials and it is not necessary to reform or replace the HRA in order to further promote jury trials. The real threat to the criminal justice system comes from the huge backlog in cases, exacerbated by the pandemic but caused by chronic underinvestment in both court infrastructure and the legal aid system.[25]

Freedom of Expression

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?

45. This is not an issue that Amnesty International has focussed on in the UK, and so we will leave it to others with greater specialism to comment in detail.

46. We would only note that HRA section 12 as currently drafted already provides enhanced protection for the freedom of expression of the press and other publishers, but that this is appropriately balanced against individuals' rights to privacy as set out in Article 8. The courts have devised a coherent and widely understood framework for determining issues where the two rights come into tension with each other, and there does not seem merit, to us, in disturbing this balance. Certainly the consultation does not make a convincing case for doing so.

47. We would also caution against seeing Article 10 rights, as protected by section 12, as necessarily always being in conflict with Article 8. As the Parliamentary Joint Committee on Human Rights has heard in evidence sessions on this topic, Article 8 also protects the privacy rights of journalists and others who are pursuing controversial stories that powerful figures would like to see suppressed. This is particularly the case with regards to instances where journalists face intimidation through the state or other entities accessing private information about them and the threat of private information about them being divulged.[26]

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

[24] See eg Twomey, Cameron and Guthrie v. the United Kingdom
[25] See eg Barry Godfrey, Jane C Richardson, Sandra Walklate, The Crisis in the Courts: Before and Beyond Covid, *The British Journal of Criminology*, 2021;, https://doi.org/10.1093/bjc/azab110
[26] See eg Caoilfhionn Gallagher QC, Joint Committee on Human Rights Oral evidence: Human Rights Act reform, HC 1033 Wednesday 9 February 2022, p. 32 https://committees.parliament.uk/oralevidence/3436/pdf/

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?

48. As per our previous answer, this has not been an area of particular focus for us in the UK and so we will limit our response. We would only reiterate that the rights to privacy which the consultation contrasts with the media's rights to expression, are entirely legitimate. We do not accept any premise that seeks to cast them as spurious or repressive. Clearly freedom of expression is also a fundamental right and it is correct that it is protected, however in general it is our view that this is adequately covered by the way the HRA and the courts currently operate. A reasoned assessment of where the balance lies between the two rights, based on the specific facts of the case, is a far more coherent way of making a rights adjudication than imposing an artificial weight on the scales, as this proposal would appear to suggest.

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

49. The protection of journalists' sources is clearly an integral part of both a functioning media landscape and, moreover, the right to freedom of expression. In its General Comment 34 on Freedoms of Opinion and Expression in the International Covenant on Civil and Political Rights, the UN Human Rights Council have noted that, '*The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function*' and '*States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.*'[27] While the government's apparent interest in greater protections for journalists' sources is of course welcome, it is difficult to see commitment to this principle in either the consultation or wider government conduct.

50. There is no discussion of the issue of journalists' sources in the consultation document at all, beyond the question itself. It was also not an issue that the IHRAR was asked to comment on. Thus there is no sense of the government's intentions in this regard, or what resources or political capital might be dedicated to pursuing it. Instead, all that is provided is an open-ended question with which, given the likely multiplicity of responses it will receive, there is no guarantee of any substantive engagement. It is also notable that, given that this is an MoJ consultation, the most serious governmental threats to journalism and journalists sources are not under the control of the MoJ at all, but instead derive from other government departments, particularly the Home Office. This makes the questionable extent of the commitment to this principle, in terms of resources and political capital, all the more important. If the MoJ is serious about pursuing this issue, it will need to engage in a concerted and detailed way with other government departments, starting with the Home Office.

51. As one example, which will also be discussed below in our answer to question 7, the Home Office is currently in the process of developing reforms to the Official Secrets Act 1989.[28] If the proposals consulted on are pursued these would represent very serious threats to both journalists and their sources. Of particular concern are the hugely

[27] UN Human Rights Committee, General comment No. 34 Article 19: Freedoms of opinion and expression, 12th September 2011, https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf
[28] See Home Office Consultation, 'Legislation to Counter State Threats', https://www.gov.uk/government/consultations/legislation-to-counter-state-threats

increased prison sentences for divulging information encompassed by the Act and the absence of a public interest exemption for prosecution.[29] Governments should never bring criminal proceedings or otherwise penalise individuals who, while under an obligation of confidentiality or secrecy, reveal information about human rights abuses for conscientious reasons and in a responsible manner. Moreover, other people, including journalists, who communicate information about human rights abuses should never be subjected to such measures. The same applies as a general rule to revealing or communicating information about other matters of public interest.

52. If the government wishes to bring in protections for journalists and journalists' sources against the harmful effects of proposals such as these, then that would of course be welcome. However, it is not necessary to revise or replace the Human Rights Act to do this. It also does not seem a sensible use of government time and resources for one department of government to be legislating to counteract the harmful rights-violating effects of another department's policies. Far better, it seems to us, for proposals like those on the Official Secrets Act to simply be scrapped.

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

53. Major threats to freedom of expression in the UK derive from the government's current legislative programme.

54. The Police, Crime, Sentencing and Courts Bill (PCSC Bill) constitutes a major attack on the right to protest, a primary form of political expression. It includes noise-based restrictions on protests; introduces overly broad terms like 'serious unease' as a basis for prohibiting protests; makes people liable for breaching a condition on a protest that they merely 'ought to have known' about, rather than actually knew about; and increases sentences for such breaches to ten years in prison.[30]

55. The government's proposed reforms to the Official Secrets Act included drastically increasing the maximum sentences for journalists and sources publishing leaked material covered by the Act, from two to fourteen years imprisonment. This was justified by equating journalism with the most serious forms of espionage. The proposals also rejected the recommendation of the Law Commission to introduce a public interest defence.[31]

56. Despite criticism from the parliamentary joint committee on the Online Safety Bill, the current draft still contains a section which creates a vaguely worded new category of "harmful content", for adults, which while not being illegal would be subject to censorship powers ultimately controlled by the Secretary of State. The bill also threatens to erode end-to-end encryption, a vital tool for journalists, activists, lawyers and other human rights defenders.[32]

[29] Home Office Consultation, 'Legislation to Counter State Threats', https://www.gov.uk/government/consultations/legislation-to-counter-state-threats
[30] See Police, Crime, Sentencing and Courts Bill, https://bills.parliament.uk/bills/2839
[31] Home Office Consultation, 'Legislation to Counter State Threats', https://www.gov.uk/government/consultations/legislation-to-counter-state-threats
[32] Department for Culture, Media and Sport, Draft Online Safety Bill, https://www.gov.uk/government/publications/draft-online-safety-bill

57. If it is serious about protecting freedom of expression in the UK, rather than pursuing unnecessary reforms to the Human Rights Act the government would be better off spending its time on revising its plans in these areas.

II. Restoring a sharper focus on protecting fundamental rights

A permission stage for human rights claims

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

58. This question appears to start from the entirely misleading and unevidenced premise that there are significant numbers of non-genuine human rights cases being argued in the Courts - whether public law or civil matters, or whether relied on in (for example) a criminal matter. It does not, however explain what these 'non genuine' cases are, or provide any evidence rather than rhetoric to establish this is the case. No persuasive examples are given of the supposed frivolous cases before the courts that are complained of. There is no data provided that would assist in understanding the government's concern. It is therefore unclear what mischief the government seeks to prevent, other than the provision of access to justice for human rights abuses at all. What "*devalues the concept of human rights"*, is a government seeking to reduce them to second class protections in law.

59. In truth, there are already strict tests before a human rights claim can be brought, as well as multiple practical and legal hurdles which often actually prevent access to justice (including post-LASPO restrictions on legal aid, tight limitation periods and more). The justice gap is likely to worsen when the Judicial Review and Courts Bill passes and remedies are weakened (including for human rights matters) to the point of no individual benefit for a winning claimant (introducing a presumption in favour of prospective only quashing orders).

60. It is unclear which type of claims these consultations are referring to at all. Judicial review claims already have a permission stage for claims to filter out unmeritorious cases. Claimants must satisfy a Judge on application that there is "*an arguable ground for judicial review which has a realistic prospect of success*", that they have sufficient interest in the matter and that it is not "*highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred*". Other refusal reasons include undue delay, availability of alternative remedies or the claim becoming academic. This filters out claims (and individual grounds within it) that do not have sufficient merit to proceed (and represents a recent tightening of the test). It is also necessary in human rights claims, to establish victimhood before damages can be awarded (section 7 HRA). This is a tighter test than the usual one for standing in judicial review, making such claims already more difficult to bring than others. In the county court, not only must victimhood also be established, but there are numerous strike out provisions for cases which have no reasonable prospects of success or are abusive, or of such limited value that they are "*not worth the candle*"[33].

[33] *Jameel v Dow Jones and Co* [2005] EWCA Civ 75.

61. Introducing a separate and distinct additional permission stage for human rights claims would add yet another hurdle to access to justice, and risks undermining an important tool for holding the state to account for public wrongs. It would also mean relegating human rights to a special inferior subset of legal protections to all else in domestic law. Equality Act 2010 claims, for example, would in contrast proceed as normal, despite often covering similar ground, while human rights cases would have to also prove '*significant disadvantage'*. This is to dimmish and degrade human rights protections, making them an "*inferior sort of claim*"[34].

62. It is also entirely unclear what this test would mean, and how it would be interpreted in the myriad different individual contexts of human rights abuses. There is a vast different between, for example, between establishing a case as 'trivial' (as Lord Wolfson tried to present those cases which it would weed out[35]') and having to prove 'significant disadvantage'. It would lead to inconsistency, confusion and satellite litigation that would unnecessarily swallow up court time and public funds to resolve a problem which does not exist. It is also unclear how it would work in practice, including when (for example) a human rights defence is raised to a criminal charge.

63. All human rights abuses should be appropriately remedied. That is not only a requirement of article 13 of the ECHR, but fundamental to being a rights respecting state.

64. The comparison with Article 35 of the ECHR is entirely inapt. That is an international, not domestic court, which applies that test sparingly and with claims before it having already had to exhaust domestic remedies. Moreover, to introduce that test in domestic cases would (as with so many of the suggested changes in this consultation) yet again result in individuals whose rights have been violated but fail some vague domestic notion of 'significant disadvantage' being denied access to justice and having to go to Strasbourg to achieve it, widening the gap between domestic and international rights protection.

65. Amnesty International UK oppose the introduction of an additional hurdle for human rights claims in this way, and believe it would place a significant and unjustified hurdle in the way of access to justice for human rights violations, tilting power towards an overbearing state so as to shield it from accountability, as well as relegating human rights law to second class status.

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.

66. As explained in question 8, there should not be an additional permission stage for human rights cases. As such, there is no need for an overriding public importance limb (particularly given that human rights cases will often be about minority rights, and existence of violation already assessed by looking at the proportionality of interference given the legitimate, public interest, aim in question). This test, two part or otherwise, would limit access to justice, water down effective human rights protection, and place

[34] Evidence from Elizabeth Prochaska to the JCHR, https://committees.parliament.uk/oralevidence/3436/pdf/ p.24
[35] Lord Wolfson to an HRA Consultation round-table, 4th March 2022

the UK in serious conflict with the requirement to ensure effective remedies for all human rights violations in its jurisdiction.

Judicial Remedies: section 8 of the Human Rights Act

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

67. As set out in question 8, there is no proper evidence in this consultation or elsewhere to suggest there is currently a problem of non genuine human rights cases flooding the Courts. As such, there is no need for any further restrictions on human rights cases. What would help the courts ensure they can focus on genuine human rights abuses would be to remove the barriers which already exist for those cases reaching the courts at all. That would include, for example, rolling back the LASPO changes to legal aid, to reverse the two -tier justice system these have created. Even more productive in reducing the number of human rights cases overall would be to improve the quality of public decision making, ensuring that authorities are aware of and able to act compatibly with people's rights. Seeking instead to restrict access to justice when that happens, as these proposals would do, is to diminish the accountability of the state and introduce systematic injustice.

68. This question is again something quite different and more specific than the drafting indicates. The text around it introduces a proposal that would "*require applicants to pursue any other claims they may have first, either so that rights-based claims would not generally be available where other claims can be made, or in advance of any rights argument being considered, to allow the courts to decide whether the private law claims already provide adequate redress.*"

69. Legislating to block legitimate claims of human rights violations is wholly improper. It is not for the state to dictate when an individual may rely on their rights in challenges brought against it. Genuine human rights claims would, under this proposal, either be entirely unheard, or only allowed to be brought if other claims do not give (the same vague test used in the presumption in favour of prospective only orders in the Judicial Review and Courts Bill) '*adequate redress'*. This proposal would introduce significant uncertainty, and injustice. Individuals would not be able to have their claim heard. There would likely, again, be a mismatch between the need for the UK state to provide an "*effective remedy"* for human rights abuses under Strasbourg Article 13, and what is actually considered domestically. The two tests do not appear to be the same, and would require lengthy complex litigation to resolve.

70. It is also utterly unclear how this could be sensibly suggested as a solution even to the mythical problem of 'trivial' claims and 'bad' claimants. A human rights claim, is a human rights claim. If it is properly made and sound, the courts will hear it. If not, they will strike it out – under existing powers (where at the permission stage of judicial review, or using the civil courts strike out powers). It is difficult to see how preventing human rights cases being brought at all, for all people, or seeking to cut down on cases by providing a less protective type of justice and claiming it is an adequate alternative, would have any impact on supposed abuses of the system (which in any event do not get heard), by stopping any such cases being even introduced – if the perceived problem is before the court gates, then presumably it will still exist in this different form. If the perceived problem is that Courts are hearing 'bad' cases, then unless it is conceded

that this proposal will result in (as we believe) lesser protection and less avenues for justice than the status quo, they will also still be heard, albeit in different form.

71. All Amnesty International UK considers such a proposal will achieve, is regression – reduced access to justice, and increased control by the state of when individuals may rely on rights they are properly entitled to in international law. Should a remedy gap between the BoR and the Convention then indeed appear in practice, once more the inevitable outcomes will be injustice, and an increase in cases against the UK in Strasbourg. We oppose this proposal.

Positive obligations

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

72. "*The proposals misunderstand the way that the convention and indeed all human rights instruments, whether it is international ones or domestic ones such as the South Africa constitution, work. Positive and negative obligations are integrated obligations. They are not independent of one another*" Elizabeth Prochaska, evidence to the JCHR[36].

73. In contrast with how they are presented in the consultation paper, positive obligations are not a distinct, severable component of human rights law. In the ECHR, they are recognised as having "*a central role in making the Convention practical and effective*"[37] and as *"inherent in ensuring the effective exercise of the rights guaranteed by the convention*". They include such obligations as ensuring legal mechanisms exist to facilitate the effective realisation of convention rights, and to take positive operational steps to secure individual rights in fact. Indeed the distinction between negative and positive rights is not binary in the way they are presented here. These are equal and inevitable, interlinked aspects of the same right.

74. Nor is this particular to the European Convention on Human Rights. It is widely recognised and understood that positive obligations form an inherent part of all human rights obligations[38]. The suggestion therefore that positive obligations can somehow be carved out from human rights protections is conceptually and legally flawed. Any attempt to do so, moreover, would place the UK far outside the rest of the world in its approach to and understanding of human rights law. It would lead inevitably, as so many of these proposals, to an increase in cases at Strasbourg and beyond, with the UK being found to have violated international law. Regression of this kind at the domestic level is unprecedented in a state which professes to be a supporter and champion of human rights, and would place the UK well outside the bounds of the international community of rights respecting states in this sphere.

[36] See https://committees.parliament.uk/oralevidence/3436/pdf/ p.27
[37] See Human rights: judicial protection in the united kingdom, Beatson , Singh et al 2008 at [2-12]
[38] See for some examples, S. Fredman, Human Rights Transformed. Positive Rights and Positive Duties, 2008, ICCPR General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add. 1326, or Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights Laurens Iavrysen 7 Inter-Am. & Eur. Hum. Rts. J. 94 (2014)

75. Rather than being based in any evidence, the proposal seems to stem from an ideological objection to the notion of rights imposing positive duties on the state to do things ***for*** people, rather than simply acting as negative limits on state actions. Having begun from this ideological standpoint, the consultation then appears to look for substantive issues it can find fault with.

76. In doing so, the proposals it comes up with would a have a significant negative impact on vulnerable groups, and on proper adherence to the rule of law. It would cut out significant valuable routes to clarifying and ensuring effective protection and improving state practice. Positive obligations have clarified several important obligations on the state (and often without the need for litigation). There must – for example - be prompt, effective independent investigation of allegations of violations of certain rights, as was central to the inquiry into the torture and killing of an unarmed Iraqi civilian, Baha Mousa, by British soldiers in Iraq, which led to a finding of "*corporate failure*" at the MoD and a large number of recommendations for improving military training and processes. In the *DSD*[39] case, concerning police failures at both a systemic and operational level to investigate the 'black cab rapist' John Worboys (who went on to abuse more women) and where there was no common law negligence action that could be relied on, the Supreme Court made clear that where there are '*obvious and significant shortcomings in the conduct of the police and prosecutorial investigation'* as there were here, police could be held liable for those failings under article 3. This is of obvious and significant important to improving practice.

77. The consultation particularly cites the 'Osman duty' to protect individuals from a real and immediate risk to life of which the state has or ought to have knowledge as problematic. Oddly, however, domestic violence victims are just one group of those vulnerable people who are able to benefit from this duty but receive no mention at all in the discussion of the issue. This is particularly odd given the consultation's characterisation of the Osman duty as skewing policing priorities away from "*serious crime perpetrated against law abiding citizens*" [148]. *Osman* itself concerned a teacher who had developed an inappropriate attachment to a student, and who despite several attempts by the family to obtain appropriate protection, killed the student's father – hardly the protection of serious criminals, which the consultation instead chooses to focus on. In *Opuz*[40], a leading case on positive obligations in the domestic violence context, the Strasbourg Court concluded that it had been obvious that the applicant's husband posed a risk of further violence after several incidents known to the authorities showed a trajectory of escalation, which should have led to preventative measures – these did not happen, and he killed her mother. The duty is not simply to protect those the government considers undeserving, but all those within the jurisdiction, including those who are most vulnerable

78. This is not, however, a boundless duty or one which does not require a high threshold, or proper account to be taken of judgment, resources and the competing objectives on public authorities – in *AB v Worcestershire County Council* [2022] EWHC 115 (QB) the Courts dismissed a claim under article 3 related to child abuse, because the incidents were "*isolated and sporadic*" and did not meet the article 3 threshold for severity of harm. Reasonableness is at the heart of the standard[41], as *Opuz* made clear[42].

[39] *Commissioner for Police v DSD* [2018] UKSC 11
[40] *Opuz v Turkey* App No. 33401/02, 9 June 2009
[41] See for example, Lord Carswell in *Re Officer L* [2007] 1 WLR 2135 at [21].
[42] At [135-6]

79. None of this, nor the other myriad situations in which other elements of positive obligations have protected the vulnerable, ensured proper attention to poor practice and encouraged lesson learning or protected the rule of law, are discussed.

80. There is also no evidence in the consultation paper to justify its the complaint that positive obligations fetter operational decisions or determine policy. In so far as the government dislikes being bound to protect and ensure human rights, the same could be said of all such aspects of human rights law. It is quite right and appropriate that the state is required to protect human rights in all aspects of decision making – indeed this is a critical element of a just society. The Courts are alive to the importance of the separation of powers, as described elsewhere in this response, and cautious in the way these questions are determined. Indeed, the Courts have expressly stated that positive obligations should not impose unduly expensive or disproportionate burdens on public bodies[43].

81. Unjustified, misconceived and regressive: Amnesty International UK opposes any attempt to sever and reduce positive obligations in domestic human rights law.

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

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

Question 12: We would welcome your views on the options for section 3.
Option 1: Repeal section 3 and do not replace it.
Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation. We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

82. The IHRAR concluded that there was "*little to no evidence to support the position that UK Courts are misusing section 3*" and that, at least since 2004, *"judicial restraint could properly be said [to] have been exercised in the use of section 3; not least demonstrated by the number of times it has been used to interpret legislation"*. Further, it rejected the view that section 3 had *"reduced democratic accountability*" further concluding that "*the majority of the Panel did not accept that the evidence supported the view that either Government or Parliament had effectively delegated responsibility in this way to the UK Courts, nor that section 3 in its current form promoted such an approach*".[44]

83. This is in marked contrast to the government's stated belief here that Section 3 has led to a "*significant constitutional shift in the balance between Parliament, the executive and the judiciary*"[117] and "*judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament*" [233], and , *"compelling the courts to displace the role of Parliament in determining difficult questions of public policy*" [117]. No data or detailed evidence has been provided to substantiate this view (other than to note a small number of cases it disagrees with), nor is there any discussion whatsoever of how the government explains this very clear departure from the conclusions of the Panel after many months of intensive expert

[43] See, for example, *Smith v Ministry of Defence* [2013] UKSC 41
[44] See [122-123]

review. The position is further confused by the consultation document stating that the government is minded to support the IHRAR's decision not to recommend repealing section 3, but then going on to consult on exactly that.

84. Indeed it is hard to see how the key case relied on, *Ghaidan-Mendoza*[45], where the courts interpreted 'spouse' to include people in same sex partnerships so that a man whose male partner had died could succeed to the tenancy of their home, as would have happened with a heterosexual couple, could be seen as an impermissible interference with parliament's role. The interpretive impact of Ghaidan was in fact to make clear that any interpretation using section 3 must go with the grain of the legislation. The courts cannot undermine the principles and scope of the legislation, amend it or alter its thrust and intent.

85. Nor is there any proper evidence provided of the stated need for *"greater legal certainty*", "*a clearer separation of powers*" or a "*more balanced approach to the proper constitutional relationship between Parliament and the courts on human rights issues*"[236]. It is difficult to understand, therefore, what drives these proposals other than a misplaced perception of abuse of the section by the courts, or a dislike of the outcomes it has resulted in. Once again, this seems to be based on an ideological objection to an element of the human rights framework that then goes looking for post facto justification.

86. We note that the Government states that it is "*minded to agree*" however that section 3 should not be repealed. Nevertheless, it has set out in its Option 1, a proposal to repeal section 3 without replacement.

87. It has also, however, proposed two alternative clauses under Option 2, which it says are intended to replace s.3 with a "*provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation*". As it itself admits, however, this approach "*would be similar*" in effect to that it describes under wholesale repeal – the only distinction between wholesale repeal and Option 2 would be to place into statute the common law presumption that Parliament does not intend to act in breach of international law and that courts can prefer a compatible interpretation where the meaning is ambiguous and that interpretation of the actual wording of the section permits. This is a distinction without difference. Both section 3 and the option 2 proposals require interpretations in line with the purpose of the legislation, but option 2 would mean that the ordinary meaning of the words used would be prioritised over a human rights compatible reading that also was consistent with the legislative intent. This is wholly regressive. The proposal here is therefore in effect to repeal section 3, and merely then to clarify the resultant diminution of the status of convention rights in statute.

88. This would take the UK back to the past. Section 3, as the IHRAR explained, "*was the means by which the HRA's aim of ensuring that legislation was interpreted and given effect compatibly with Convention rights was to be achieved: to 'bring rights home'*"[46]. As Lord Irvine described the core principle behind s.3 at the time:

> "*Parliament, at least post-ratification of the Convention, must be deemed to have intended its statutes to be compatible with the Convention to which the*

[45] *Ghaidan v Godin-Mendoza* [2004] UKHL, [2004] 2 AC 557
[46] P.190 at [10]

United Kingdom is bound, and that courts should hold that that deemed general intention has not been carried into effect only where it is impossible to construe a statute as having that effect. This seems to me to be a sensible principle and is consistent both with Parliament's presumed intention post-ratification and with ministerial statements of compatibility, when they come to be made under Clause [section] 19 of the Bill"[47]

89. A return to the pre-2000 position would result in an increase in rights violations in the UK, with Courts having to instead make declarations of incompatibility, and individuals (or indeed large groups of affected people) therefore being left without an effective remedy for those abuses. This gap between domestic and promised protection under the ECHR would again, like so many of these proposals, result in an increase in cases against the UK in Strasbourg, from those able to do so. Those who could not, would be left without remedy at all.

90. The design of section 3 moreover specifically preserves parliamentary sovereignty by ensuring that the Courts cannot set aside primary legislation – where a compatible meaning is not possible, all that can be done is to make a Declaration of Incompatibility under s.4, leaving the legislation intact. Removing the duty on courts to do their best at the outset to achieve a compatible interpretation would significantly damage that careful balance, and cut out the essential heart of domestic human rights protections. Amnesty International UK opposes this proposal.

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

91. As above, we consider that there is already an appropriate and carefully balanced role for Parliament contained in the scheme for sections 3 and 4 of the HRA. The role of the JCHR, however, as addressed by the IHRAR, could usefully be enhanced to improve a dialogue between Parliament and the government in respect of section 3 judgments and enhance the discussion and attention time given to human rights in UK legislative decision making.

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

92. As above, we agree with the IHRAR's recommendation to put in place a database of superior court judgments using section 3 to ensure convention compatibility. Transparency, and factual data over empty rhetoric, are to be welcomed in this sphere.

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

Declarations of incompatibility

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

[47] Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 535

93. Amnesty International UK does not agree with this proposal.

94. Firstly, this question is misleadingly worded. It implies that the expansion of 'declarations of incompatibility' would provide the Courts with an optional additional remedy when courts are dealing with secondary legislation. In fact, it is clear from the preamble in the consultation document that the intention of this proposal is to remove the courts' existing power to amend or strike down non-rights compliant secondary legislation and replace that power with the weaker Declaration of Incompatibility ('DoI') power.

95. Under the Human Rights Act, DoIs provide a compromise between the need to enforce human rights protections and the principle of preserving parliamentary sovereignty.[48] The HRA's model is one that ultimately rests on parliamentary sovereignty and the view that democratic legitimacy in the UK means that Parliament must be free to legislate however it likes, including that no one Parliament can bind a future Parliament. This, it was decided, included the capacity to legislate contrary to human rights standards as contained within the European Convention on Human Rights.[49] As such, full strike down powers of primary legislation were not granted to UK courts under the HRA in the way that they are to many courts applying fundamental rights documents in other jurisdictions (such as the US Supreme Court, which can strike down legislation incompatible with the Bill of Rights). Instead 'Declarations of Incompatibility' were created. These mean that rights violating laws can remain in place until Parliament changes them – or chooses not to do so, in full awareness of the international and domestic implications. This leaves parliament free to pass laws that contravene human rights standards, but ensures that: a) parliament is aware that it has done this b) it has an opportunity to change course, and c) a political cost is imposed in terms of reputational damage if parliament nevertheless decides to maintain a rights-violating law.

96. Such a system was considered to make sense by Parliament in passing the HRA with regards to primary legislation, given the constitutional concerns regarding the importance of parliamentary sovereignty to the concept of democratic legitimacy in the UK. However, no such concerns are applicable to secondary legislation.

97. The conflation of primary and secondary 'legislation' by some commentators, as if they were essentially the same beast, only serves to muddy the waters.[50] The phrase 'Secondary legislation' is a catch-all term for a range of laws made with very little scrutiny, and often no parliamentary voting at all. They are made by government ministers and subject to a range of weak oversight mechanisms. This may be necessary for day-to-day practical reasons, such as updating technical regulations. However, secondary legislation cannot be said to have the same full democratic legitimacy as is conferred on primary legislation by adherence to the complete Parliamentary procedure and ultimately the active choices of elected representatives. There is therefore no compromise to strike between the need to uphold basic human rights standards and the democratic legitimacy of legislation, when it comes to secondary legislation.

[48] See eg IHRAR para 24, p. 187 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

[49] See eg Lord Hoffman, Secretary of State for the Home Department, Ex Parte Simms Secretary of State for the Home Department, Ex Parte O'Brien, R v. [1999] UKHL 33

[50] See eg Policy Exchange, Protecting the Constitution How and why Parliament should limit judicial power, 2019, https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf

98. This basic premise is a long standing and largely uncontroversial principle of UK law in other non-human rights contexts. If a piece of secondary legislation is found to be unlawful by the courts it can be struck down or disapplied. There is no basis both in terms of principle or practical need for this situation to be reversed when it comes to secondary legislation that is unlawful for being in violation of human rights. It would be strangely anomalous for secondary legislation to be subject to strike down powers for ordinary public law error, but somehow immunised against such powers for human rights violations.

99. A further anomaly would arise with regards to legislation passed by the devolved legislatures in the nations of the UK. The ECHR is embedded in the devolved settlements in Wales, Scotland and Northern Ireland so that legislation passed by these parliaments and assembly must comply with ECHR rights.[51] Legislation from the Senedd, Stormont and Holyrood can be struck down by a court, as the consultation acknowledges, for being outside of its competence, including if it is contrary to ECHR rights. Replacing strike down powers with Declarations of Incompatibility for Westminster secondary legislation will create a situation in which devolved legislation is the only legislation left that is subject to human rights strike-down powers.

100. When the courts find that secondary legislation contravenes protected rights, they should retain the power to disregard it or to strike it down.

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

101. Amnesty International has opposed the measures for expanding the use of suspended and prospective quashing orders in the current Judicial Review and Courts Bill (JRCB) and we oppose them in this consultation, for essentially the same reasons. Our understanding of that Bill is that it will apply to all judicial review cases, there is (unfortunately) no carve out for human rights based claims. As such, it will presumably apply not only where cases concern secondary legislation, but all decisions of public authorities. Here, therefore, we consider not only secondary legislation but the broader impact.

102. When a judge makes a prospective-only order, this would by definition be forward-looking only. A prospective-only order would actively confer lawfulness on an otherwise unlawful action; in the case of secondary legislation a ministerial regulation that is constructed in terms that are incompatible with a Convention right. It would do this right up until the date of the order coming into effect. As such, anyone affected by the unlawfulness up to that date – including the claimant - would get no redress for what has already happened to them, since it has now been labelled as valid at the time despite the actual judgment recognising it was not. They may well see no change whatsoever in their current circumstances, and the public authority will avoid the full consequences of their rights-violating action. All those people who have suffered loss and damage as a result of human rights violations, would be denied justice for that wrong.

[51] See Scotland Act 1998 s. 29; Government of Wales Act 2006 s.108A; Northern Ireland Act s.6

103. This seems a very contradictory policy to be promoting in a consultation that is otherwise professing concern about what it sees as judges overstepping their proper role and becoming too involved in policy making or otherwise changing legislation passed by Parliament. Indeed, as Lord Pannick explained at Second Reading of the Judicial Review and Courts Bill, "to give the judge a discretion to say that what was unlawful shall be treated as lawful is to encourage judges to enter into very treacherous waters".[52] These are treacherous waters indeed. Parliament has in the HRA s.3, 4 and 6 scheme provided that secondary legislation which is incompatible with Convention rights should be substantially amended or struck down. A prospective only order would require the court to confer validity on rights abusive secondary legislation, contrary to the express will of Parliament in that scheme.

104. In the case of suspended orders, these would effectively license the public authority to keep acting unlawfully, and in violation of peoples human rights, until some designated time in the future. An order that was made both prospective only and suspended would mean no proper consequences at all.

105. It is difficult to see how allowing the government to escape the normal consequences of its unlawful actions in this way could ever be just for claimants, third parties or society. Ordinarily, these orders will leave injustice unremedied, insulate the government from scrutiny and make it more difficult to hold decision makers to account. Despite having gone to all the effort of going to Court, and despite having won, the claimant would get no proper remedy for the injustices they have already suffered. It is hard to see what the point would be of bringing a case – something claimants, legal advisors and the legal aid authorities will no doubt factor into their decisions.

106. Most concerningly, if the provisions of the JRCB are directly brought over, these will include the presumption that such orders must be made other than in very narrow circumstances. This will flip the current position (that such remedies be extraordinary only) on its head, and mean that the normal expectation in all human rights cases will be that the claimant gets no proper remedy. This is wholly unacceptable.

107. It is difficult to see how a prospective only quashing order could ever be an effective remedy for a human rights violation, as required by Article 13 of the European Convention on Human Rights. Article 13 is clear that the victim of the rights violation 'shall have an effective remedy before a national authority' and yet prospective only remedies would expressly and directly exclude the victim from any such remedy, other than where (assuming the JRCB provisions are read across) there is some good reason not to do so, tightly constrained. This proposal will substantially tie the Court's hands and water down the effectiveness of the rights protection framework, deterring judicial reviews at all, and leaving claimants without that they are entitled to under the Convention. It is therefore one amongst many in this consultation which will inevitably lead to the UK losing more cases at Strasbourg than it has done previously, as victims of rights abuses will have to seek proper redress at the international level after being excluded at the domestic level. Indeed, the UK's chances of defending any such case at the Strasbourg Court level would appear to be even lower than normal, as in these circumstances the domestic courts will already have agreed with the victim that the impugned provision of secondary legislation is in violation of the Convention. The only

[52] Lord Pannick, Judicial Review and Courts Bill, House of Lords Second Reading, Volume 818, Column 1369, 7th February 2022, https://hansard.parliament.uk/lords/2022-02-07/debates/00763BCD-2EF1-4719-BDA6-54C42851113A/JudicialReviewAndCourtsBill

remaining question will then be the issue that the victim themselves has been excluded from a remedy.

Remedial orders

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

Please provide reasons

108. As we have made clear throughout this response, we do not accept that there is a need to replace the Human Rights Act with a new Bill of Rights. However, if this is to happen, then it is our view that a remedial order power similar to that contained in the HRA should be retained.

109. Amnesty International UK considers that the remedial order power in s.10 of the HRA has worked well. While it obviously raises an issue in the sense of it resembling a Henry VIII power, there are sufficient safeguards on it to mean that these concerns have not in practice been a significant problem.[53] The requirement that remedial order powers can only be used where "there are compelling reasons for proceeding under this section" means that remedial orders cannot be used when scrutiny by parliament of primary legislation in the form of a Bill is necessary.[54] There have been far more significant and concerning Henry VIII powers passed in recent years without any apparent concern from the government.[55]

110. Since the power has been available, it has not generated any major issues of concern. It has, however, promoted actual resolution of human rights problems; a crucial issue given the limitations of a Declaration of Incompatibility as a remedy. If victims of human rights violations have succeeded in court to the point where judges have ruled that legislation the person has been affected by is contrary to basic human rights standards, but the concrete remedy of striking down or disapplying the given legislative provision is not available, then it is in our view incumbent on the government of the day to remedy the rights violation as soon as possible. Compliance with the Convention requires this. If this can be done through ordinary legislation then that is all to the good, but retaining a distinct remedial order power is nevertheless important in order to avoid long deferrals of case resolution caused by demands on the parliamentary timetable and the limitations of the normal legislative process.

111. One final point we would make is that we have not detected any significant parliamentary appetite, whether from the JCHR or wider parliamentarians, to take on the further burden of resolving declarations of incompatibility. As the JCHR itself has said,

[53] See HRA s.10 (2); HRA Schedule 2; and Commons Standing Order No. 152B and Lords Standing Order No. 72(c)
[54] See JCHR, https://publications.parliament.uk/pa/jt5802/jtselect/jtrights/89/8912.htm
[55] See eg https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/225.pdf; https://publiclawproject.org.uk/content/uploads/2020/10/201013-Plus-ca-change-Brexit-SIs.pdf

"In practice, the remedial power is not used for politically sensitive issues and therefore its use has not been seen as controversial. Given pressures on parliamentary time there is very little appetite for requiring stricter procedures and processes for non-controversial matters. There is therefore little need or appetite for a more stringent parliamentary process in respect of remedial Orders".[56]

Statement of Compatibility – Section 19 of the Human Rights Act

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

112. The duty in s.19 on the Minister introducing a Bill to parliament to express a view on its compatibility with Convention rights assists parliament to understand the proper impact and consequences of its legislative power. It is a useful and important tool to aid proper and full consideration of the large number of Bills legislators must consider.

113. It may also serve a useful purpose in requiring Ministers to take and consider advice on the Convention compliance of their proposals. It thus encourages appropriate focus and reflection by Ministers on their human rights responsibilities when legislating.

114. It is not, however, treated as the last word on the matter, instead merely providing important insight into the government's thinking. It could be strengthened if desired by adding wording to the section to require that the Minister also provide a more detailed statement of reasons for the government's view. This would add a statutory duty to provide the kind of helpful detail seen in ECHR memorandums (provided as a matter of practice rather than duty at present) to all discussions in Parliament, and thereby improve Parliament's power to conduct independent scrutiny of the government's position. It can only assist parliamentary sovereignty, which it appears is an aim of this consultation exercise. That is the change which Amnesty International UK would suggest or support.

Application to Wales, Scotland and Northern Ireland

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

115. Before answering this question in detail we must first note that these proposals as a whole are profoundly Westminster-centric. The very fact that this question is being asked in this way indicates that little or no thought has been given to the notion of producing a rights document that works cohesively across the UK. This is profoundly concerning for an organisation such as ourselves, with an international remit that has observed the development of rights protections and bills of rights in countries all around the world.

116. When countries around the world develop a national Bill of Rights, they usually try to build consensus and a sense of unity around the document by operating an inclusive, open and positive process that accommodates views from across their society.

[56] https://publications.parliament.uk/pa/jt5802/jtselect/jtrights/89/8912.htm

Instead, we have a frequently misleading consultation document with an anti-rights agenda, skewed to pandering to the priorities of a limited pool of Westminster political and media interests. These priorities are not reflective of those of the devolved nations that make up the UK. The impact these proposals would have is deeply concerning. It is clear the devolved administrations have not been considered in their design. There is no support from the devolved administrations for any reform of the HRA or reduction in the rights protection it offers citizens in Scotland, Wales and Northern Ireland. Both Scottish and Welsh governments have publicly recorded their clear opposition to the proposals.[57] The proposals will have profound consequences for devolution and the Belfast/Good Friday Agreement (B/GFA), yet the consultation gives little consideration to these implications.

117. With regards to Northern Ireland first, we are concerned that the proposals undermine and potentially breach the B/GFA and pose a real risk of destabilising the delicately balanced peace settlement.

118. The incorporation of the European Convention on Human Rights into Northern Ireland law was an explicit commitment of the Belfast (Good Friday) Agreement:

'*The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.*'[58]

119. This incorporation has proved vital to peace-building efforts, both in terms of building post-conflict institutions and the confidence of communities in Northern Ireland and as a mechanism to help address human rights violations over thirty years of the conflict, and indeed since.

120. The HRA has been central to the progress in building public confidence in policing in Northern Ireland In 2016, George Hamilton, Chief Constable of the PSNI reflecting on the then threat to repeal the HRA, said: "...*the practical consequences if the Act is repealed would be I think hugely detrimental to both the confidence in policing and the confidence of the police to make difficult decisions*."[59]

121. One of the key functions of the Northern Ireland Policing Board – a key oversight body consisting of members from all the main NI political parties and independent representatives – as set out in s3(3)(b)(ii) of the Policing (Northern Ireland) Act 1998, is to monitor compliance with the Human Rights Act 1998.[60] The PSNI Code of Ethics, provided for under s52 of the same Act, is also designed around the framework of the ECHR as provided for by the HRA. The full impact of this legislation involves both the letter of the Convention and its jurisprudence.

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[57] See eg https://www.gov.scot/news/joint-statement-on-human-rights-act-reform/

[58] Para 2 of the Rights, Safeguards and Equality of Opportunity section of the Agreement set out this commitment https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

[59] See keynote speech from then PSNI Chief Constable Sir George Hamilton at 2016 conference: 'The Impact of the Human Rights Act in Northern Ireland', available at http://www.humanrightsconsortium.org/wp-content/uploads/2017/04/The-Impact-of-the-HRA-in-NorthernIreland-Conference-Report-1.pdf,

[60] See: Keir Starmer and Jane Gordon, 'Monitoring the Performance of the Police Service in Northern Ireland for Compliance with the Human Rights Act 1998' (2005) 3 EHRLR 233.

122. In addition, the HRA is central to attempts to deal with the legacy of human rights violations in Northern Ireland. The positive obligations on public authorities that have emerged from ECtHR interpretations of Article 2 and 3 have been essential in seeking progress on legacy investigations, with a number of cases having reached the Supreme Court in this area in recent years.[61] The HRA has enabled new investigations to take place into unsolved murders. The HRA has also enabled coroners' inquests into unexplained conflict-related deaths, which have produced significant information for loved ones of the deceased and, on occasions, apologies from organisations or institutions involved in the deaths. Several miscarriages of justice have been brought to light as a result of the application of Article 6 of the ECHR. Any reduction in the scope of positive obligations is likely to lead to undermining access to the above convention rights for victims of the conflict and bereaved family members in Northern Ireland.

123. Beyond the practical importance of the HRA to the realisation of rights and peace settlement in Northern Ireland there is the issue of the B/GFA being an international agreement.

124. The B/GFA's promises regarding incorporation of the ECHR were given effect though the HRA and Northern Ireland Act 1998. At the same time, the B/GFA also committed the Irish Government to incorporate the ECHR under the 'equivalence' provisions, resulting in Ireland's European Convention of Human Rights Act 2003. As such, any amendment of the HRA necessitates a process of review between the UK and Irish Governments in consultation with the NI Assembly parties. Paragraph 7 of the section 'Validation, Implementation and Review' of the B/GFA makes this clear:
"Review procedures following implementation ... If difficulties arise which require remedial action across the range of institutions, or otherwise require amendment of the British-Irish Agreement or relevant legislation, the process of review will fall to the two Governments in consultation with the parties in the Assembly. Each Government will be responsible for action in its own jurisdiction."

125. These proposals amount to replacing the HRA, implementing a set of rights that although worded the same are distinct from the ECHR rights, and in a number of respects represent a fundamentally regressive change to how Convention rights have been enjoyed in Northern Ireland since the implementation of the B/GFA. It is very difficult to see how international and local agreement could be secured for such changes. Reducing access to rights would undermine and potentially breach a carefully crafted domestic and international peace agreement and upsetting the delicate balance that has been hard won over the years.

126. In addition, we would also note that, as the consultation acknowledges, the B/GFA also provided that these protections should be enhanced through a Bill of Rights for Northern Ireland:

"...rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity

[61] E.g.: In the matter of an application by Geraldine Finucane for Judicial Review [2019] UKSC 7; In the matter of an application by Hugh Jordan for Judicial Review [2019] UKSC 9.

of esteem, and – taken together with the ECHR [European Convention on Human Rights] – to constitute a Bill of Rights for Northern Ireland."[62]

127. The key term in this paragraph is 'supplementary'. The consultation says that the proposals 'will have no adverse impact on any future developments towards a Northern Ireland Bill of Rights', but this cannot be the case if, as is required by the B/GFA, the NI Bill of Rights is to be a "Convention rights-plus" document. The proposals undermine how Convention rights would apply in NI and therefore undermine the foundation for the proposed NI Bill of Rights.

128. Turning to the wider issues of devolution, the proposals run counter to the direction that human rights law is developing in Scotland, Wales and Northern Ireland and would fall within the scope of the Sewell Convention.

129. As has already been discussed, in Northern Ireland the intention has always been to introduce a Convention Rights-plus document specific to the circumstances in Northern Ireland. Scotland, meanwhile, has recently brought the UNCRC into Scots law, a Bill passed unanimously in the Scottish parliament which was expressly predicated on the continued operation of the HRA and the human rights provisions of the Scotland Act. However, the consultation's proposals change fundamental aspects of human rights legal protections across the UK, such as the universality of human rights, positive obligations, strike down power and the courts' ability to take into account the ECtHR. As such they would not only undermine the rights protections that the devolved institutions are striving for but would impact significantly on pre-existing devolved matters.

130. Furthermore, the UK Government would not normally legislate on procedural matters in Scottish courts, such as proposals around permission stages, remedies and applicant's conduct etc, as these are devolved matters.

131. In such circumstances the Sewell convention would clearly be invoked. It appears clear that consent for such changes will not be forthcoming. The Deputy First Minister of Scotland has stated that legislative consent should be sought from the Scottish Parliament on any resulting Bill of Rights. and a joint letter from the Scottish and Welsh Governments makes their opposition to the plans clear.

Public authorities: section 6 of the Human Rights Act

Question 20: Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.

132. The existing definition of public authorities should be maintained.

133. Section 6 (3) of the Human Rights Act defines 'public authorities' as,
(a) a court or tribunal, and
(b) any person certain of whose functions are functions of a public nature,

[62] Agreement Reached in the Multi-party Negotiations (1998) pp 16-17 [hereafter, Belfast (Good Friday) Agreement]

While section 6(5) refines this by stating that, "*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".*

134. It is our view that this definition and the jurisprudence around it is sufficiently clear and requires no further alteration, and certainly no further restriction in a way which would insulate those performing public functions from accountability. We note that the consultation itself states that the range of bodies and functions to which the HRA currently applies to be "*broadly right*" and that "*The current formulation in the Human Rights Act has the benefit of flexibility, which has allowed the application of the Act to evolve in line with changes in how public functions are delivered*." We agree with this assessment. We do not follow, therefore, why the consultation then feels the need to go on to claim that the definition may require 'greater clarity'. The limited examples given to support this claim do not, in our view, make anything like a compelling case for change.

135. The first case example it gives, *Ali v Serco* [2019] CSHI 54, is merely an entirely normal example of a higher court (the Inner House of the Scottish Court of Session) overruling a lower court (the Outer House of the Scottish Court of Session) on the particulars of a specific case. Such an event is inevitable in a legal system with any kind of appellate structure and does not, in our view, point to systemic flaw in the legislation being applied.

136. The second example given is *LW and others v Sodexo and the Secretary of State for Justice*[63], where the consultation seeks to imply there was something untoward or concerning about the Ministry of Justice also being found to be responsible for human rights violations in the instant case, when a private company (Sodexo) had been identified as a public authority for the purposes of the case. However, this simply misrepresents the issues in the case; where Sodexo had been found liable for a breach of Article 8 after its staff conducted strip searches that were not in accordance with the law, the MoJ was held liable on separate grounds for failing to fulfil its positive obligation to take sufficient steps to ensure that such violations did not occur. There was no uncertainty as to why the MoJ was identified as a relevant public authority in the case and no suggestion that it was responsible for the same human rights violation as Sodexo. As is obvious, it is entirely possible for more than one public authority to be implicated in different human rights violations arising from the same incident.

137. There is, therefore, no compelling case for change. The courts in the UK have already produced a clear and sufficient set of guidelines through caselaw for some time now on the qualities that identify an entity as a public authority for the purposes of the act.[64] There is nothing in the consultation document to suggest that any affected party, or potentially affected party, finds that these are unclear, or so unclear as to require legislative intervention. What change would bring, though, is a raft of new litigation to resolve the meaning of the new definitions and how, if at all, they substantively differ from the old definitions.

138. We would be particularly concerned if any proposed change were to have the effect of insulating private companies, or any other entity, contracting with government to perform public functions from human rights challenge. There cannot be a circumstance where an accountability black-hole is created, whereby a public function

[63] LW & Ors v Sodexo Ltd & Anor (Rev 1) [2019] EWHC 367 (Admin) (20 February 2019)
[64] See eg *YL v Birmingham City Council* [2008] AC 95

is being performed but the appropriate organisation cannot be held responsible for its human rights implications. This seems highly likely to result in further human rights violations from those entities, and – again – to challenges in the Strasbourg Court.

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.

139. Amnesty International UK does not believe that there is any need to change s.6, or any convincing evidence to the contrary provided in this consultation.

140. This proposal reads as an extrapolation from a particular ideological critique of section 3 onto section 6, without any regard being paid to the reality of how section 6 and the Human Rights Act has been functioning. There is no evidence, and the consultation document does not provide any, of there being a problem with regards to public authorities' ability to perform their functions in light of s.6 as currently drafted. The preamble merely floats a hypothetical possibility, "*section 6(1) could still require courts to compel the public authority to act in a way that is contrary to the clear will of Parliament"*, without providing any proper evidence of this having occurred. Given the resources that have been dedicated to producing this consultation and the apparent willingness to produce tendentious examples to justify other weak proposals, we consider that this omission is indicative of just how lacking in substance this purported concern is.

141. As discussed in our earlier answers, we do not accept the critique pursued in this consultation regarding the interpretative powers given to courts by section 3, in that we do not accept that section 3 has resulted in courts interpreting legislation in a way that is contrary to the clear will of Parliament. As such, we similarly do not accept the related apparent concern here that public authorities are put in a position by section 6 of having to act in conflict with the clear will of Parliament. As noted above, there is no evidence for this and there is nothing inherent in how section 6 (and relatedly section 3) are drafted that would make it so.

142. While we can see the logic in ensuring that the wording of the protection in section 6 reflects that of section 3, we are particularly concerned by the suggestion of removing the interpretive element from section 6 altogether. We do not support attempts to further insulate public authorities from accountability for human rights violations. Section 6 as currently written provides ample protection for public authorities and does not need to be revised.

Extraterritorial jurisdiction

Question 22: Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

143. That human rights law – the Convention itself and other international treaties - applies outside the bounds of territorial jurisdiction is settled law. As the Consultation paper recognised, seeking to restrict the jurisdiction of the Bill of Rights so that it was only applicable domestically would do nothing to change this fundamental principle and thus the UK's obligations under the Convention and other instruments of international law.

144. The paper also correctly recognises that legislating to restrict the extraterritorial jurisdiction of the BoR would create a gap between domestic legislation and the UK's obligations under the ECHR (as would, of course, many of the other proposals in this consultation). It is entirely correct to state that this is not an issue where the UK can unilaterally seek to restrict the application of human rights law by changing its domestic legislation. The same though applies to many of the proposals in this consultation, most of which would lead to the same gap.

145. The resultant diversion from Convention jurisprudence would inevitably lead to more cases against the UK in the Strasbourg courts, and more violations of rights in overseas operations and more. The two jurisdictions, UK and Strasbourg, must be consistent, as the House of Lords recognised in *Al-Skeini*[65]. To legislate otherwise would, as the JCHR explained after careful consideration[66], "*leave a category of victim under the convention unable to obtain a remedy in the UK and would put the UK in breach of its obligation to provide an effective remedy under article 13 ECHR"*. It would also, as is recognized in this consultation paper, lead to Strasbourg being required to determine more cases touching on national security, with resultant procedural issues the UK is unlikely to find palatable.

146. Nor should such diversion be pursued through political means - intended to water down the scope of the Convention. Regression and greater legal black holes than already exist would be created. Currently, while jurisdiction is primarily territorial, there are certain clear exceptions recognised in the Strasbourg case law. Recognition of these bases for jurisdiction has led to important transparency and (a measure of) accountability in such cases as Al-Skeini, where civilian hotel receptionist Baha Mousa was tortured and killed by British soldiers in a make-shift detention facility. Investigations into fatalities in Iraq which were opened only as a result of the extraterritorial reach of the Convention revealed "*some shocking findings*" about what happened to individuals overseas at British hands, and enabled important lesson learning for the armed forces[67]. This is entirely right and as it should be. The lives in issue where the UK – for example – has effective control of an area – are no less valuable than those within the bounds of the UK itself.

147. It is simply not the case that there has been an "*extension of jurisdiction to any extraterritorial exercise of force*" as the consultation paper suggests. Indeed, the use of force on its own is insufficient to establish jurisdiction under the Convention[68]. Further, the extraterritorial jurisdiction of the Convention has proved an important tool to protect British soldiers – from the state's negligence in the provision of wholly inadequate

[65] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 AC 153
[66] The Government's Independent Review of the Human Rights Act, Third Report of Session 2021–22https://committees.parliament.uk/publications/6592/documents/71259/default/ at [159]
[67] Richard Hermer QC, oral evidence to the JCHR 24 March 2021, available at https://committees.parliament.uk/oralevidence/1964/pdf/
[68] *Al-Saadoon v Secretary of State for Defence and Rahmatullah v Secretary of State for* Defence [2016] EWCA Civ 811 at [69].

equipment resulting in death, to the investigation of the rape, bullying and other mistreatment of Corporal Anne-Marie Ellement on a base in Germany. Without the extraterritorial application of the HRA, neither of these important cases would have been heard, and the resulting important improvements in policy and practice would not have been made. Restriction of jurisdiction would create a legal black hole for UK forces themselves. Moreover, it would be likely to create a race to the bottom internationally, where other states would also ignore their human rights obligations internationally. This could put British soldiers in danger.

148. It would also damage the reputation of the UK internationally. Regression of this kind is likely to influence relations with partners and send a statement to the world about the nature of the UK's commitments to fundamental principles of international human rights law.

149. As the JCHR also noted in its Report in the IHRAR, the evidence it received was "*unanimously against*" [69] limiting the extra territorial reach of the HRA through any further changes. It found there was *"no justification for making any such amendments"*[70]. We do not accept that any of the discussion of the subject in the consultation paper suggests that there is an 'issue' with extraterritorial application which requires resolution through limiting its reach.

Qualified and limited rights

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

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

Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.

Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

150. Assessments of proportionality are a core function of the courts under the HRA and have now a long established and settled process. Crucially, they allow for the protection of human rights by assessing the means of achieving a legitimate aim set out in legislation or departmental policy against the individual circumstances of a given

[69] The Government's Independent Review of the Human Rights Act, Third Report of Session 2021–22https://committees.parliament.uk/publications/6592/documents/71259/default/ at [174]
[70] Ibid at [181]

case. In so doing, courts already exercise even more considerable restraint in relation to key areas of contestation, such as public spending or national security issues. However, the individual is protected through the courts' ensuring that where a restriction on a person's qualified right is permissible, this restriction is limited to the minimum necessary to achieve the state's legitimate end. In this way even where rights have to be curtailed due to some important public interest, the right in question is not restricted any more than is necessary, bearing in mind the specific facts of the case.

151. Both option 1 and option 2 appear confused as to what powers the courts currently have and the way that they are currently being used. Option 1 requires the court to give "*great weight"* to Parliament's view of proportionality when reviewing a decision made by a public body under primary or secondary legislation. Yet, public bodies are already protected from findings of unlawfulness when they act in a way that is required by primary legislation, under section 6(2). However, if a public body has discretion under the legislation about how to act in a given circumstance, then the courts will be determining the proportionality of the decision to act in that way in the instant case. The fact that parliament will have legislated for the overarching availability of a power will tell the courts very little about parliament's view of the proportionality of its use in an individual case. Likewise, option 2 requires courts to give "*great weight*" to the fact that Parliament has passed legislation in the public interest. Once again, if Parliament has legislated to give a discretionary power to a public authority, that decision to legislate does not transplant the weight of Parliament onto a separate public authority's context-specific decision to exercise the power.

152. Beyond these specific options, it might be proposed that Parliament legislate to specifically address questions of proportionality that it would seek to apply in a sweeping way across an issue area. It did a version of this, for example, in the 2014 Immigration Act with regards to Article 8 questions in deportation appeals.[71] However, the courts do not require 'guidance' from politicians about how to balance qualified rights. Although dressed in a veneer of parliamentary respectability, such 'guidance' would amount to political interference in the fundamental duties of independent judges: to interpret the meaning of legislation and rights, and apply case law.

153. We would be particularly concerned by proposals along these lines, as they would be likely to seriously undermine human rights protection for unpopular or marginalised groups, and others who lack sufficient influence with the majority party in Parliament at any given time. It is a core function of human rights to protect people who lack power and influence from the oppressive tendencies of governments seeking popularity by demonising or otherwise targeting minorities

Deportations in the public interest

Question 24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.
Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment. Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in

[71] See Immigration Act 2014 s.19

deportation against such rights. Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State

154. None of the Options presented is necessary or appropriate.

155. Amnesty International UK recognises as a matter of principle, State's rights to determine immigration policy and give effect to that subject to two basic principles. Firstly, the right to seek and enjoy asylum is not fettered by the right of the State to control its borders. The Refugee Convention and related human rights obligations, where a person would be at risk of serious harm such as torture, inhuman or degrading treatment if removed from the UK, cannot legitimately be fettered by any of the considerations given in these Options. Secondly, whereas the setting of immigration policy is a matter for the State, giving effect to this must be in accordance with human rights obligations. For the following reasons, none of the Options is in principle or practice a necessary or appropriate means to achieving this.

156. We address various considerations under two subheadings. The first concerns the brief explanation of the relevant Government proposals. The second sets out further considerations.

Government's proposals (paragraphs 292 to 296):

157. The Government's understanding of the matter of wider public confidence is flawed. This is a particular problem in relation to deportation. It is instructive to reflect on the relatively short history of the development of the powers of deportation and connected policy and legislative constraints on human rights in relation to them. This shows the error pursued by successive Governments on these matters has not alleviated the matter of public confidence but has merely served to exacerbate it. A starting problem with each of the Options presented, as explained in these paragraphs, is that they seek not to address and correct the error but rather to continue, replicate or exacerbate it.

158. Before the changes in the Immigration Rules in 2006 and the introduction of provisions in the UK Borders Act 2007 on deportation, the longstanding position in UK immigration law, policy and practice was straightforwardly that the power of deportation was an immigration power. Its exercise was determined against the competing considerations of the public interest in expelling a migrant person from the UK, whose presence was by permission only, against the cumulative factors relevant to strength of connection of that person's in the UK and any harmful impact of the person's expulsion.

159. Paragraph 364 of the Immigration Rules provided a comprehensive list of considerations that the Secretary of State would consider before making a deportation order.[72] This holistic approach long pre-dated the Human Rights Act 1998. The

[72] These were (i) age; (ii) length of residence in the United Kingdom; (iii) strength of connections with the United Kingdom; (iv) personal history, including character, conduct and employment record; (v) domestic circumstances; (vi) previous criminal record and the nature of any offence of which the person has been convicted; (vii) compassionate circumstances; (vii) any representations received on the person's behalf.

motivation for change, firstly in the rules and thereafter in primary legislation, had nothing to do with concerns as to the adequacy of these powers or the accompanying rules. Nor had it anything to do with the Human Rights Act 1998. The motivation is succinctly summarised in the introduction to HM Inspector of Prison's Foreign national prisoners: a thematic review, July 2006:

"…just after the fieldwork for this report was completed, it emerged that many foreign nationals leaving prison had neither been identified nor considered for deportation. This was not because of a gap in legislation or powers. It was an acute symptom of the chronic failure of two services to develop and implement effective policies and strategies for people who were not seen as a 'problem': though in fact, as this report shows, they were people who had many problems, which were not sufficiently addressed."

160. The operational failure at the heart of this received significant public and political attention. It resulted in a recall of over a thousand people to prison, some of whom were held for further periods of months or years and many of whom were ultimately released back into the community. This operational impact lingered long after the inspector's 2007 report; and was exacerbated by complications introduced in the rules in 2006 and thereafter by provisions of the UK Borders Act 2007 concerning so-called 'automatic' deportation.

161. The UK Borders Act 2007 transformed deportation consideration in very many cases into a specific human rights concern. This was because rather than continuing the previous and long-standing holistic approach under what had been paragraph 364 (described above), the question in near every case to which the 2007 Act regime applied became the single one of whether deportation would breach the person's human rights – i.e. whether the person fell within Exception 1 set out in section 33(2) of the Act. The introduction of further complicating statutory provisions relating to Article 8 by section 19 of the Immigration Act 2014 merely aggravated this. Of course, the political context for all of this – led by the often exaggerated and harmful public statements of successive Home Secretaries and, occasionally, Prime Ministers – has both sustained and extended the concern described in the consultation paper relating to public confidence. Reports of the Joint Committee on Human Rights over the period have generally highlighted the problem in this – in particular, the Committee's Tenth Report of Session 2017-19 (Enforcing Human Rights), July 2018 and Thirty-Second Report of Session 2005-06 (The Human Rights Act: the DCA and Home Office Reviews), November 2006. The latter including the conclusion (paragraphs 9-41):

"...public misunderstandings will continue so long as very senior Ministers make unfounded assertions about the Act and use it as a scapegoat for administrative failings in their departments."

162. Seeking to once again legislate in similar ways will not help. The fundamental reason for that is as follows: Proper and effective consideration of deportation powers requires an individualised assessment of the full circumstances of a person's case as was always understood in domestic immigration law long before the Human Rights Act 1998. It cannot rationally be reduced to a presumption that a particular factor such as a minimum length of imprisonment will certainly prove overriding in all cases (Option 1). Attempts at such an approach only serve to exacerbate the problem of elevating the need for reliance on the fundamental nature of human rights as the means to mitigate a flawed approach that improperly directs a decision-maker (whether civil service or

judicial) to ignore the relevance or weight of countervailing factors or inhibits consideration of these. Seeking to exclude consideration of certain human rights (Option 2) is just a different version of the same approach albeit potentially more draconian and more clearly incompatible with the 1950 European Convention on Human Rights. Seeking instead to exclude effective independent judicial oversight of the decisions of the Secretary of State (Option 3), whether made in person or by an official, merely creates a different problem of absence of an effective remedy contrary to Article 13 of the Convention. As such, it fundamentally undermines the presumption at the heart of the Human Rights Act 1998 that the legislation itself provides a guarantee of that required by Article 13 and hence does not include that article among those included in Schedule 1 to the Act.

Further considerations:

163. The problems with what is said and proposed in the consultation are enlarged when consideration is given to how deportation powers are in practice exercised and sought to be exercised. The clear indication is that it is not consideration of the propriety of the exercise of this immigration power in any particular case that is the primary motivation for the exercise of the power. Rather, that motivation is driven by real or perceived political evaluation of the expediency of either the number of deportations being at or above any particular level or the level of public approbation that may be secured by securing (in the case of the Home Secretary) or calling for (in the case of other media or political actors) the deportation of a particular individual. These can provide only arbitrary and inconsistent grounds for the exercise of what is, by any calculation, a severe power. As such, these cannot provide a basis for deportation that is either compliant with human rights or with any rational (or common sense, if that is preferred) and therefore rule of law respecting analysis.

164. The starkest examples concern people born in the UK who have grown up in this country, who are British by connection, identity and recognition of the British nationality law (as made by Parliament), but whose citizenship requires to be registered under the British Nationality Act 1981. Indeed, the consultation cites a case, OO Nigeria, where these issues arise.[73] Similarly, stark examples are provided by people brought to the UK at a very young age who grow up here with the same connection and identity. The report of Stephen Shaw, Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons: A follow-up report to the Home Office, July 2018[74] both exposes the excessive nature of current deportation policy and practice and underestimates this. The underestimation is because Stephen Shaw's report is not informed by any analysis of the underlying citizenship rights of the people affected and the incompatibility of deportation policy with the parliamentary purpose behind the British Nationality Act 1981 in conferring statutory entitlements to British citizenship.

165. It is remarkable that the Windrush scandal, which began as a deprivation of citizenship rights of British people,[75] is effectively repeated by exclusion of many British people from their citizenship rights today. There are a variety of means by which this done. The impact of deportation policy on those affected by this is precisely the same impact of exile and exclusion upon, predominantly Black and Brown, British

[73] https://tribunalsdecisions.service.gov.uk/utiac/hu-16908-2018

[74] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728376/Shaw_report_2018_Final_web_accessible.pdf (paragraph 4.93ff)

[75] By origin and by statutory entitlement under the new settlement of British nationality made by the 1981 Act

people for which the Government has formally apologised, promised to learn from and yet is continuing.

166. As indicated, the paragraphs under this subheading provide only examples, albeit particular stark examples, of the harms that are currently being done and would be gravely enlarged if any of the proposals are adopted. There are many other examples that might be considered concerning people who are either or both long resident and strongly connected to the UK, particularly with family here. For example, there is the impact upon family members – including children, partners and dependent relatives – that also needs to be considered in relation to any proposed deportation. Indeed, as regards children, that is both a statutory duty upon the Home Secretary by section 55 of the Borders, Citizenship and Immigration Act 2009 and an international law duty under the 1989 UN Convention on the Rights of the Child. The problems we have set out as to the proposals being made apply similarly to the effective exclusion or inhibition of proper consideration of these matters that the proposals would cause in any individual case.

Illegal and irregular migration

Question 25: While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

167. As regards this question, much of what we have said in relation to the previous question would apply here too. We must emphasise that the context in which the question is put is itself contrary to understanding and respect of the UK's international human rights obligations. As we have said in response to the previous question, seeking asylum is a right of all refugees that precedes the State's rights to determine and give effect to immigration policy. The reference to arrivals in the UK by boat indicates that what is under consideration is significantly removed from understanding and respect for human rights. While the Government either refuses or fails to understand the rights of refugees to cross borders, without prior authority, to seek asylum, it will not be in a position to describe still less construct any human rights compliant policy in relation to irregular migration. It will also fail to describe still less construct any immigration policy that is effective, for it will always be pushing against not merely people's human rights but also their real human needs.

168. There is a wider lesson for the Government here. Human rights law is a critical means – though not the only means – by which people and the reality of their lives, experiences and needs are given weight and consideration in administrative action. Where administrative action is not informed by, or is constructed in ways that are so uncompromising as to be incompatible with people's experiences and needs, the result can only be friction between the administrative aims and actions and human rights. That friction will inevitably – in any human rights respecting environment – manifest itself in legal challenge; and the more Government presses against that, the more it will merely exacerbate both that friction and its impact on wider public perceptions. Our answer to the previous question provides example of this and its detrimental impact.

Remedies and the wider public interest

Question 26: We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:
a. the impact on the provision of public services;
b. the extent to which the statutory obligation had been discharged;
c. the extent of the breach; and d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.
Which of the above considerations do you think should be included? Please provide reasons.

169. The question is premised on a number of assumptions which we reject, and have rejected throughout this consultation response. It also introduces confusion around the purpose of awarding damages in a human rights case.

170. We reject the assertions and implications made throughout the consultation that there is somehow too much human rights litigation happening in the UK, that this litigation is a vehicle for (often spurious) damages claims and that this litigation is hampering public authorities in performing their work. These assertions read to us as merely regurgitations of the worst forms of tabloid misinformation, that have beset the HRA since it came into force. There is no tension or context between victims of human rights violations being able to seek appropriate legal redress and the 'wider public interest', as the consultation document would characterise it. It is in the wider public interest for public authorities to act a way which respects' the public's human rights.

171. As the MoJ will surely know, damages payments in human rights litigation are very small, and substantially smaller than other forms of civil litigation. One consequence of this is that there is no evidence that damages in human rights cases have had any negative impact at all on the provision of public services. To the extent that risk of damages (as opposed to the overarching risk of a finding of unlawfulness/violation) in any way influences public authority decision making, it can only work appropriately to discipline public authorities' conduct and to help focus minds on rights compliance. The 'wider public interest' is therefore served by operating a system of legal accountability for human rights breaches, which includes financial redress for victims. These are good things that the MoJ should be encouraging.

172. Notably, in relation to judicial review (which is the route for many human rights cases resulting in damages), the Independent Panel on Administrative Law[76] reported that those government departments that gave an estimate of their cost in financial and human resources gave little indication that the cost was overwhelming or in any way disproportionate to the value of maintaining "*the lawfulness of executive action*" and none of the 84 responses to the question whether specified grounds for review "*seriously impeded the proper or effective discharge of central or local government functions"* suggested that this was the case.

173. IRAL considered the "*general assumption*" that the impact of judicial review on public administration was largely negative and made it difficult for public bodies to deliver public services efficiently, noting the conclusion of a recent impact study that

[76] Report available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf

there was *"no evidence that this was the case*" and that this assumption was "*at best misleading and generally untrue."*[77]

174. The proposal in the consultation that judges should have *'responsibility to consider the impact of the award of a remedy on the public authority's ability to discharge its mandate'* is confused. Judges are not provided with the information that would be necessary to make such an assessment on any sort of meaningful basis. In any case, human rights damages for an individual claimant are so small that there is not a public authority in the land for whom making such a payment would substantially impair its ability to discharge its mandate. Were such a, highly unlikely, eventuality to arise this would say more about government budgetary decisions than it would about the damages system under the Human Rights Act. Most importantly, though, the purpose of a damages payment in a human rights case is to ensure just satisfaction for the individual victim of the rights violation. It is not, and cannot be, as the consultation apparently wishes, an overall accounting exercise for all parties involved in a rights dispute.

175. The assessment of Human Rights damages under the present system is designed to reflect the practice at Strasbourg,[78] which is based on the notion of 'equitability'; essentially fairness.[79] All relevant factors are taken into consideration and that will inevitably include the nature and extent of the breach identified, albeit that Strasbourg has always rejected calls for the introduction of 'punitive' or 'exemplary' damages – reflecting the core purpose of the damages award as being a form of just satisfaction for the claimant rather than a form of punishment for the state party concerned.[80] The other factors in the list proposed in this question are not generally considered relevant, as they have no relationship to the determination of 'equitability' in a given circumstance.

176. The decision of the domestic courts to reflect Strasbourg jurisprudence on these points has made sense under the HRA system, as the purpose of the HRA is to provide legal redress for ECHR rights domestically and that logically includes domestic courts bringing about 'just satisfaction' as Strasbourg would recognise it. This is itself part of ensuring a sufficient domestic remedy so as to avoid people having to take their cases to Strasbourg. However, this proposal exposes the confusion at the heart of the current consultation, particularly with regard to what is being proposed about the UK's relationship with ECHR rights going forwards. If the rights in the new Bill of Rights are truly meant to be broadly in line with Strasbourg (even if with a small amount of variation here or there) then it makes no sense to diverge from Strasbourg's remedy framework by imposing this statutory list of considerations. If, however, the government is genuinely trying to substantively diverge from Strasbourg rights then changing the remedy framework is at least consistent, albeit unwise given the ongoing issues discussed throughout this document of the proposals leading to people not getting a sufficient domestic remedy and being compelled to go to Strasbourg anyway.

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[77] Report available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf

[78] See eg *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673; and Faulkner, R (on the application of) v Secretary of State for Justice & Anor [2013] UKSC 23 (1 May 2013)

[79] See ECHR Practice Direction: Just Satisfaction Claims, 28th March 2007, https://www.echr.coe.int/documents/pd_satisfaction_claims_eng.pdf

[80] See ECHR Practice Direction: Just Satisfaction Claims, 28th March 2007, https://www.echr.coe.int/documents/pd_satisfaction_claims_eng.pdf

IV. Emphasising the role of responsibilities within the human rights framework

Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.
Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or
Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

177. We are opposed to these proposals; both the general statement about introducing the notion of 'responsibilities' to the Bill of Rights and the more specific proposal to use the remedies system as a means of enforcing this. In particular we are opposed to the attempts to link damages payments to an assessment of a person's past conduct.

178. Human rights are not something earned through good behaviour. They are universal and inalienable, derived as they are from the inherent dignity and respect attached to each human life. This proposal, though, seeks to undermine that fundamental human rights proposition. It rests on repeating a tabloid myth, by implying that the human rights act has led to a major issue of large damages payments being handed out to 'undeserving' claimants. As has already been noted, there is no evidence for the claim that rights litigation is a vehicle for compensation. Compensation payments in human rights civil cases are considerably smaller than in ordinary civil litigation and rights cases often result in no compensation payment at all. By repeating this myth at length, the government is contributing to the misinformation that surrounds the Human Rights Act.

179. The proposal also promotes confusion about the role of legal human rights protections. Certainly people have responsibilities to others in society, but it is not the job of human rights laws to provide for this. Human rights laws protect the individual, including unpopular minorities such as prisoners and others who might be regarded as failing the kind of morality test being proposed here, against the powers of the state. They are not a means for the state to regulate the conduct of individuals: that is the function of (for example) criminal law.

180. As noted in our answer to the previous question, the current damages framework is based on the Strasbourg approach of an assessment of 'equitability', or fairness. This is already sufficient to take account of extreme circumstances, such as the case example provided in the consultation where Strasbourg refused a damages payment, without officially endorsing a set of damaging myths regarding human rights litigation and introducing confusion about the function of human rights protections in society.

181. A further concern with these proposals regards the ambit of those they would likely catch. Whether the test is pitched at conduct directly related to the circumstances of the claim, or some wider assessment of conduct, the proposal opens up the very real possibility of victims of abuse and human rights violations having conduct associated with that rights abuse and those violations by the state being held against them. The

most obvious example of this arises at present in trafficking contexts, where people subject to exploitation in the sex and drugs trades are regularly prosecuted for criminal offences that arise solely as a result of their exploitation. If this were not damaging enough, these people often find their convictions held against them for years to come and have a very difficult time getting them overturned. There is a very real prospect in these circumstances of such 'adverse conduct' being held against them in a future human rights damages assessment.[81]

V. Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role

Question 28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.

182. Article 46 of the ECHR, as the consultation paper recognises, requires state parties to the convention to implement judgments of the Strasbourg Court in cases brought against them. It is therefore a requirement of international law that the UK '*abide by'* such rulings, acting to remedy the violation in question. As the then Council of Europe Commissioner for Human Rights made clear in 2016, "*the rule of law requires that judgments be implemented promptly, fully and effectively*". As the Commissioner explained in his Memorandum of observations for the Joint Committee on Human Rights on the Draft Voting Eligibility (Prisoners) Bill in 2013[82],

> "*judgments of the Court often concern issues which are not popular with mainstream voters… No matter how unpopular, these judgments must still be executed. Non-compliance of a member state with a judgment of the Strasbourg Court is irreconcilable with its obligation, as a state party to the Convention, to execute the Court's judgments fully and effectively"*

183. Further, selective non-compliance by one member state, the Commissioner went on to explain:

> "*would undermine the system as a whole. If a member state decides which judgments to implement, leaving some allegedly "political" or exceptionally "sensitive" judgments without execution, the effectiveness of the entire system is reduced and may eventually collapse as other countries would follow the noncompliance path"*[83]*.*

184. Commenting particularly on any attempt by the UK as a founding member to 'cherry pick' or selectively implement judgments, he underlined that if this happens "*other states will invariably follow suit and the system will unravel very quickly*"[84]. The authority and credibility of the system depend to a large extent on the effectiveness of enforcement. While the choice of means to discharge the article 46 duty is left to the state, those means must be fully compatible with the Court's conclusions in its judgment. A partial failure to execute engages the international responsibility of a state as much as a full one.

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[81] For more on this see Joint Committee on Human Rights Oral evidence: Human Rights Act reform, HC 1033 Wednesday 9 February 2022, https://committees.parliament.uk/oralevidence/3436/pdf/
[82] Available at https://rm.coe.int/16806db5c2
[83] Ibid p.3
[84] Ibid

185. Amnesty International UK, as part of a movement with national sections across member states, who observe daily the importance of the integrity of the Convention to justice and stability at home in their countries, agrees. It is not hyperbole to state, as the Commissioner did, that such a move would send a signal to other states to follow the UK's lead and claim that compliance with certain judgments was not possible, necessary or expedient, and that this would be "*the beginning of the end of the ECHR system*"[85] at the core of the Council of Europe. The government states that it is committed to that system, to remaining within it, and to its importance. Any attempt to remain within the system and yet selectively implement judgments for any reason – political or otherwise - would irreversibly damage its effectiveness, and risks a wholesale rollback across the continent. The Council of Europe's Secretary General in 2014 pointed out that proposals to make Strasbourg judgments advisory rather than binding, would be "*welcomed by regimes less committed to human rights than the UK"*[86].

186. It would also have disturbing echoes. Amendments to the Russian Constitution adopted by the Russian parliament and signed into law by President Putin in March 2020 introduced, inter alia, a provision stipulating that "*decisions of interstate bodies*" should not be "*subject to enforcement in the Russian Federation*" if they ran counter to the Russian Constitution. The Venice Commission (the Council of Europe's body of constitutional legal experts) published an opinion on those amendments and their compatibility with Article 46, expressing serious concern[87]. It assessed a background where the Russian Constitutional Court had ruled in individual cases that certain Strasbourg judgments were not enforceable in Russia, and earlier legislative amendments to the power of the Duma (parliament) in 2015 along those lines. It also discussed the matter with the Russian authorities, with interlocutors in those discussions claiming that as a matter of principle Russia was committed to fulfilling its international obligations, but justifying the changes. Those justifications included saying that '*legal certainty'* was the driving force behind the amendments, that the Strasbourg Court had "*interpreted the ECHR beyond its originally intended meaning to an extent that exceeds the original consent of states*" and that since any incompatibility (referring to cases against Russia on prisoner voting) resulted from that perceived expansion, Russia reserved its right "*to openly contest decisions"*[88].

187. The amendments were thus seen by Russian interlocutors as protecting the Constitution from contradictory standards the Strasbourg Court might develop, allowing the Russian Constitutional Court to 'classify' judgments. The Venice Commission pointed out that while there is choice of domestic solutions as to the status of the ECHR in domestic law, and as to division of power between branches of the state, whichever model is taken any state is bound by international law under Article 26 of the Vienna Convention on the Law on Treaties to perform its obligations, and that Article 27 of that treaty prevents invocation of internal law provisions as justification for failure to perform a treaty [at 50]. It concluded as follows:

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[85] Ibid

[86] Jagland, T., Azerbaijan's human rights are on a knife edge. The UK must not walk away, The Guardian, 3 Nov 2014, https://www.theguardian.com/commentisfree/2014/nov/03/azerbaijan-human-rights-uk-tory-echr .

[87] OPINION ON THE DRAFT AMENDMENTS TO THE CONSTITUTION (AS SIGNED BY THE PRESIDENT OF THE RUSSIAN FEDERATION ON 14 MARCH 2020) RELATED TO THE EXECUTION IN THE RUSSIAN FEDERATION OF DECISIONS BY THE EUROPEAN COURT OF HUMAN RIGHTS, Adopted by the Venice Commission on 18 June 2020, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)009-e

[88] Ibid at 43. Their reliance on supposedly analogous models in Italy and Germany was also roundly rejected by the Venice Commission, see fn 29.

"*The Venice Commission has previously found that the power of the Constitutional Court of the Russian Federation to declare a judgment non executable as such, thus putting an end to the process of execution, contradicts the obligations of the Russian Federation under the European Convention on Human Rights. The Commission is alarmed by the constitutional entrenchment of such a power*"[89]

188. At the time, Amnesty International's Eastern Europe, and Central Asia Director, commented that "*these constitutional amendments are an attempt by the Russian authorities to empower themselves to override ECtHR rulings. This is a blatant affront to human rights and the rule of law and would rob many in Russia of a crucial avenue for justice…by joining the European Convention on Human Rights Russia agreed to abide by the rulings of the European Court of Human Rights. <u>It cannot simply ignore judgments it doesn't like</u>*"[90].

189. It is against this background that the consultation's reference to a "*clear and explicit democratic shield to defend the dualist system in the UK*" will inevitably be seen. "*Making clear that Parliament, in the exercise of the legislative function, has the last word on how to respond to adverse rulings*" (316) should not be taken to mean in law or practice that the UK state is free to respond to adverse rulings by refusing to execute them. This is about international obligations rather than parliamentary sovereignty, and objections to article 46 concern national sovereignty, a different concept. Article 46 does not affect the constitutional principle of Parliamentary sovereignty, but makes clear the outcome for the UK's legal obligations internationally if it refuses to execute judgments, whatever the basis for so doing. As in all areas of international law, well beyond human rights – the decision to limit national, rather than parliamentary, sovereignty in this way, is at the heart of and necessary to the effective working of an international legal order, far beyond human rights law.

190. Indeed, the draft clause proposed is disturbingly vague. It affirms that Strasbourg judgments are not part of UK law, and cannot *"affect the right of parliament to legislate*". However, it makes no mention of the fact that were parliament to legislate in such a way as to prevent enforcement of an adverse ruling, to cherry pick which of those judgments it is given notice of to implement (even partially), the UK would be left in violation of its international obligations, just as would be the case with non-implementation as a result of the legislative and constitutional changes in Russia.

191. The reference to this proposal as a <u>shield</u> against Strasbourg, and the consultation paper's repeated references to a need for legal certainty and claim that Strasbourg is exceeding its mandate, inevitably gives rise to a concern that non-enforcement might be the intent.

192. We are left in hope that this is not intended to be the outcome of this clause – indeed it seems unlikely that the domestic Courts would construe the lack of certainty in this provision to that effect, given where it would place the UK. However, what then is the purpose? Is it simply to encourage debate over the means by which an adverse judgment is to be complied with? If so, it is concerning that there is no reference

[89] At [64]

[90] Europe/Russia: Venice Commission denounces Putin constitutional amendments which avoid execution of ECtHR rulings, 19 June 2020 https://www.amnesty.org/en/latest/news/2020/06/europerussia-venice-commission-denounces-putin-constitutional-amendments-which-avoid-execution-of-ecthr-rulings/

whatsoever to that being the intent in the question or the text surrounding it. If the government wishes to negotiate as to the way in which it chooses to implement its judgments, to reach acceptable compromises as in the case of prisoner voting, informed by parliamentary debate, it is already free to do so. That is the current flexible framework, and there is no need for legislative change to improve practices domestically to support that approach. If all that is here intended is to encourage such debate, and not to set up a protective shield against the rulings of Strasbourg, the government should say so, and draft clauses accordingly.

Impacts

Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights.

In particular:

a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate;

b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate; and

c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.

193. It is crystal clear that watering down human rights protections in the way this consultation proposes would have a disproportionate impact on people with protected characteristics, as can be seen from the content of submissions to this consultation from such organisations as Stonewall. It is therefore deeply concerning to see so little attention paid to this in the consultation paper, and resultant lack of scope for responders to consider the government's position on equality impact properly.

194. It is not the role of civil society to have to provide government with necessary equality impact information and assessment – s.149 of the Equality Act requires the Ministry of Justice, like all public authorities, to have due regard to the need to eliminate discrimination harassment, victimisation, and any other conduct that is prohibited by or under the Act; to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and to foster good relations between people who share a relevant protected characteristic and persons who do not share it. The broadbrush statements that these have been considered, and superficial discussion of them in Appendix 3, is woefully inadequate. As the government recognises, a full impact assessment is necessary - and must be proactively and properly undertaken by those proposing each measure. However, it should have been provided together with the proposals themselves, to enable those representing affected groups to engage with and comment on the data and considerations provided. This is a significant gap in this consultation.

195. The HRA framework has been critically important, in particular, to protecting those who come into more frequent contact with the state. That will often be those from marginalised or vulnerable groups. Moreover, a key principle of the Convention is the

protection of minorities from majority rule, ensuring those who may have less power in society do not enjoy unequal access to rights. There are huge numbers of cases where the HRA has been the only avenue for protection for such groups - for example, a child with learning difficulties relying on the HRA to secure proper transport to school, a woman fleeing domestic violence being reunited with the children removed from her after being labelled 'intentionally homeless', and a woman with severe disabilities securing properly adapted accommodation[91]. Further, the Windrush scandal is just one area where HRA cases have helped provide some routes to justice for some victims of discriminatory policies[92]. These are just a tiny handful of the vast numbers of cases where the HRA has been essential to access to justice and effective protection for people with protected characteristics. We have discussed above the impact of the immigration related proposals in particular, and it is clear that these will have a disproportionate impact on protected groups.

196. That policy decisions – such as proposals here to remove s.2 HRA, limit positive obligations, or introduce an additional permission hurdle for claims - "*will potentially have an impact on all individuals who are within the UK, regardless of their protected characteristics"* is true (and indeed certain, rather than potential), but does nothing to shed any light at all on the different impacts for differently affected groups. The statement that it is difficult to assess proposed arrangements because there is no data on who brings litigation or how human rights legislation affects protected groups is woefully inadequate. The consultation claims that it has considered indirect discrimination and to have *"identified*" those groups the proposals may indirectly discriminate against, but fails to set out a single element of its reasoning or thinking even at a high level in this consultation, instead baldly claiming that these are the consequence of these measures being "*a proportionate means of achieving the legitimate aim of balancing the rights of individuals with the wider public interest*." [17]. This is not how such an assessment should work, and does not permit of any proper consultation response. The government should have set out with these proposals what it considers those specific impacts to be (even if high level, at this stage), and how they are each proportionate and justified.

197. It is also hard to understand how claiming that these proposals are intended to *"maintain proper rights protections' and improve a number of areas including making sure our common law traditions are respected, strengthening the role of the UK Supreme Court, and providing a sharper focus on protecting fundamental human rights*" has anything to do with advancing equality of opportunity, limb 2 of the duty. Nor does a statement that putting into law everyone's rights should be respected and upheld (an entirely banal statement of the basics of human rights law with nothing to do with this consultation) help understand how these specific proposals are intended to foster good relations in accordance with limb 3.

198. As such, we are deeply disappointed to see the lack of any proper or appropriate engagement with the equality impacts of this proposal from the MoJ, given the depth and breadth of what it contains, and the importance of the HRA framework to those

[91] See Liberty's submission to this Consultation for more detailed examples, which we do not propose to repeat.
[92] *(Vanriel and Tumi) v Secretary of State for the Home Department* [2021] EWHC 3415

with protected characteristics. We hope and expect that a full equalities impact assessment will soon be provided, and opportunity provided for proper comment and consultation on it.