Equality and Human Rights Commission

Consultation response

Human Rights Act Reform: A Modern Bill of Rights

Consultation details

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Introduction

The Equality and Human Rights Commission ('the Commission') has a statutory role to protect and promote human rights. As a National Human Rights Institution (NHRI), we are responsible for upholding human rights and holding the UK Government[1] to account for its fulfilment of its international human rights obligations.

Our long-established position is that there should be no weakening of the protections provided by the Human Rights Act (HRA), and no reduction in access to justice if people's human rights are breached.

The Commission strongly welcomes the Government's firm commitment that the UK will remain party to the European Convention on Human Rights (ECHR), and continue to uphold its international human rights obligations. The rights in the Convention, by being incorporated into UK law through the HRA, have played an important role in improving human rights protections and people's lives across the UK. The UK's commitment to the ECHR is a mark of its wider commitment to and global leadership in human rights and international law, and is part of its obligations following its exit from the EU.[2]

We are nonetheless concerned that some proposals in the consultation document lack evidence or are unclear in their purpose. Some may also risk undermining fundamental aspects of human rights protections, or risk reducing the ability of individuals to bring claims or access remedy when their human rights have been breached. Some of these changes, both separately and together, could have the effect of reducing human rights protections in the UK. In this document we analyse the Government's proposals, and recommend amendments to its approach in order to continue to protect human and embed them in the UK's political and legal culture, in line with the Government's stated intention.[3]

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[1] References to Government or Parliament are to the UK Government or Parliament unless otherwise specified.

[2] The Withdrawal Agreement, Protocol on Ireland/Northern Ireland, Article 2; and The Trade and Cooperation Agreement, Article 763.

[3] Evidence of Lord Wolfson of Tredegar, JCHR, Oral evidence: Human Rights Act reform, HC 1033, p2

The Independent Human Rights Act Review (IHRAR) report was published alongside the Government's proposals.[4] The Commission considers the IHRAR report a thoughtful and measured approach to HRA reform, reflecting extensive evidence, the views of a wide range of stakeholders and a detailed analysis of the issues. We recommend that the Government's proposals are subject to the same broad and systematic consideration undertaken by the IHRAR before any legislative change is considered. There are also areas where we consider the Government's proposals would benefit from aligning more closely with the IHRAR's findings and recommendations.

A core recommendation of the IHRAR was for the UK Government to "develop an effective programme of civic and constitutional education in schools, universities and adult education."[5] The IHRAR panel noted that, while the vast majority of submissions were supportive of the HRA, public perception of the Act is influenced by negative narratives, and that people in the UK lack a sense of ownership and understanding of human rights. The Commission too has long advocated for improved human rights education. People's understanding and awareness of human rights is vital to their ability to access justice, plays a role in development of a human rights culture, and contributes to a more respectful society and better public policy making. The Commission strongly supports the IHRAR's recommendation in this regard, and urges the Government to act on it as part of its reforms. The Commission will continue to play our statutory role and fulfil our responsibility as an NHRI[6] to promote understanding of the importance of human rights, encourage good practice and compliance, and protect human rights.[7]

[4] UK Government, Independent Human Rights Act Review: Report, 2021

[5] UK Government, Independent Human Rights Act Review: Report, 2021, Chapter 1 p21

[6] See United Nations (1993) Principles relating to the Status of National Institutions (The Paris Principles)

[7] Equality Act 2006, s. 9(1)(a-d)

Consultation Questions

Question 1: Section 2

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.

The objectives of the proposed clauses are primarily to:

- Make clear that UK courts are not bound to follow the case law of the European Court of Human Rights (ECtHR) in Strasbourg.
- Require domestic courts to consider the common law before applying Strasbourg case law.
- Permit courts to consider relevant authorities from other common law jurisdictions.

The Commission's view is that section 2 of the Human Rights Act (HRA) is already clear that UK courts are not bound by Strasbourg rulings. The duty on UK courts is to take account of Strasbourg case law, not to follow it. Case law has developed accordingly since the passage of the HRA.[8] The requirement for UK courts to take account of Strasbourg jurisprudence plays a key role in the constructive judicial dialogue that UK courts have with the Strasbourg court, and means they must set out their reasoning for following, or not following, a decision of the ECtHR. The fact that UK courts address relevant Strasbourg authority in their judgments has contributed to a decline in applications to the Strasbourg court being declared admissible and to a decline in the number of findings against the UK Government. This means that people can enforce their rights effectively in the UK without spending time and money going to Strasbourg.

[8] See, eg. R v Abdurahman (Ismail) [2019] EWCH Crim 2239; [2020] 4 WLR 6 where the Court of Appeal departed from a Grand Chamber decision. More generally, see eg. R (Quila) v SSHD [2011] UKSC 45; Poshteh v Kensington and Chelsea Royal LBC [2017] UKSC 36; In re McLaughlin [2018] UKSC 48; [2018] 1 WLR 4250; R (Hallam) v SSJ [2020] UKSC 2.

We are not opposed in principle to making it explicit that Strasbourg authority is not binding on UK courts, but we agree with the IHRAR that such an amendment is unnecessary and that it could disturb the authority that UK courts currently enjoy in Strasbourg.[9]

The Government's consultation suggests that "The courts could also be directed explicitly, as the IHRAR Panel proposed, to consider first other statutory provisions and the common law"[10]. The Commission's view is that UK courts already consider the common law as their starting point, where relevant. This approach was articulated by the Supreme Court in Osborn v Parole Board [2013] UKSC 61; [2014] AC 1115. To compel UK courts to consider common law points in all situations before considering a Convention point could result in unnecessary expense and constrain judicial discretion. This is also likely to lead to satellite litigation[11] causing a further drain on public funds.[12]

Permitting UK courts to consider relevant authorities from other common law jurisdictions was not recommended by IHRAR, although it did note that, if priority is given to common law or domestic rights over ECHR rights, then there would be more merit in this objective as it "could particularly benefit the future development of human rights case law in the UK…" (IHRAR at [174]). The Commission agrees that the ability of UK courts to look to other jurisdictions or to the decisions of international human rights bodies is beneficial. We note that UK courts already can and do have regard to authorities from other jurisdictions. In Starrs v Ruxton 200 S.L.T. 42, for example, the High Court of Justiciary had regard to Norwegian and Canadian authorities when determining an Article 6 question relating to temporary sheriffs.

[9] IHRAR para 168-172

[10] Consultation at paragraph 195.

[11] Satellite litigation is where cases are being brought to clarify the meaning of specific elements of legislation as opposed to claiming a breach or addressing a substantive issue.

[12] See the comments of Lord Mance, Joint Committee on Human Rights Oral evidence: Human Rights Act Reform, HC 1033 Wednesday 26 January 2022, p.14 -15

The replacement of the HRA with a Bill of Rights

The “illustrative draft clauses” in the Government consultation are premised upon the HRA being replaced with a new Bill of Rights for the UK. Consideration of this was not within the terms of reference of the IHRAR, which therefore did not consider the proposal.

It is essential that any such major change, for example where the HRA would be replaced with a significantly different piece of legislation setting out new or altered rights and protections, should undergo broad public consultation and rigorous analysis, such as that conducted by the IHRAR, on detailed, specific proposals, before legislation is brought forward. It is notable that no specific question is directed to this issue in the consultation and that the proposed change is not fully articulated to allow for consideration of its implications. It is not clear, for example, whether the proposed Bill of Rights will retain the same form as the HRA.

The consultation document at page 56 states that the Convention rights will sit ‘at the heart of a Bill of Rights’, and mentions in passing that they will remain incorporated into UK law (p.14, para. 38). This is vital to prevent regression in human rights protections or divergence from ECtHR case law, and we welcome this commitment.[13] If a Bill of Rights offered less extensive interpretations or fewer remedies than those under the ECHR and ECtHR, the UK would likely be found in breach of its obligations.

[13] We also note that it has been held by the ECtHR to be a requirement under ECHR Article 1 that ‘the rights and freedoms … must be secured under the domestic legal order … to everyone within the jurisdiction of the Contracting State’; see: James and Others v United Kingdom, App. No. 8793/79 (1986) [84]. Under Article 13, States must also ensure that individuals have an ‘effective remedy’ in domestic law for violations of ECHR rights.

It is not clear whether the Government intends to maintain the verbatim inclusion of Convention rights in the Bill of Rights, with like-for-like replacement of the HRA's many references to "Convention Rights", or their replacement with an equivalent or different set of rights. The scope for inclusion of additional rights in the Bill is also unclear, although some are considered (see below Question 3). The Commission welcomes the possibility of including additional human rights protections, and recommends a fully public, participative, inclusive process if new rights are to be considered and articulated in a UK Bill of Rights. We also reiterate the importance of ensuring full incorporation of existing ECHR rights as currently set out in Schedule 1 of the HRA in any new Bill of Rights, and the full inclusion of the protection mechanisms in the HRA enabling access to redress.[14] Existing levels of protection will therefore be maintained, with any new rights creating additional protections.

The IHRAR has stated that it had been "provided with no evidence to show any depth of support" for replacing the HRA with a Bill of Rights; "on the contrary there was an overwhelming body of support for retaining the HRA."[15]

The Government may wish to make the application of human rights in the UK more autonomous from the ECHR. However, if UK courts exercise autonomy to develop rights at variance to Strasbourg case law, there may be reduced or more uneven human rights protections in the UK, or a divergence in rights protections within the UK's four nations.

[14] If the HRA is replaced with a Bill of Rights without giving the ECHR any legal effect in domestic law, the UK would become an outlier among Council of Europe states, each of which has directly incorporated the Convention into their domestic legal order (see Guide on Article 13 of the ECHR, 31 August 2021, para 7). We consider that this would not further the UK's objectives of fostering respect for human rights in the UK and around the world, and is likely to increase applications to the Strasbourg Court and greater scrutiny from that Court.

[15] (at [19])

The Commission's long-established position, in line with our statutory remit, is that there should be no regression in the legal protection of equality and human rights. We would oppose any changes to the legislative framework of the HRA which risked reducing human rights protections. We welcome the Government's commitment to continue to fulfil its obligations under the ECHR,[16] a commitment that reflects the UK's obligations not only under that Convention but also in agreements with the EU.[17]

The illustrative draft clauses

In terms of the proposed clauses to replace section 2 of the HRA, Option 1 does not include an explicit requirement for courts to take account of ECtHR decisions, with the consequences noted above. Subsection 2(a), which explicitly directs UK courts not to consider rights in the Bill of Rights to have the same meaning as rights in the ECHR, is likely to have a similar effect.

Option 2 subclause (3) directs attention to the text and preparatory work of the ECHR. We do not consider it appropriate to direct UK courts in this manner, as it may encourage them to interpret the proposed Bill of Rights in a manner that gives its rights a narrower meaning than they have under the ECHR following the case law of the Strasbourg court. This could mean UK courts interpreting human rights based on their more limited meaning when the ECHR was drafted in 1950. The rights of many groups, including disabled and LGBT people, were severely restricted at that time, and many fundamental aspects of today's society, including digital technology, were not contemplated. This could result in a reduction of rights protection in the UK for which there is no justification and which would place the UK in breach of its international obligations under Articles 1 and Article 13 ECHR, as well as the Withdrawal Agreement and Trade and Cooperation Agreement with the European Union.

A further concern is that the clauses, as currently drafted, are lengthy and repetitive, risking unintended consequences and litigation to clarify them. For example, in Option 1 both subclauses (2) and (6) are to the same effect, that domestic courts are not bound by Strasbourg authority. Subclauses (4) and (8) both seek to codify the law of precedent unnecessarily.

[16] at [70]

[17] The Withdrawal Agreement, Protocol on Ireland/Northern Ireland, Article 2; and The Trade and Cooperation Agreement, Article 763.

For these reasons, the Commission does not support either of the proposed clauses. We would however welcome the inclusion of a clause that made clear that UK courts are permitted to take account of relevant international and comparative law in considering the meaning and effect of human rights.

Question 2: The role of the Supreme Court

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?

The Supreme Court is already the highest judicial authority in the UK.[18] The consultation has not provided evidence of a need for greater "certainty and authority" on this point. The Commission does not agree with the analysis[19] that the Supreme Court's supremacy has been undermined by its duty to take into account Strasbourg case law under section 2 of the HRA or by the 'presumptive authority' given by UK courts to Strasbourg case law. Courts remain able to depart from the decisions of Strasbourg.[20] Indeed, the judicial dialogue which has developed between UK courts and ECtHR since the enactment of the HRA has meant UK courts have developed greater influence with Strasbourg, and been a respected contributor and partner in the development of ECHR case law.[21]

[18] See for example: UK Supreme Court, 'The Supreme Court' 'In October 2009, The Supreme Court replaced the Appellate Committee of the House of Lords as the highest court in the United Kingdom', accessed 18 February 2022.

[19] UK Government: (December 2021) Human Rights Act Reform: A Modern Bill of Rights, p. 60

[20] See e.g. R (on the application of Elan-Cane) v Secretary of State for the Home Department, [2021] UKSC 56, para 101

[21] EHRC, IHRAR Call for Evidence: Response, March 2021, para 44-45, para 35

An assertion of the supremacy of the Supreme Court, such as that in Option 2 of the draft clauses relating to Section 2, is therefore unnecessary, and could have unforeseen consequences such as litigation on its precise meaning and implications (if any). We warn in particular against any change which would undermine the UK's international law obligation under Article 46 of the ECHR to abide by rulings of the Strasbourg Court.

On the question of whether the institutional competence of the UK courts should be clarified in legislation, we note that the IHRAR panel recommended no change, and found that courts "have shown proper consideration for their role, and the respective roles of Parliament and Government … consistently over the first twenty years of the HRA".[22] We support the recommendations of the IHRAR panel on this issue.

Question 3: The right to a jury trial

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

The qualified right to a jury trial already exists in common law in England and Wales, however, as the consultation paper notes, it does not exist as a right in the same way in other devolved jurisdictions. As noted by the Government,[23] jury trials are in line with but not specifically stipulated by the ECHR as part of the right to a fair trial.

The Government proposes in paragraph 203 of its consultation that the right to jury trial could apply "as prescribed by law in each jurisdiction". The effect of such a qualification could mean as prescribed by law from time to time in each jurisdiction, emptying the right of substantive content beyond existing legislation. Its application would depend upon the ordinary law in each jurisdiction, which could be open to change or amendment at any time.

[22] UK Government, The Independent Human Rights Act Review Report, p132 para 66, accessed 7 February 2022

[23] UK Government: (December 2021) Human Rights Act Reform: A Modern Bill of Rights, p. 61

Therefore, while the Commission supports in principle the idea of strengthening protection for jury trial in line with the right to fair trial, it is not persuaded that its inclusion as currently proposed would be workable and so further the protection of human rights. Any proposals to strengthen protections for jury trials should be considered in more detail, in particular in order to be respectful of devolved competencies in this area. We refer to the Scottish Human Rights Commission (SHRC) and Northern Ireland Human Rights Commission (NIHRC) responses with respect to issues arising in the context of Scotland and Northern Ireland from this consultation.

Inclusion of additional rights

We welcome the Government's apparent intention to strengthen the protection of human rights in the UK by considering including in a Bill of Rights additional rights to those set out in the ECHR. Additional rights were not within the scope of the IHRAR and therefore not subject to its analysis. If the Government includes additional rights in a Bill of Rights, we recommend that full consideration of what these might be should take place through an independent and inclusive process.[24]

We would also recommend that it seek to make progress in incorporating the relevant rights contained in international human rights treaties to which the UK is a signatory: the Convention on the Rights of the Child (CRC), the Convention on Elimination of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD), the International Covenant on Economic Social and Cultural Rights (ICESCR), the UN Convention on the Elimination of Racial Discrimination (CERD), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[25]

[24] The Commission previously published guiding principles for a substantive Bill of Rights process: EHRC, Developing a Bill of Rights for the UK, 2010, p82, accessed 4 February 2022.

[25] See e.g. EHRC, Follow-up submission to the UN Committee on the Elimination of Discrimination against Women, 2021, p4, access 4 February 2022; EHRC, Disability rights in the UK: updated submission to the UN Committee on the Rights of Persons with Disabilities, 2017, p11, accessed 7 February 2022. The Commission considers the rights contained in the International Covenant on Civil and Political Rights (ICCPR) to be broadly reflected in the rights set out under the ECHR and therefore HRA already.

This would give increasing protection of human rights to people across the UK, in line with the UK's existing international law commitments. It would help ensure that the rights of individuals across the UK are protected on an equal footing, as processes to incorporate additional treaty rights are currently under consideration or in progress in Wales and Scotland.[26]

Question 4: Free expression: injunctions

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?

The IHRAR was not asked to consider these issues and makes no reference to freedom of expression or section 12 of the HRA. We recommend that the Government's proposals here should be subject to a similarly rigorous consideration to that of the IHRAR.

As evidence of a need to limit interference, the consultation refers to a single judgment of the Strasbourg court in which it was held that the publication of an article about a historic spent conviction of the applicant's deceased son was not justified as an exercise of the right of freedom of expression.[27] However, the ruling was limited and only extended to the unsubstantiated and sensationalist commentary that accompanied the article that itself had no public interest. It could not, in other words, be considered the sort of speech that is necessary to the essential foundations of democratic society:

> "the Court reiterates that there is a distinction to be drawn between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life. In respect of the former, **the pre-eminent role of the press in a democracy and its duty to act as a "public watchdog" are important considerations in favour of a narrow construction of any limitations on freedom of expression**." (emphasis supplied)

[26] See Welsh Government, Programme for Government: Update, December 2021, p14; and Scottish Government, Programme for Government, 2021-22, 2021, p39

[27] ML v Slovakia (2021) ECHR 821

The Strasbourg Court thus recognises the vital role of the media in a democracy and the need for exceptions to freedom of expression to be narrowly construed. Its ruling only extended to unnecessary "sensational and, at times, lurid news, intended to titillate and entertain".[28]

In the absence of wider evidence concerning the approach of UK courts to freedom of expression and media freedom, we do not consider the case for reform is made.

Question 5: Free expression: 'utmost importance'

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

The Commission agrees with the Government that the right of freedom of expression is fundamental to our democracy.[29] The consultation does not identify evidence of problems in the protection of freedom of expression that require a change in the law.

As a qualified right under the ECHR, freedom of expression can be restricted only in specific and limited circumstances.[30] In particular, any interference with free expression must be: clearly set out in law; "necessary in a democratic society"; proportionate; and meet a legitimate aim (i.e. one of those specifically set out in the Convention). Restrictions on free expression must always be justified according to these principles, which are already limited and exceptional, in line with international law.

[28] At [53]

[29] As Singh LJ and Farbey J stated in the Divisional Court in Ziegler v DPP [2019] EWHC 71 (Admin) [2020] QB 253, at [48]

[30] Art 10(2) ECHR

The Government suggests that there should be a presumption in favour of freedom of expression, subject to "exceptional countervailing grounds" (at [215]). The inclusion in a Bill of Rights of a presumption that one right prevails over another, or of an attempt to dictate how the proportionality balance is to be struck, is unlikely to be compatible with the ECHR. Seeking to prescribe a threshold different from that applied under the ECHR to the balance between the right to freedom of expression and the right to privacy, for example, could mean that UK law fails to afford individuals an effective remedy for violations of the right to privacy, contrary to Article 13.[31]

We also note that UK courts have determined that an "exceptionality" test would place inappropriate conditions on their ability to analyse if a restriction was proportionate.[32] Whilst there might be cases where one can reasonably expect an outcome only to arise exceptionally, that cannot displace the test of proportionality. Attempting to prescribe a different standard from that set out in the ECHR is likely to give rise to a breach of Article 13.

Question 6: Journalists' sources

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

The protection of journalists' sources is a key element of freedom of expression and media freedom. The ECtHR has held that it is protected under Article 10, for example in Goodwin v UK, and most recently finding a violation of Article 10 in Big Brother Watch & others v UK.[33] Journalists' sources are thus already protected in line with wider international legal standards, and we do not consider that a compelling case has been made for amending UK law.

[31] By analogy the Wednesbury test failed to provide an effective remedy for the protection of privacy and other rights under the ECHR as it was not adequately focused on proportionality: R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532.

[32] Huang v Secretary of State for the Home Department [2005] UKHL 11, [2007] 2 AC 167 at [20]

[33] Big Brother Watch and others v UK; Our submission with ENNHRI.

Question 7: Freedom of expression – increasing protection

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

As noted above, the Commission agrees that the right to freedom of expression is fundamental to the enjoyment of wider human rights as well as to our democracy. The ECHR sets out the limited circumstances in which certain rights may be restricted, including when balanced against other rights, and provides strong protections for freedom of expression. The Commission is however concerned that adding a specific emphasis on freedom of expression or any other qualified right, (beyond the existing distinction between rights which cannot be restricted, and those which can in very limited circumstances), fails to recognise the interdependency of human rights, and may interfere with the careful balancing act that courts must apply in any interaction between rights. Further discussion on the balancing of qualified rights is provided in our response to Q23 below.

However, the Commission recommends that the Government take other steps to strengthen the protection of freedom of expression in UK legislation, including by removing proposals in the Police, Crime, Sentencing and Courts Bill to restrict the right to protest in England and Wales.[34] The Online Safety Bill also has implications for freedom of expression, and we recommend that the Government ensure that this right is sufficiently protected in the Bill.

Question 8: Permission stage

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.

[34] See EHRC's most recent briefings on the Bill.

The Commission does not support the introduction of such a test. This question was not subject to the in-depth consideration of the IHRAR. The consultation provides no evidence that UK courts are not already focused on genuine human rights matters. The consultation refers to four claims to suggest a general pattern of vexatious litigation. But all four were brought by prisoners and two by the same person who was subsequently the subject of an application for a civil restraint order.[35] Of the four claims, the consultation notes that all failed and three were struck out by the court. This suggests that the existing system is functioning as it should.

It is already the case that, in judicial review claims, a judge will only allow a claim to proceed if it is reasonably arguable. In claims brought outside judicial review, a respondent may seek summary judgment on the basis that the claim does not have reasonable prospects of success. There are thus already means for dismissing unmeritorious claims at an early stage. We do not consider that the introduction of a test of significant disadvantage has been shown to be necessary.

Question 9: Permissions stage: overriding public importance

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.

The Commission does not advise the introduction of a permission stage. Nonetheless, if a "significant disadvantage" threshold is introduced, then it is essential that the term be clearly defined, and that there is a mechanism allowing claims to proceed where respect for human rights requires an examination of the claim on the merits. This would mirror the "safeguard clause" which is included in Protocol 14 ECHR alongside its "significant disadvantage" test, and would ensure that the provision does not breach the right to an effective remedy in Article 13 ECHR.

[35] It is not stated whether the order was granted.

Question 10: Exhaustion of other claims

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

We do not have anything further to add to the above responses.

Question 11: Positive obligations

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

A fundamental aspect of international human rights law is that it places positive and negative obligations on the state to respect, protect and fulfil human rights and enable access to justice for human rights violations. Article 1 of the ECHR requires state parties to "secure to everyone within their jurisdiction" the rights set out in the Convention. The ECtHR has found that this, alongside elements of other Articles of the Convention, creates positive obligations on states to protect human rights.[36] General comment 31 of the UN Human Rights Committee explicitly states that the ICCPR, for example, confers both positive and negative obligations on states.[37] Thus the international legal obligations of the UK, as a signatory of these treaties, already create positive obligations for the protection of human rights. The Commission therefore disagrees with the assumption in the question that positive obligations on the Government and public authorities to take action to protect human rights are an imposition or expansion by UK or European courts.

[36] ECHR Article 1; See also Council of Europe, Human Rights Handbooks no.7, Positive obligations under the European Convention on Human Rights, 2007, p8

[37] UN Human Rights Committee, General Comment 31, 2004 paras 6-8; See also Article 2(2) of the ICCPR: 'each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.'

The enforcement of the Government's positive obligations has played a key role in improving human rights protection in the UK. Cases such as the Hillsborough inquest and the decision by the UK Supreme Court in Commissioner of Police of the Metropolis v DSD and another [2018] UKSC 11 (the case relating to John Worboys) set out the positive obligation on the police to effectively investigate, respectively, loss of life and behaviour which breaches human rights, including rape and other forms of violence against women. Any effort to limit these obligations would have the effect of reducing human rights protections.

The consultation provides little evidence that positive obligations have deleterious impacts on public service provision. The main example given relates to the positive obligation recognised by the Strasbourg Court in the case of Osman v United Kingdom (2000) 29 EHRR 245. The Government's concern appears to be that considering and issuing Threat to Life Notices (also known as "Osman warnings") consume an undue proportion of police time.

If this is a problem, then the cause may lie in the interpretation of jurisprudence rather than in the jurisprudence itself. The obligation to give an Osman warning only arises in circumstances in which the police are aware, or ought to have been aware, of a "real and immediate" risk to life of an identified individual. UK courts have emphasised that the obligation could not be interpreted or applied in such a way as to give rise to disproportionate or excessive burdens on the police:

> "bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, **such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.**" (at [115] (emphasis supplied))

The question appears to relate to the cost of litigation rather than to the cost of observing human rights standards. That raises a different issue which is addressed in Question 8 above.

Question 12: Section 3

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

The Commission does not consider that the consultation provides evidence that the section 3 requirement on UK courts to "read and give effect to" legislation compatibly with Convention rights "so far as it is possible to do so" needs to be amended or repealed.

The relationship between section 3 and section 4 reflects a distinction between the judiciary's role in interpreting the law and Parliament's sovereignty in making law. Section 3 does not allow courts to interpret legislation in a way that goes against its fundamental features.[38] While there is limited data on the use of section 3, it has been used to give effect to the intentions of Parliament and, at the request of Government, to avoid the use of Section 4.[39] It also has benefits for individuals who have been subject to human rights violations, by enabling courts to address the breaches and provide remedy. Section 4, while enabling a possible change in the law, does not provide the original claimant with a remedy.

Where it is not possible to interpret a law compatibly with the ECHR, then the courts make a declaration of incompatibility (DOI) under section 4. This gives Parliament the opportunity to change the law. The HRA model thereby provides a greater degree of parliamentary sovereignty than constitutional models in jurisdictions such as the United States, where courts can strike down rights-conflicting legislation without recourse to the legislature.

[38] EHRC, IHRAR Call for Evidence: Response, March 2021, para 50

[39] F Powell and S Needleman, UK Constitutional Law Blog, How radical an instrument is Section 3 of the Human Rights Act 1998?, 24 March 2021, accessed 9 February 2022; Evidence of Baroness Hale to the JCHR, JCHR (February 2021), Oral evidence: The Government's Independent Human Rights Act Review, HC 1161, Q. 27, Q. 28

The IHRAR panel thoroughly considered the case for amending section 3 and whether there was a widespread feeling that it required amendment. Its conclusion was that there was "no case for change".[40] Its only proposals were that section 3 could clarify that conventional principles of statutory interpretation should be considered before section 3 is applied, and that a database should be established to monitor the extent of use of section 3 (see below Question 14). The Commission endorses both IHRAR proposals, and recommends that the effects of those changes are fully understood before any further reform is considered. We would not support any changes which weakened access to redress for breaches of rights.

Question 13: Parliamentary scrutiny of section 3

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

Section 3 of the HRA requires UK courts, so far as possible, to read and give effect to legislation in a way which is compatible with Convention rights. This has given rise to concerns expressed in the consultation (e.g. paragraph 233) that UK courts might in some circumstances interpret laws in a way which is contrary to the intention of Parliament.

There is limited evidence for this concern (see Q12). Where concerns about section 3 interpretation have arisen, it is open to Parliament to consider and change the law to clarify its meaning for the future, although this is limited by the constraints of parliamentary time and process. Parliament should do so in a manner that is compatible with the ECHR if it is to respect the UK's international obligations.

Parliamentary scrutiny of section 3 interpretations would be enhanced by the creation of a database of judgments as proposed in Question 14. The IHRAR panel also recommended an enhanced role for the Joint Committee on Human Rights (JCHR) in scrutinising section 3 declarations by amendment to its terms of reference (at [200]-[201]). The Commission supports both proposals.

[40] at [193]

Question 14: Section 3 database

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

We agree with the IHRAR panel's recommendation and the proposal in the consultation paper to create a database of judgments which use interpretive powers under section 3 HRA.[41] This would aid greater transparency in how the provision is being used and enable the development of evidence-based proposals for any necessary changes. We do not support amendments to the provision ahead of this database being created, as this would undermine Parliament's ability to assess the need for change.

Question 15: Section 4

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

The Commission considers that courts should not be able to make declarations of incompatibility for secondary legislation. Currently, courts may quash delegated legislation and Acts of the devolved legislatures which they find to be incompatible with human rights. However, where primary legislation is found to be incompatible with the HRA, a court may only issue a declaration of incompatibility (under section 4 HRA) which is non-binding and does not affect the validity or continuing operation of the incompatible legislation. This mechanism has been designed to take specific account of the sovereignty of the Westminster Parliament when enacting primary legislation.

It would not be appropriate for this process to be extended to secondary legislation, which is an executive act, even where secondary legislation has been positively approved by Parliament. The HRA and a Bill of Rights, as primary legislation, should rightly prevail over delegated legislation.

It would be constitutionally anomalous for delegated legislation to be afforded a higher status in relation to protected rights than Acts of the devolved legislatures, which are required to be compatible with protected rights.

[41] EHRC, IHRAR Call for Evidence: Response, March 2021, para 57

Moreover, challenges under the HRA or a Bill of Rights frequently overlap with other grounds of challenge: common law principles such as Wednesbury reasonableness, common law constitutional rights, or the fact that the legislation is ultra vires of the enabling statute. It would be arbitrary and may create considerable confusion if those grounds could result in the delegated legislation being quashed, but a breach of the HRA or Bill of Rights resulted in the legislation merely being subject to a declaration of incompatibility.

Question 16: Suspended and prospective quashing orders

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.

Quashing orders are made by the courts to confirm that a decision by a public body is of no legal effect. The Judicial Review and Courts Bill provides that the effect of such orders might be suspended until a prescribed time (potentially subject to conditions), temporarily validating a decision judged unlawful.[42] It also includes provision for quashing orders to be prospective only. In deciding whether to suspend an order, or make it prospective only, UK courts would be required to have regard to a range of factors, including any detriment to good administration that may arise from its decisions.[43] Where a court decides to make a quashing order, the proposals in the Bill would require it to suspend the order or limit its retrospective effect if this approach offers "adequate redress in relation to the relevant defect…. Unless it sees good reason not to do so".[44]

The courts already have the power to suspend the effect of quashing orders, and to limit or remove their retrospective effect, albeit that this power is rarely exercised.[45]

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[42] Clause 1, new section 29A(1)-(5) to the Senior Courts Act 1981.

[43] Clause 1, new section 29A(8) to the Senior Courts Act 1981.

[44] Clause 1, new section 29A(9) to the Senior Courts Act 1981.

[45] See: HM Treasury v Ahmed (No. 2) [2010] 2 AC 534 at [4], [6], [24] and dissent of Lord Hope; Kadi v Council of the European Union; [2009] 1 AC 1225 at [373]–[376]; R (Rockware Glass Ltd) v Chester City Council [2007] Env LR 3, at [63]

We consider the current law strikes the right balance in reserving this remedy for exceptionally rare cases.

Suspended and prospective only quashing orders have the potential to undermine the rule of law, which requires that no person should be subject to unlawful action[46] and that individuals have access to an effective judicial remedy against unlawful measures.[47] Article 13 of the ECHR further protects people's rights to an effective remedy. Suspended or prospective only quashing orders also have the potential to impact third parties affected by an impugned human rights or equality decision.

We advise the Government to reconsider proposals on suspended and prospective only quashing orders in the Judicial Review and Courts Bill. For the same reasons we advise against their introduction in a Bill of Rights.

Question 17: Remedial orders

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.

The Commission considers that the remedial order process set out in the HRA works effectively and should be retained in any Bill of Rights.

[46] *Bobb v Manning* [2006] UKPC 22 at [14]

[47] R v Commissioner of the Metropolis, ex p Blackburn [1968] 2 QB 118, at p. 148E-G.

Remedial orders provide a means for Government and Parliament to swiftly remedy an incompatibility with a Convention right in primary legislation. The alternative process of passing amending legislation can involve significant delay, during which period the incompatible legislative provisions and any dependent secondary legislation remain in force, potentially resulting in further breaches of rights.

HRA remedial orders are an appropriate use of executive power, so long as they are used in accordance with their limited purpose of amending a provision in order to remove an incompatibility with a Convention right[48] and thereby to enhance the human rights compliance of legislation. Moreover, under Schedule 2, remedial orders are subject to a draft affirmative procedure, requiring approval by both Houses of Parliament. This procedure gives Parliament an opportunity to debate such measures, and approve them or not. This is the most stringent form of parliamentary scrutiny of delegated legislation that is generally adopted.

Question 18: Statements of compatibility

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

Section 19 of the HRA requires the Government to state whether a Bill being introduced to Parliament is or is not compatible with Convention rights. The IHRAR considered whether there should be any change to section 19, and the consultation asks whether the requirement should be changed to allow for "innovative policies" while "ensuring human rights compatibility".

There is no need for change to section 19. The current position (supported by both UK and Strasbourg jurisprudence) already allows for legislation to be passed, and upheld, where Parliament considers legislation to be necessary, even if there is uncertainty as to its compatibility with Convention rights or their interpretation by the courts. Section 19 plays a useful role in improving the human rights compliance of legislation by requiring the Government to consider the implications for human rights and set these out clearly before Parliament. The consultation provides no evidence for its suggestion that section 19 may impede innovative policy-making.

[48] Remedial orders should only be used to bring the law into line with the ruling of the domestic court, in contrast to a discretionary power conferred on ministers to introduce new policies.

The IHRAR also considered whether there was a case for allowing the Government to state that it believed legislation to be compatible with the Convention, even if the legislation was inconsistent with the manner in which the ECHR rights have been interpreted by the courts (at [157]-[158]). As the IHRAR pointed out, this occurred in the case of the Communications Act 2003 which included a ban on political advertising. The Government made a statement of incompatibility under s.19(1)(b) rather than a statement of compatibility under s. 19(1)(a), but indicated that this "does not … mean that the Government believes the ban would necessarily be found to be incompatible if the ban were to be challenged in the United Kingdom courts….".

Both the House of Lords and the Strasbourg Court subsequently upheld the restriction on political advertising as compatible with Article 10 ECHR (R (Animal Defendants International v Secretary of State for Culture, Media and Sport [2008] UKHL 15, [2008] AC 1312; Animal Defenders v United Kingdom App. No. 48876/08, 22 April 2013). Lord Bingham placed weight on the fact that Parliament had addressed the possible incompatibility with Article 10, given the case law of the Strasbourg Court, and nonetheless resolved that the measure was necessary:

> "Parliament has resolved, … that the prohibition of political advertising on television and radio may possibly, although improbably, infringe article 10 but has none the less resolved to proceed under section 19(1)(b) of the Act. It has done so, while properly recognising the interpretative supremacy of the European court, because of the importance which it attaches to maintenance of this prohibition. The judgment of Parliament on such an issue should not be lightly overridden."[49]

The Commission agrees with the IHRAR that the proposed benefit to amending section 19 is already achieved under that section.

We also consider that an amendment to provide for human rights memoranda, or human rights impact assessments, in addition to statements of compatibility, would aid transparency, and contribute to greater scrutiny of human rights in the passage of legislation.

[49] At [33]

Question 19: Devolved contexts

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?

The proposal for a Bill of Rights notes that it will recognise differences in the application and implementation of a human rights framework according to the needs and preferences of the nations of the UK. This provides an opportunity for the specific interests of the nations of the UK to be reflected. As already noted, we consider that a Bill of Rights must not reduce the protection of rights across the UK, but should preserve at least the current minimum standard, with the opportunity for devolved administrations including Wales and Scotland to enhance protections of human rights beyond the current standard. The proposed changes set out in the consultation are a constitutional matter with implications for the exercise of legislative and executive competence in Wales and other devolved contexts.

Although we have comparable roles as NHRIs, the EHRC, the Scottish Human Rights Commission (SHRC), and the Northern Ireland Human Rights Commission (NIHRC) each have distinct and important roles protecting human rights in England, Wales, Scotland and Northern Ireland. We refer to the SHRC and NIHRC responses with respect to issues arising in the context of Scotland and Northern Ireland from this consultation.

Compliance with the ECHR is safeguarded by the Government of Wales Act 2006 (Wales Act) in two principal ways:

a) The power of the Welsh Government and the Senedd is limited by reference to the “Convention rights”. These are given the same meaning as under the HRA.
b) Observing and implementing obligations under the ECHR is devolved (Schedule 7A para 10(3)). This obligation applies to all ECHR rights “as they have effect for the time being in relation to the United Kingdom”. Any change to the status of ECHR rights, as incorporated in UK law under the HRA, would therefore of necessity involve a change to the devolved competences of the Welsh Government and the Senedd.

Part of the consultation is directed at achieving greater autonomy for UK courts and for the UK Parliament to be able to interpret the rights in a Bill of Rights, thereby lessening the authority of the ECtHR within the UK's legal systems. As already noted, this risks the protection of rights across the UK becoming narrower than required by the case law of the ECtHR. This would be a material change to the Wales Act.

We presume that devolved competence would be defined by reference to a Bill of Rights in place of Convention Rights. This would also materially affect the breadth and nature of devolved competences.

The consultation proposes, at Question 8, a requirement for claims under the Bill of Rights to surmount an additional hurdle of showing that the victim has suffered "significant disadvantage", and statutory guidance on the award of damages under a Bill of Rights. The Wales Act sets out a separate cause of action for people who wish to make claim for a violation of their ECHR rights against Welsh institutions (s.81). The consultation does not suggest that the proposed changes would also be introduced to the Wales Act.

The creation of differences such as these between claims under a Bill of Rights and claims under the devolution legislation would be anomalous and arbitrary. It could lead to "forum shopping" on the part of litigants to avoid any hurdles imposed on claims brought directly under a Bill of Rights.[50]

It would not be appropriate for a "significant disadvantage" threshold to be imposed on claims under the Wales Act, given that the ECHR defines the scope of devolved competence in Wales. Such a change would prevent the courts ensuring that the Welsh institutions act within their powers where that threshold is not met. In effect, the competence of the Welsh institutions would be increased to include actions which did not comply with the ECHR, so long as they did not reach the threshold of "significant disadvantage". This could limit the ability of individuals to challenge infringements of their rights under the Wales Act, with constitutional implications relating to the scope of devolved competence.

The proposals are thus likely to interfere with the constitutional settlement in ways which need to be better understood.

[50] Forum shopping is the practice of choosing the court or jurisdiction that has the most favourable rules or laws for the position being advocated.

Question 20: Defining public authorities

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.

The consultation asks for drafting suggestions that would achieve broadly the same results as the current definition of public authority in the HRA but offer greater clarity. The consultation does not seek to expand the application of a Bill of Rights such as by applying it to private sector bodies or charities. [51]

Whilst thought might usefully be given to whether clarification can be provided on certain issues, such as the nature of a hybrid public authority, we advise against changes which risk reducing the scope of a Bill of Rights from that of the HRA, including by depriving the courts of the ability to consider the complex, fact-specific issues that arise in practice. The Equality Act 2010 adopts the definition of a public authority contained in the HRA (s. 31(4) and s. 150(5)), so any change to the definition would have consequences for the scope of application of the 2010 Act.

Question 21: Public authorities acting unlawfully

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.

[51] At [269]

The Commission does not support Option 1. A provision that public authorities are not acting unlawfully when they are "clearly giving effect" to legislation could cause confusion and lead to litigation on the meaning of "clearly giving effect", as well as increasing the likelihood of litigation and adverse judgments in Strasbourg, and reduced access to remedy for claimants. Public authorities that are found to act unlawfully are generally seeking to give effect to the legislation that they are acting pursuant to. The focus of any defence has to be on the meaning and terms of the legislation in question, not the motivation or objective of the public authority.

If there is a change to section 3, such as that proposed in Option 2 of Q12 which we do not support, then this could have consequences for the interpretation of legislation that public authorities rely on as a defence to a claim under the HRA (or a Bill of Rights). Option 2 here does not to add further to Q12.

Question 22: Extra territoriality

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.

The Strasbourg Court has held that ECHR rights apply to acts of public authorities that take place outside the territory of the UK where the UK (or its agents) are exercising "authority and control". This stringent test of jurisdiction applies to a more specific set of circumstances than the law of armed conflict. This approach has protected human rights, including by protecting British soldiers serving overseas.[52] The current approach also helps safeguard the UK's position as a global leader on human rights, and reinforces the integrity of UK operations overseas.

Any change to the extra-territorial jurisdiction of the HRA or Bill of Rights would not alter the UK's international legal obligations, nor the ECtHR's view on extraterritorial application of the ECHR. We welcome the Government's acknowledgement of this and its decision not to alter this through a Bill of Rights.

[52] Smith v Ministry of Defence [2013] UKSC 41; [2014] AC 52

Attempts to restrict extra-territorial application of the HRA could lead to more cases being brought before the Strasbourg Court. It could also set a precedent for other countries in the Council of Europe to follow suit, including those with weaker human rights records than the UK.

As noted by the IHRAR panel and by the consultation[53], if the Government wished to make any change to the scope of jurisdiction and application of the ECHR it would need to do so through discussion and agreement between all Council of Europe states.

Question 23: Qualified rights

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

We do not support Options 1 or 2 of the proposed clauses, and recommend that the Government avoid legislating in this area. An attempt to prescribe how UK courts should balance competing interests across different situations is likely to breach Article 1 and/or Article 13 of the ECHR and therefore fail to comply with the UK's international legal obligations. Balancing human rights requires careful consideration of various factors. Courts are best placed to make such considerations on a case-by-case basis.

[53] At [281]

Article 13 is breached in circumstances where UK courts are unable, because of limitations on their competence under domestic law, to assess the question of proportionality for themselves. In Smith & Grady v United Kingdom,[54] the ECtHR found a violation of Article 13 because the ability of UK courts to assess the applicants' complaints under Article 8 was limited to Wednesbury review. It stated:

> "Even assuming that the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the … policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention."

A law that increased the threshold in a claim for violation of a qualified or limited right, such that the courts would be "effectively excluded" from considering the question of necessity and proportionality, would thus breach Article 13.

The courts already give considerable weight to the views of Parliament on issues of public interest and necessity for measures. Lord Bingham stated in Animal Defenders International:

> "The weight to be accorded to the judgment of Parliament depends on the circumstances and the subject matter. In the present context it should in my opinion be given great weight,.." (at [33]).

It is not always the case that Parliament has addressed the specific issue before the court, or circumstances may have changed since it did so. In SC v Secretary of State for Work and Pensions [2021] 3 WLR 428 Lord Reed PSC citing Lord Bingham in R (Countryside Alliance) v Attorney General [2008] AC 719, stated:

[54] [1999] ECHR 72

> "As Lord Bingham explained, the degree of respect which the courts should show to primary legislation in this context will depend on the circumstances. Among the relevant factors may be the subject-matter of the legislation, and whether it is relatively recent or dates from an age with different values from the present time. Another factor which may be relevant is whether Parliament can be taken to have made its own judgment of the issues which are relevant to the courts assessment. If so, the court will be more inclined to accept Parliament's decision, out of respect for democratic decision-making on questions of political controversy."

The legislation proposed could tie the hands of the courts in affording appropriate weight to Parliament, risking an unduly high threshold being imposed that would breach Article 13.

The artificiality and inappropriateness of such an approach is illustrated by the case of R (Rusbridger) v Attorney General [2004] 1 AC 357. That case challenged s.3 of the Treason Felony Act 1848 which criminalises the advocacy of republicanism, on the basis that it contravenes the right of freedom of expression protected by Article 10. The House of Lords held that it was "unreal" to suggest that there could be any prosecution under that provision and that the complaint was therefore academic.

The proposed reform would require the courts to accept that the existence of the law is "determinative of Parliament's view that the legislation is necessary in a democratic society" (as in Option 1) or "give great weight to the fact that Parliament was acting in the public interest in passing the legislation" (as in Option 2). We do not consider it necessary or appropriate to bind the courts in these ways.

Question 24: Deportation

How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.

Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment;

Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights; and/or

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

These proposals raise issues of incompatibility with international law and the universal nature of human rights. They risk some individuals having their rights under the HRA, and their ability to challenge violations, diminished significantly. These proposals should be excluded from any reform.

The Supreme Court in Sanambar v Secretary of State for the Home Department [2021] UKSC 30, emphasised that a "delicate and holistic assessment" must be carried out "in order to justify the expulsion of a settled migrant who has lived almost all of his life in the host country".[55] It is, in other words, not possible to treat all individuals in the same way, even if they may have committed the same criminal offence. The ECtHR has similarly held that a number of criteria must be carefully considered in such cases to ensure the proportionality of any restriction on Article 8, and that significant reasons are needed to justify the deportation of someone who has spent all or most of their childhood in the country they are to be expelled from.[56]

It is neither possible nor legal to restrict human rights for certain groups without undermining their universal nature and their protection for everyone. Human rights provide a counterbalance to the general public interest by requiring the consideration of basic individual needs. This careful balance between the public interest and individual rights cannot be overlooked without excluding the essence of the protection provided by human rights.

[55] At [49]

[56] Üner v Netherlands (2006) 45 EHRR 14; Maslov v Austria [2009] INLR 47

Each of the proposed options is inconsistent with the UK's observance of its human rights obligations under the ECHR. Option 1 would represent a breach of the ECHR, for example if Article 8 was declared not to apply to deportation. Options 2 and 3 could be incompatible with Article 13 because of the manner they tie the hands of the courts for the same reasons as set out in answer to Question 23.[57]

The proposed provisions, by excluding consideration by the court, may also represent a procedural bar to access to the courts in contravention of Article 6 ECHR.

Question 25: Immigration 'impediments'

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?

The consultation provides no evidence that there is a problem here that needs to be addressed. Human rights laws and obligations are not and should not be viewed as an impediment to government action, but as an important and necessary check on the power of the government over individuals' basic rights and freedoms, in line with the rule of law.

We welcome the Government's commitment to protecting Article 3 ECHR and its respect for the principle of non-refoulement (i.e. not to return people to a country where they may be persecuted). We nonetheless recommend that the Government reconsider its approach here in line with its commitment to maintaining the UK's international obligations and to avoid undermining the UK's strong human rights record.

Question 26: Remedies

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

[57] Domestic frameworks, including the Nationality, Immigration and Asylum Act 2002 already make provision in relation to cases concerning deportation decisions. As stated above human rights protection continues to apply.

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.

Damages awarded under the HRA are rare and generally modest. UK courts are already able to consider a range of factors when determining whether to award damages and how much to award. Damages provide justice and redress to those whose rights have been breached. They can also provide a proportionate means of deterring public bodies from breaching rights. The consultation does not identify evidence to support concerns about the award of damages under the HRA, such as their impact on the provision of public services. This issue was not considered by the IHRAR panel as an area for further discussion.

Separately there may be merit in exploring whether greater clarity to guide decisions on damages would be useful; any list of considerations must be non-exhaustive and not fetter the existing discretion afforded to courts and the important role played by damages in deterring breaches and providing redress.

Question 27: Responsibilities

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.

Many areas of criminal and civil law place numerous responsibilities on private individuals. In contrast, the specific purpose of human rights law is to set out the responsibilities of state actors in their treatment of individual people. While human rights laws include circumstances in which a person's rights can be restricted, it would be incompatible with the fundamental purpose of human rights to make these rights, and any remedies, conditional on an individual person's fulfilment of their responsibilities.

In the specific context of awarding damages, we consider that the existing discretion afforded to UK courts is sufficient to address all relevant factors. Separately there may be merit in exploring whether measures to help improve consistency in the award of damages would be useful.

Question 28: Mechanism on adverse rulings

We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause

The consultation proposes a formal requirement for the Government to lay notice of adverse Strasbourg decisions before Parliament, or to lay a motion for a specific debate.

We welcome the proposal for greater involvement of Parliament where there has been an adverse ruling from the Strasbourg Court. Parliament has a vital constitutional role in holding governments to account, including for the UK's compliance with its international obligations. Where governments have been found to be in breach of their international obligations, it is right that Parliament is at the forefront of rectifying the breach.

However, it is important for all parliamentarians to be given a complete and balanced picture of adverse rulings, not least to put them in context. We therefore urge the Government to maintain a published list of rulings by the Strasbourg Court on cases brought against the UK. This list should include both positive and negative rulings, as well as findings that applications are inadmissible.

Question 29: Equality impact

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

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

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

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

The Government must comply with the Public Sector Equality Duty. This requires it to consider how its proposals could positively contribute to the advancement of equality and good relations, to reflect equality considerations in the design of its policies and the delivery of its services, and to keep these issues under review. The Government must also assess the specific impact of its proposals on the nine protected characteristics, and take steps to mitigate any obstacles to the enforcement of rights affecting particular groups.

It is also necessary for the Government to consider policy proposals in the context of practical barriers to the enforcement of human rights. This includes any reduction in legal aid provision, advice deserts[58] and cost regimes for HRA and judicial review cases. Previous changes to the UK's criminal and civil justice system have at times impacted disproportionately on groups sharing certain protected characteristics.[59]

[58] Advice deserts are situations where individuals are unable to access apppropriate legal advice in their area due to a lack of legal aid provision.

[59] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 affected access to justice in England and Wales, including by weakening people's ability to enforce their human rights. For example, removal of legal aid provision in many family law and immigration cases affects those seeking redress for violations of the right to respect for family life under ECHR Article 8, and removal of provision in education cases has affected those seeking redress for breaches of the right to an education protected by ECHR Protocol 1, Article 2. People with certain protected characteristics have been particularly affected including disabled people, women, children and people from ethnic minorities. The Commission on Justice in Wales emphasised that this had a particular negative impact in Wales where there are areas with no access to legal aid practitioners at all. See: EHRC (September 2018), Response of the Equality and Human Rights Commission to the Post-Implementation Review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and Commission on Justice in Wales (24 October 2019), Justice in Wales for the People of Wales, p. 10

The proposals in the Government consultation may also have negative impacts on groups with protected characteristics. Given the uncertainty about some details in the Government's proposals, the lack of evidence in places, and the possibility that its proposals may change, we urge the Government to commit to publishing a full Equality Impact Assessment of its final proposals to reform the HRA. The Government must analyse its specific proposals for change to ensure that all equality opportunities and risks are understood and addressed.

We also note the letter to the Lord Chancellor from civil society organisations[60] regretting the late provision of accessible formats of the consultation, which has limited the ability of some disabled people to participate fully in the consultation. While noting the limited extension which has now been granted to people and organisations requiring these formats, we nevertheless stress the necessity of ensuring that any further stages of the HRA reform process are fully inclusive of the views and needs of disabled people, and subject to thorough equality consideration.

[60] See: letter to the Lord Chancellor from civil society organisations (PDF) (accessed 2 March 2022)