

# **LIBERTY**

## **LIBERTY'S RESPONSE TO THE MINISTRY OF JUSTICE'S CONSULTATION: 'HUMAN RIGHTS ACT REFORM: A MODERN BILL OF RIGHTS'**

**MARCH 2022**

## **ABOUT LIBERTY**

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty has been providing legal advice and supporting landmark cases since 1934. Our substantial experience in bringing HRA challenges over the last 20 years means we are well placed to comment on the operation of the Act as well as the critical role it plays in upholding justice and accountability

This submission was compiled with the benefit of advice from Chris Buttler QC, Steve Cragg QC, Beth Grossman, Professor Francesca Klug OBE, Katy Sheridan, and Professor Paul Wragg, who we would like to thank for their input.

Liberty's policy papers are available at <https://www.libertyhumanrights.org.uk/policy>.

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## **INTRODUCTION**

1. Liberty welcomes the opportunity to respond to the Ministry of Justice's (MOJ) consultation into 'Human Rights Act Reform: A Modern Bill of Rights'. Before setting out our responses to the substantive questions, it is important to recognise the context in which they are being asked.
2. Our starting point is that we dispute the premise underlying the exercise. There is no need for a Bill of Rights (BoR) to replace the Human Rights Act (HRA). Over the past two decades the HRA has given individuals a mechanism to enforce their rights in practice. It has enabled people to challenge unlawful policies, to be treated with dignity by public authorities and to secure justice for their loved ones. It has helped bring a culture of respecting human rights into hospitals, schools, care homes, and housing associations – changing the way that thousands of people are treated and supported. The HRA was introduced less than 25 years ago in order to 'bring rights home' and enable individuals to enforce their rights in the UK, rather than having to go to the European Court of Human Rights (ECtHR) in Strasbourg. These proposals both weaken those rights, and make enforcing them more difficult. A BoR that weakens human rights protections in the UK is a very poor replacement for the HRA.
3. This consultation is purportedly a response to the findings of the Independent Human Rights Act Review (IHRAR), although it bears little resemblance to the independent panel's final report. We note that the independent panel undertook nine months' worth of consultation, including meeting with individuals who have used the HRA to advocate for their rights in a session organised by Liberty and the British Institute of Human Rights (BIHR), and produced a comprehensive 580-page report. We do not agree with all of the panel's findings; however, they are serious recommendations, arrived at through careful consideration. The consultation document largely ignores the report, far exceeding IHRAR's terms of reference, soliciting views on proposals explicitly rejected by IHRAR and ignoring the panel's specific recommendations, such as for a programme of human rights education in schools and universities. Many of the questions within this consultation were not considered by the panel at all.
4. The supposed 'case for change' set out in Chapter 3 of the consultation document is nothing of the sort. It provides a sensationalist and slanted understanding of the operation of human rights in the UK, disregards the positive impact of the HRA, and sets up a division between people who are deserving of human rights and those who are not. The proposals, if passed, would enforce this division. Everybody would lose out were this Bill

of Rights to become law, but already-marginalised groups would be more negatively affected than others. It is only the Government and public authorities who stand to gain, at the cost of us all.

5. We are highly concerned about the way this consultation has been conducted. The consultation document is very technical, and many of its claims are presented with little to no evidence. In spite of the Government's own consultation guidelines stating that "consultations should take account of the groups being consulted,"<sup>1</sup> no equality impact assessment has been conducted of the proposals to enable people to understand their implications – a prerequisite to meaningful consultation.
6. On 24 February 2022, with twelve days left to go of the consultation period, the Ministry of Justice (MOJ) finally published an accessible text-only version of the consultation document, but did not provide an audio version nor an easy read version, nor did it grant an extension to submit to the consultation.<sup>2</sup> On the day before the deadline, on the afternoon of 7 March 2022, the MOJ finally published an easy read version, and belatedly announced that those who require accessible materials will be given until 19 April 2022 to submit to the consultation. Fundamentally, there was no reason for the consultation to be launched before provision was made that would enable everyone affected to take part in the process. Were it not for pressure from civil society, including 140 organisations who wrote to the Justice Secretary calling on the MOJ to extend the deadline for the consultation<sup>3</sup> and more than 200 organisations and individuals writing to the Joint Committee on Human Rights (JCHR) criticising the MOJ for its oversight,<sup>4</sup> the failure of the Government to provide this basic standard of accessibility would have effectively blocked disabled people from taking part. We are perturbed that something as crucial as accessibility to a consultation with such wide-ranging human rights impacts, could have been relegated to an afterthought in this manner.
7. At the same time as undertaking this consultation, the Government is rushing multiple concerning Bills through Parliament, including the Police, Crime, Sentencing and Courts

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<sup>1</sup> Cabinet Office, *Consultation principles*, 19 March 2018, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691383/Consultation\\_Principles\\_1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles_1.pdf),

<sup>2</sup> A note on the consultation webpage from 24 February 2022 states: "We are publishing a word-only Easy Read accessible version for those who need a version to respond to the consultation. We apologise that it is a text-only version and are working with suppliers to update this." <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights>,

<sup>3</sup> Liberty, *Disabled people excluded from human rights review, MPs and campaigners warn*, 1 March 2022, <https://www.libertyhumanrights.org.uk/issue/disabled-people-excluded-from-human-rights-review-mps-and-campaigners-warn/>

<sup>4</sup> BIHR, *BIHR supports joint letter to JCHR on inaccessible HRA consultation*, 3 March 2022, <https://www.bihhr.org.uk/News/easyreadhra>.

Bill, which will shut down protest and extinguish the protected way of life of Gypsy and Traveller communities; the Elections Bill, which will make it harder to make our voices heard at the ballot box; the Judicial Review and Courts Bill, which will erode access to justice; and the Nationality and Borders Bill, which will fundamentally undermine the asylum system and renege on the UK's international obligations. This consultation must be seen in this broader legislative context.

8. While the 29 questions below are wide-ranging and broad in their scope, the consultation paper does not ask the most important question: should the Human Rights Act be replaced with a Bill of Rights? We say absolutely not: for the great benefits that the Act has bestowed upon our country; for the protection it has given each of us; for the growth in respect, justice, and dignity it has enabled; and for the many ways in which people's lives may be made worse as a result of these proposals. We urge the MOJ to make use of the submissions to this consultation, heed what they say, and abandon these plans.

## **RESPECTING OUR COMMON LAW TRADITIONS AND STRENGTHENING THE ROLE OF THE UK SUPREME COURT**

**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.**

9. The consultation opens with a misleading question. Rather than simply enabling the UK courts to draw on a wide range of law, the draft clauses appear to be intended to sever the link between the ECtHR and the UK courts. This proposal would represent a radical change of approach from that of the HRA. Ultimately, the consequence of separating the interpretation of domestic rights from the Convention, while remaining party to it, would be two parallel systems of rights protection in the UK. A corresponding increase in the number of petitions directly to the ECtHR would be inevitable.
10. The consultation paper proposes that the new BoR will take a different approach to the interpretation of Convention rights from the HRA, but entirely fails to make the case for doing so. As Liberty set out in our response to IHRAR's call for evidence, section 2 of the HRA was carefully and deliberately constructed in a way which retains and protects the independence of the domestic courts. There is no evidence that this independence has been undermined in the last two decades. We noted in our response that the UK courts

have moved a long way from the mirror principle articulated in *Ullah*,<sup>5</sup> as can be seen in the case of *Pinnock*, where Lord Neuberger said:

*“This Court is not bound to follow every decision of the ECtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the ECtHR which is of value to the development of Convention law. Of course, we should usually follow a clear and constant line of decisions by the ECtHR. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber...”*<sup>6</sup>

11. More recently, in the case of *Abdurahman*,<sup>7</sup> the Court of Appeal found that while it should usually follow a clear and consistent line of decisions from the ECtHR, “[i]t might, however, be right to depart even from a ‘clear and constant’ line of decisions if (i) it is inconsistent with some fundamental substantive or procedural aspect of our law or (ii) its reasoning appears to overlook or misunderstand some argument or point of principle ... But this should be viewed as guidance rather than a straitjacket. The degree of constraint the Strasbourg jurisprudence imposes is context-specific. Even where the Grand Chamber has endorsed a line of authority, it is not necessary for the domestic to court [sic] to conclude that it involved an ‘egregious’ oversight or misunderstanding before declining to follow it”. On that basis, we do not agree with the consultation paper that there “remains an over-reliance on Strasbourg case law”<sup>8</sup> or that any change is required.
12. In its extremely detailed consideration of the application of section 2 of the HRA, IHRAR made the same findings. It concluded that following the “initial evolutionary phase” of *Ullah*,<sup>9</sup> the UK courts have retreated from the mirror principle and developed a more nuanced approach. It is now clear that the UK courts may decide not to follow the ECtHR where there is no clear and consistent line of ECtHR case law, where an ECtHR decision is based on a misunderstanding of UK law, or where there is a failure to properly consider UK law.<sup>10</sup> IHRAR also considered the development of common law rights protection alongside the Convention, and made as its only recommendation in relation to section 2,

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<sup>5</sup> R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 3 WLR 23.

<sup>6</sup> Pinnock v Manchester City Council [2010] UKSC 45.

<sup>7</sup> R v Abdurahman [2019] EWCA Crim 2239.

<sup>8</sup> Human Rights Act Reform: A Modern Bill of Rights. Ministry of Justice, 14 December 2021, <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights> [190]

<sup>9</sup> The Independent Human Rights Act Review, December 2021, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040525/ihrar-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf) [2.50].

<sup>10</sup> IHRAR [2.64].



that it be amended to clarify that domestic statute and common law be applied before ECtHR case law.<sup>11</sup>

13. The draft clauses go significantly further. Option 1 makes it clear that UK courts are not required to follow decisions of the ECtHR and that they must have regard to the common law, and may take into account relevant international jurisprudence. More concerning, it also detaches the meaning of rights protected by the new Bill of Rights from the rights protected by the Convention. Option 2 takes a different route to achieve the same effect; by providing that the Supreme Court has ultimate responsibility for the interpretation of rights under the Bill of Rights, and requiring the courts to have regard to the text of the right, including the *travaux préparatoires* of the Convention, the UK courts will inevitably diverge from the ECtHR.
14. Severing the link between domestic rights and the ECtHR's interpretation of Convention rights will lead to a divergence in rights protection and leave the UK out of step with other members of the Council of Europe (CoE). The provisions of the two draft clauses achieve this divergence in a number of different ways. For example, an originalist approach relying on the texts produced during the drafting of the Convention and its first Protocol will prevent the courts from taking into account the contemporary context, including developments in technology and social norms. We are also concerned that proposal to allow the UK courts to have regard, by way of Option 2, to a judgment in a common law jurisdiction outside the UK, or per Option 1, to a judgment made under the law of *any* country for territory outside the UK seems likely to lead to significant legal uncertainty about the correct approach to the interpretation of rights in the UK.
15. Liberty agrees with Lord Carnwath, who has said in respect of this proposal that:

*“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*

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<sup>11</sup> IHRAR [2.185-196].

*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.”<sup>12</sup>*

16. Both options will result in a lower, or at best different, standard of rights protection in the UK. As a result, either option is also likely to result in an increasing number of applications to the ECtHR, as individuals seek to reconcile conflicts between protections under UK law and the ECHR, or even to challenge rights which are no longer protected in UK law.

**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. In Liberty’s view, this question is misleading. It is apparent from the context preceding the question in the consultation paper that the Government’s intention is to codify matters which are outside the competence of the UK courts, rather than to clarify the supremacy of the Supreme Court. This is further to the question asked of IHRAR about the approach of the UK courts to issues falling within the ‘margin of appreciation’.<sup>13</sup> The consultation paper notes that response to this question, the Panel “considered but ultimately did not recommend, the option of clarifying in statute matters that fall outside the institutional competence of UK courts... We would welcome views on this proposal.”<sup>14</sup>
18. As Liberty noted in our response to IHRAR, the domestic courts have generally been extremely deferential when asked to consider issues treated by the ECtHR as falling within the margin of appreciation.<sup>15</sup> A wide margin of appreciation is usually applied to matters of economic or social strategy<sup>16</sup> on the grounds that decisions of that kind involve political choices more suited to the democratically elected legislature, and on the basis that the executive may be better placed than the court to make such judgements in light of its day to day experience. The UK courts also take this approach to matters of foreign policy and national security. In *Bank Mellat*,<sup>17</sup> Lord Sumption said: “Any assessment of the

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<sup>12</sup> 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](https://constitutionallawmatters.org/2022/02/lord-carnwath-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights/#_ftn1).

<sup>13</sup> Theme One, Question B, Independent Human Rights Act Review (IHRAR) Call for Evidence, 13 January 2021, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/962423/Call-for-Evidence.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962423/Call-for-Evidence.pdf).

<sup>14</sup> Human Rights Act Reform: A Modern Bill of Rights [201].

<sup>15</sup> Liberty, *Response to the Independent Human Rights Act Review Call for Evidence*, March 2021, <https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-response-to-the-IHRAR-call-for-evidence-March-2021.pdf> [21].

<sup>16</sup> R (on the application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions and others (Respondents) [2021] UKSC 26.

<sup>17</sup> Bank Mellat (Appellant) v Her Majesty’s Treasury (Respondent) [2013] UKSC 38 & [2013] UKSC 39.

rationality and proportionality of the [measure under challenge] must recognise that the nature of the issue requires the Treasury to be allowed a large margin of judgment. It is difficult to think of a public interest as important as nuclear non-proliferation... for my part, I wholly endorse the view of Lord Reed that ‘the making of government and legislative policy cannot be turned into a judicial process.’ More recently, in *Z v Hackney Borough Council*, Lord Sales said:

*“Where, as here, Parliament has had its attention directed to the competing interests and to the need for the regime it enacts to strike a balance which is fair and proportionate and has plainly legislated with a view to satisfying that requirement, the margin of appreciation will tend to be wider. A court should accord weight to the judgment made by the democratic legislature on a subject where divergent views regarding what constitutes a fair balance can reasonably be entertained.”*<sup>18</sup>

19. Liberty agrees with IHRAR’s summary of the current approach by the UK courts, that:

*“The case law demonstrates that when acting within the margin of appreciation afforded to Convention states by the Convention and ECtHR and when applying the domestic margin of appreciation, UK Courts:*

- *Adopt a cautious and careful approach to developing Convention rights within the margin of appreciation (as discussed in Chapter Two)*
- *Are acutely aware of the importance of considering where institutional responsibility lies for falling within the margin of appreciation.*
- *Apply a range of factors to determine whether an issue lies within their institutional competence or that of Parliament and Government. Those factors are analogous to the factors the ECtHR takes into account in determining the width of the margin of appreciation.*
- *Have adopted an approach, along a sliding scale or spectrum, that seeks to ensure that they determine legal matters, with political matters, and those other matters that lie within Parliament and the Government’s institutional competence, being left to the political Branches of the State.”*<sup>19</sup>

20. As the consultation paper notes, IHRAR specifically considered codifying the boundaries of the institutional competence of the UK courts and rejected this option on the basis that

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<sup>18</sup> R (on the application of Z and another) (AP) (Appellants) v Hackney London Borough Council and another (Respondents) [2020] UKSC 40.

<sup>19</sup> IHRAR [3.33].

a prescriptive approach would give rise to satellite litigation, and a general approach would be unlikely to be beneficial.<sup>20</sup> The Panel also noted that removing specific areas from the ambit of the HRA would be likely to increase applications to the ECtHR.<sup>21</sup> IHRAR ultimately concluded that UK courts have developed and applied an approach which shows proper consideration for their role and the roles of Parliament and the executive. That approach is guided by judicial restraint and no change is required.<sup>22</sup>

21. Liberty agrees with the Panel. Over the last 20 years the UK courts have developed a careful approach to issues falling within the margin of appreciation. We would strongly oppose any attempt to legislate to exclude issues which automatically fall outside the institutional competence of the UK courts.

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

22. Liberty would welcome an open and engaged public debate on how best to ensure the right to trial by jury is protected for everyone in the UK. The suggestions made in this paper, however, look very much like symbolism without substance; a political re-packaging exercise that appears to accord the right ‘recognition’ without real protection. We are concerned that this could consume the existing political will to address the real threats to the right to jury trials. Ultimately, depending on the specific drafting adopted, this proposal could actually make it *easier* for the State to undermine and restrict the right to trial by jury.
23. The right to trial by jury is not an artefact of British history, it is a crucial, practical, legal protection for those being accused of the most serious crimes. This is particularly true for people of colour, who are arrested, tried in Crown Court, and face custodial sentences at a disproportionate rate.<sup>23</sup> In 2017, the Lammy Review found that juries were one of the few elements of the criminal justice system not systemically failing BAME defendants.<sup>24</sup> The lack of diversity both at the bar (around 13% of barristers identify as

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<sup>20</sup> IHRAR [3.61-64].

<sup>21</sup> IHRAR [3.56].

<sup>22</sup> IHRAR [3.2].

<sup>23</sup> Pg. 12, Ministry of Justice, *Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales*, 2016,

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/639261/bame-disproportionality-in-the-cjs.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639261/bame-disproportionality-in-the-cjs.pdf).

<sup>24</sup> Pg. 31-32, Lammy, D., *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, September 2017,

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/643001/lammy-review-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf).

BAME)<sup>25</sup> and on the bench (around 7% of judges identify as BAME)<sup>26</sup> means that a jury is one of the few parts of the justice system where people of colour are likely to be involved in the criminal justice process proportionately to their representation in the population as a whole.

24. It is telling that this proposal is primarily framed as a recognition of the “significant historical place in our legal traditions”<sup>27</sup> occupied by the right to a jury trial, rather than as a substantive response to the very real threats it is faced with right now. During the COVID-19 pandemic, the Government seriously considered suspending the right to trial by jury.<sup>28</sup> Following the recent trial of the Colston Four, comments from a former cabinet minister and the current Attorney General betrayed an alarming willingness to publicly undermine the finality of the jury’s decision, and with it the rule of law.<sup>29</sup> Another Conservative MP, Tom Hunt, said of the verdict that, “[i]f the jury is a barrier to ensuring [the defendants] are punished then that needs to be addressed”, and that, “I and colleagues will be discussing with ministers a way to ensure this sort of verdict never happens again.”<sup>30</sup>

25. The threats that the right to trial by jury faces are concerning. But the government’s consultation does not address these at all. It suggests that the right to a jury trial, “could apply insofar as trial by jury is prescribed by law in each jurisdiction [within the UK]”.<sup>31</sup> This appears to mean that the right would be protected in each of the UK’s legal jurisdictions *only insofar as that right is already protected* in other legal instruments, raising questions as to the actual point of the Government’s proposal. If the level of protection is not enhanced by inclusion in the proposed BoR, then this proposal is simply about rebranding, not rights.

26. The Government’s proposal does not appear to materially strengthen the right to a trial by jury, and it may ultimately weaken it. Although no draft clause has been provided, the Government has suggested introducing the right to trial by jury as a “qualified right”. The

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<sup>25</sup> Pg. 3, Bar Standards Board, *Diversity at the Bar 2019: A summary of the latest available diversity data for the Bar*, 2020, <https://www.barstandardsboard.org.uk/uploads/assets/912f7278-48fc-46df-893503eb729598b8/Diversity-at-the-Bar-2019.pdf>.

<sup>26</sup> Quirk, H., *Why you should care about the right to trial by jury*, openDemocracy, 15 July 2020, <https://www.opendemocracy.net/en/openjustice/why-you-should-care-about-right-trial-jury/>.

<sup>27</sup> Human Rights Act Reforms: A Modern Bill of Rights [203].

<sup>28</sup> Rozenberg, J., *Jury’s out: Reducing jury trials would reduce the legal backlog, but at what cost?*, The Critic, 25 June 2020 <https://thecritic.co.uk/jurys-out/>.

<sup>29</sup> Siddique, H., *Suella Braverman accused of politically driven meddling over Colston Four*, The Guardian, 7 January 2022 <https://www.theguardian.com/uk-news/2022/jan/07/suella-braverman-accused-of-politically-driven-meddling-over-colston-four>.

<sup>30</sup> Williams, A., *MP comments on future of trial by jury after ‘Colston four’ verdict*, The Ipswich Star, 6 January 2022 <https://www.ipswichstar.co.uk/news/tom-hunt-colston-four-jury-trials-comments-8603210>.

<sup>31</sup> Human Rights Act Reform: A Modern Bill of Rights [203].

extant qualified rights in the HRA and ECHR are qualified by broadly varying criteria from allowing interference where it is “necessary in a democratic society” to where it is considered “in the public interest” and even “in the interests of [...] the economic well-being of the country”. As noted above, this government considered suspending jury trials for either-way offences during the COVID-19 pandemic.<sup>32</sup> Even before the first lockdown, the case backlog in the courts was at 37,000 and rising, much of which can be explained by years of deep cuts to the funding of criminal courts.<sup>33</sup> Trials without juries are quicker and, crucially, much cheaper. Were the public interest or economic qualifications quoted above applied to this new right, the Government would have a ready-made justification for infringing it, where it currently does not. These are just two examples of qualifications in the current HRA: the Government could, of course, introduce any number of new limitations on this right in its Bill of Rights. It may sound paradoxical, but placing this common law right on a statutory footing as a qualified right could actually make it easier for public authorities to develop specific ways to systematically infringe it.

27. It appears that the main purpose of this proposal is symbolic: to differentiate the proposed “British Bill of Rights” from the existing HRA, by wrapping it in a flag. Much is made in the consultation paper of the right to trial by jury being one of just two identified “quintessentially UK rights”.<sup>34</sup> Yet, in its struggle to justify its own existence, this proposal actually emphasises the multiplicity of legal traditions within the UK. The Government states that its “intention is to create a Bill of Rights for the whole of the UK”, and yet this would be the only right in the proposed Bill of Rights the extent of which would be contingent on whether you happened to be in England and Wales, Scotland or Northern Ireland.<sup>35</sup>

28. To be clear, Liberty recognises that different approaches to the right to trial by jury have developed out of the legal, social and political contexts unique to each of the UK’s jurisdictions. We are by no means suggesting that these approaches should be unilaterally standardised by Whitehall diktat: quite the opposite. The protections afforded to people should be strengthened substantively in dialogue *with* each of the relevant jurisdictions. The Government’s proposal, however, is a symbolic gesture which neither materially strengthens those protections, nor seeks to engage with the nuances in the jurisdictions. This proposal packages a recognition of divergence between jurisdictions, as an

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<sup>32</sup> Rozenberg, J., *Jury’s out: Reducing jury trials would reduce the legal backlog, but at what cost?*, The Critic, 25 June 2020 <https://thecritic.co.uk/jurys-out/>.

<sup>33</sup> Quirk, H., *Why you should care about the right to trial by jury*, openDemocracy, 15 July 2020, <https://www.opendemocracy.net/en/openjustice/why-you-should-care-about-right-trial-jury/>.

<sup>34</sup> Human Rights Act Reform: A Modern Bill of Rights [Foreword].

<sup>35</sup> Human Rights Act Reform: A Modern Bill of Rights [35].

assertion of uniformity across them. There is a real risk that this contradiction could lead people in each of the jurisdictions to misunderstand the rights available to them.

29. Even if the Government did actually engage with the devolved administrations about how best to strengthen this right, it is unlikely that the proposed Bill of Rights would be the appropriate place in which to codify those changes. One of the many strengths of the HRA is its universality. It guarantees a baseline set of fundamental rights that apply equally and predictably to everyone in the UK. For twenty years, the HRA has provided a single, shared, foundation of legal protection for every person in every part of the UK. Whatever additional rights and freedoms the government and devolved administrations have decided to guarantee (or, indeed, to threaten), each person in the UK has been able to rely on that shared foundation. This fundamental commitment to a single set of core values has not just accompanied the devolution movement, but has been instrumental in allowing it to flourish: the HRA is written into the devolution settlements, as it is in the Good Friday Agreement. This proposal would threaten to change that.
30. We are also concerned that adding a right to the proposed Bill of Rights where the level of protection afforded is contingent on a person's location within the UK, could jeopardise our broader, shared understanding of what the other rights that it contains are. The extent of ECHR rights are not – cannot be – determined by postcode. This raises some quite fundamental questions about what the Government's proposed Bill of Rights actually is. The Government has stated that "the Bill of Rights will continue to be based on the rights protected under the Convention."<sup>36</sup> The Convention protects human rights; rights which are intrinsically attached to all people. The HRA brought those human rights into our domestic law. This proposal marks a clear departure from that tradition.

**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?**

31. Section 12 of the HRA – created precisely in recognition of the importance of the right to freedom of expression and in particular the freedom to publish – protects the publication of material that might otherwise be subject to an injunction or other court order restraining publication. It provides that no order is to be made affecting the exercise of the right to freedom of expression against a party who is neither present nor represented, unless the court is satisfied that the applicant has taken all practical steps to notify him or there were compelling reasons not to take that step (s.12(2) HRA).

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<sup>36</sup> Human Rights Act Reform: A Modern Bill of Rights [35].

Furthermore, no interim order (i.e. an order preventing publication before a case proceeds to full trial) may be made to stop publication before trial “unless the court is satisfied that the applicant is likely to establish that publication should not be allowed” (s.12(3) HRA). What this means is that the applicant must show that it is more likely than not they will win at trial (though in some cases a lesser degree of likelihood will be enough). Finally, S.12(4) HRA requires the courts to “have particular regard” to the freedom of expression.

32. The Government’s claim that the protection provided by the requirement of courts to “have particular regard” to the freedom of expression is having “no real effect” on the way that decisions on injunctions are being made is presented without evidence and appears to be false. The s.12(3) test applies to every hearing for an interim injunction to restrain publication (i.e. an injunction to prevent the publication of certain information) and in each case the court has had particular regard to the need to protect freedom of expression. The House of Lords confirmed in *Cream Holdings* that s.12 set “a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a “serious question to be tried” or a “real prospect” of success at the trial.”<sup>37</sup>
33. If what the Government means by “no real effect” is that s.12 HRA has not resulted in the court automatically giving Article 10 priority over Article 8 in every case involving prior restraint, this is in keeping with the premise of the HRA and ECHR that no right assumes priority over another. In respect of s.12(4) HRA, the courts have found that because it is the qualified “Convention right” to freedom of expression that triggers the protections under s.12 HRA, and because neither Article 10 nor Article 8 has pre-eminence in the ECHR, “you cannot have particular regard to Article 10 without having equally particular regard at the very least to Article 8”.<sup>38</sup> In practice, the court will need to form its own view on the balance between Articles 8 and 10 on the facts of a particular case: “such applications fall to be decided not on the basis of rival generalities but by focussing on the specifics of the rights and interests to be balanced in the individual case.”<sup>39</sup> In particular, where the two articles conflict, Lord Steyn stated in *Re S* that “an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.”<sup>40</sup> For example, in *Clayton v Clayton*, the court was required to consider the Article 8 rights of a child and the Article 10 rights of their parent, who was seeking to

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<sup>37</sup> *Cream Holdings Limited and others v Banerjee and others* [2004] UKHL 44 [18].

<sup>38</sup> *Douglas & Anor v Northern And Shell Plc & Anor* [2000] EWCA Civ 353 [133].

<sup>39</sup> *Clayton v Clayton* [2006] EWCA Civ 878 [64].

<sup>40</sup> *In re S (FC) (A Child)* [2004] UKHL 47 [17].



discuss his experience with the family justice system (he had previously abducted the child and was arrested and imprisoned in Portugal and the UK as a result, attracting widespread media attention, although this was not the focus of the case).<sup>41</sup>

34. In *McNally v Saunders*, the High Court considered the case of an individual who published multiple blog posts and tweets about the director of health of a local council. The director alleged that the blog posts and tweets together amounted to harassment, and that they were having an impact on her mental health and her ability to do her job during the coronavirus pandemic. The court considered the case in relation to section 12 HRA because the individual claimed that he was a citizen journalist; he argued that his blog posts were not harassment but “critical remarks about the public conduct of a senior government official” and therefore falling within the protection of Article 10.<sup>42</sup> In his granting of summary judgment for the respondent, Chamberlain J carefully evaluated the Article 8 rights of the applicant and the Article 10 rights of the respondent. He considered that the applicant’s lack of objection to any of the factual elements of the blog posts or tweets meant that the right to reputation which could engage Article 8 was not engaged in this case. Chamberlain J also found that although the blog posts and tweets referred to the claimant’s mental health issues – which is an aspect of her “physical and psychological integrity”<sup>43</sup> and therefore could engage Article 8 – “the weight to be attached to [the claimant’s] Article 8 interests is significantly diminished by her own decision to put her history of mental ill-health into the public domain.”<sup>44</sup>

35. We are concerned about this proposal, which was not considered by IHRAR and which lacks clarity. For example, the term “interference” is vague, and the catch-all phrase “the press and other publishers” conceals enormous variation. Given advancements in technology and the growth of social media platforms, there is no longer (if there ever was) an established line between who is and who is not a journalist. As noted by Chamberlain J in *McNally v Saunders*, “The enhanced protection which Article 10 gives to such expression is not limited to those in the mainstream or conventional press or media... ‘Journalistic material’ is to be identified by its subject matter, not its author, nor the process by which it comes to be published.”<sup>45</sup> The issue here is that in appearing to try and address a particular issue – celebrity injunctions – there are a wide range of others that may be affected which do not appear to have been considered by the

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<sup>41</sup> Clayton v Clayton [2006] EWCA Civ 878.

<sup>42</sup> *McNally v Saunders* [2021] EWHC 2012 (QB) [45-48].

<sup>43</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1 [23].

<sup>44</sup> *McNally v Saunders* [2021] EWHC 2012 (QB) [88].

<sup>45</sup> Paras 71 and 74, *McNally v Saunders*, [2021] EWHC 2012 (QB).

Government at all, e.g. injunctions to stop individuals from harassing journalists who have themselves sought relief and blackmailers/harassers.<sup>46</sup>

36. In our view, raising the threshold of the s.12(3) HRA test could be problematic. First, it may make it more difficult for an applicant to secure an interim order, even though the consequences of not granting an order might be extremely serious, such as the publication of confidential information or other serious violations of privacy. As noted by the House of Lords in *Cream Holdings*, “Confidentiality, once breached, is lost for ever.”<sup>47</sup> Failure to secure an order could even result in personal injury, for example if someone who has given evidence in a trial has their whereabouts disclosed. Second, raising the threshold such that injunctions would effectively never be granted could mean that a court might not be able to consider arguments from both the parties by granting a temporary stay. This would erode the court’s important role in evaluating and balancing the protections of Article 8 and Article 10 in individual cases.

37. It is worth noting the reasons why, from the published judgments available, it would appear that the courts frequently make injunction orders even when they engage Article 10 issues. Expert counsel who we spoke to advised that in practice, the reason why a publication might notify an individual in respect of an upcoming publication is because they are seeking to clarify the accuracy of a story (given that failure to do so might make the publisher liable to action by the Independent Press Standards Organisation (IPSO) and/or a libel claim). If there was no such issue of libel, a publisher would not, in notifying an individual of the impending story, give them an opportunity to apply for an injunction. Sometimes, an individual who is a litigant in person may seek to apply for an injunction upon being put on notice. If they seek legal advice, and where it is clear that an injunction will *not* be granted and the test in s.12(3) and (4) will win out, counsel will likely advise that individual to settle the issue out of court. In such cases, there may not end up being a trial in which the court considers the issues, but that does not mean that the protection in s.12 (i.e. to prevent an injunction from succeeding on the grounds of free speech) has failed – in fact, it is quite the opposite. A section 12(3) and (4) order – for example, one which may involve an Article 8/Article 10 balancing issue requiring application of the “intense focus” test, or even the balancing of two people’s Article 10 rights<sup>48</sup> – requires justification and therefore the court is likely to want to seek to publish its judgment on such an order (where it is not reported). A dismissal – which would uphold the status quo – is conversely

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<sup>46</sup> *Davies v Carter* [2021] EWHC 3021 (QB).

<sup>47</sup> See Lord Nicholls in *Cream Holdings Limited and others v Banerjee and others* [2004] UKHL 44 [18].

<sup>48</sup> *Davies v Carter* [2021] EWHC 3021 (QB) [90].

less likely to be published. With minimal evidence provided of the purported problem, the Government's proposal does not appear to be grounded in reality.

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

38. The consultation document states that the Government would like to issue guidance to the courts "on how to balance the right to freedom of expression with competing rights (such as the right to privacy) or wider public interest considerations."<sup>49</sup>
39. The courts have long acknowledged the importance of the freedom of the press, both at common law and in light of the HRA. In *Reynolds*, which the courts presided over long before the passage of the HRA, Lord Nicholls said: "The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."<sup>50</sup> Among other reasons, this is because the freedom of the press is crucial for ordinary people to be able to participate in political life. As observed by Lord Bingham: "[T]he majority cannot participate in the public life of their society... if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed."<sup>51</sup>
40. One of the key concerns voiced by parliamentarians during the passage of the Human Rights Act (Bill as it was) was the potential impact of incorporation of the ECHR, especially the right to respect for one's private and family life, on freedom of expression and specifically freedom of the press. In response to this, Lord Pannick said at the time: "[A]ny law of privacy will be a better law after incorporation, because the judges will have to balance Article 10 and Article 8, giving Article 10 its due high value".<sup>52</sup>
41. Today, it is well-recognised that under the HRA, neither freedom of expression nor respect for an individual's privacy have precedence over the other. As stated by Lord Hoffman, "There is in my view no question of automatic priority. Nor is there a

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<sup>49</sup> Human Rights Act Reform: A Modern Bill of Rights [215].

<sup>50</sup> *Reynolds v. Times Newspapers Ltd and Others* [1999] UKHL 45.

<sup>51</sup> Lord Bingham in *Turkington and Others v. Times Newspapers Limited (Northern Ireland)* [2000] UKHL 57 [1].

<sup>52</sup> Fiddick, J., *The Human Rights Bill [HL], Bill 119 of 1997-98: privacy and the press*, 13 February 1998, <https://researchbriefings.files.parliament.uk/documents/RP98-25/RP98-25.pdf>.

presumption in favour of one rather than the other. The question is rather the extent to which it is *necessary* to qualify the one right in order to protect the underlying value which is protected by the other.<sup>53</sup> Where the values under Article 8 and Article 10 conflict, the courts undertake “the ultimate balancing act”: starting with an “intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary,” taking into account the justifications for interfering with or restricting each right; and applying the proportionality test to each. In terms of Article 8, the significance of the HRA is to have “identif[ied] private information as something worth protecting as an aspect of human autonomy and dignity.”<sup>54</sup>

42. The courts currently undertake careful balancing exercises such as that between Article 8 and Article 10 in cases of prior restraint. They are well-equipped to deal with granular detail and to assess and evaluate different issues, including the perspectives and rights of each party. For example, in *Campbell v MGN*, concerning the publication of photographs of the model Naomi Campbell on her way to a Narcotics Anonymous meeting, the issues considered by the court included, on the one hand, the pain and distress caused to Campbell, the effect on her treatment for drug addiction, the private and sensitive nature of the information; and on the other, the fact that Campbell had previously stated publicly that she did not use drugs, the important role of the press to “expose the truth and put the record straight”,<sup>55</sup> her pre-existing relationship with the media,<sup>56</sup> and the importance of a flourishing news industry (which depends on the selling of newspapers).<sup>57</sup>

43. It is unlikely that the Government would be able to legislate for such an exercise, especially given its highly fact-specific nature. We are concerned that attempts by the Government to define “wider public interest considerations” could actually create greater restrictions on the freedom of the press. This is because there is no common agreement on what is in the public interest.<sup>58</sup> For example, as noted by Lord Garnier (Mr. Garnier as he was then) during the passage of what would become s.12 of the HRA, “the press often forget, find it convenient to forget, or fail to distinguish between two separate concepts: what is the public interest or in the public interest, and what is interesting to the public.”<sup>59</sup> Any attempts to delineate “limited and exceptional circumstances” in which

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<sup>53</sup> *Campbell v MGN Limited* [2004] UKHL 22 [55].

<sup>54</sup> *Campbell v MGN Limited* [2004] UKHL 22 [50-51].

<sup>55</sup> *Campbell v MGN Limited* [2004] UKHL 22 [151].

<sup>56</sup> *Campbell v MGN Limited* [2004] UKHL 22 [37].

<sup>57</sup> *Campbell v MGN Limited* [2004] UKHL 22 [77].

<sup>58</sup> Horton, G., *Injunctions and public figures: the changing value in injunctions for privacy protection*, *Journal of Media Law*, vol.13, no.1 pp.81-106, <https://doi.org/10.1080/17577632.2021.1889866>.

<sup>59</sup> HC Deb 2 July 1998, vol. 315, col. 550.

interference with Article 10 would be permitted could actually do more to harm freedom of expression, because it could appear to specify areas where Article 10 protections do not apply, removing the courts' ability to undertake careful evaluation, including balance of rights analyses, on specific sets of facts.

44. One of the live issues in this area is how the Article 8 rights of individuals under criminal investigation should be balanced with the Article 10 rights of journalists and media outlets to report on such issues. In *ZXC v Bloomberg*, the Supreme Court consolidated the existing law and stated that a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation. This full implications of this decision remain unclear,<sup>60</sup> however, the decision has been criticised widely for having a chilling effect on journalistic freedom.<sup>61</sup> West Midlands Police has recently cited *ZXC* in its request to the court to exclude reporters from a hearing in which a journalist will be asked to reveal the identity of his source.<sup>62</sup> We are concerned about the impact that this judgment could have on freedom of the press, the ability of individuals to hold the police and State to account (e.g. over wrongful arrests), and the ability of victims and survivors of abuse to speak out about their experiences. Nonetheless, we are sceptical about proposals on the part of the Government to rectify this issue in a BoR, which is meant to be a higher-level constitutional statement of the key rights protections to which individuals are entitled. The specific issues relating to individual privacy versus journalistic freedom raised by *ZXC* demand a flexible and sensitive approach; a general statement of principle in a BoR would likely be so broad as to be ineffective in practice, and a more specific statement would be out of place as well as potentially posing negative unintended consequences.
45. The consultation document states that “freedom of expression cannot be an absolute right when balanced against the need to protect national security, keep citizens safe and take steps to protect against harm to individuals... [w]hen a court is applying the freedom of expression to the particular facts of any case, the government believes that, where Parliament has expressed its clear will on issues relating to the public interest and the exercise of public functions, this should be given great weight.”<sup>63</sup> We note the apparent contradiction between this statement and the wider thrust of the proposals in this section; while speaking of the “utmost importance” attached to Article 10, the

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<sup>60</sup> Clarke, I., *Privacy in the context of criminal investigations: Bloomberg LP v ZXC [2022] UKSC 5*, 21 February 2022, <https://1chancerylane.com/privacy-in-the-context-of-criminal-investigations-bloomberg-lp-v-zxc-2022-uksc-5/>.

<sup>61</sup> Ponsford, D, 'Deeply worrying' bid by West Midlands police to hold journalist sources-grab hearing in secret, 23 February 2022, <https://pressgazette.co.uk/birmingham-six-sources-secret-hearing-chris-mullin/>.

<sup>62</sup> Siddique, H., *Police move to ban reporters from Birmingham Six journalist hearing*, The Guardian, 22 February 2022, <https://www.theguardian.com/uk-news/2022/feb/22/birmingham-six-journalist-hearing-reporters-ban>.

<sup>63</sup> Human Rights Act Reform: A Modern Bill of Rights [216].

Government is simultaneously seeking to ensure that its protections are relegated beneath the interests of the State. We will consider this in greater detail in our response to question 23.

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

46. Ensuring protection for journalistic sources is a laudable aim; however, there is no suggestion that the HRA is failing in this or that it is relevant to consideration of a new Bill of Rights. IHRAR was not asked about journalists' sources and there is no detail in the consultation document either relating to the purported problem or any proposed solution. If the Government wants to protect journalists' sources, the HRA is not the legislation it should be looking at.
47. Journalists' sources are currently protected under section 10 of the Contempt of Court Act 1981 (CCA) and Article 10 ECHR.<sup>64</sup> Together they are said to have "common purpose in seeking to enhance the freedom of the press by protecting journalistic sources".<sup>65</sup> Courts – most notably the ECtHR – are well aware of their responsibilities in this area. In the famous case of *Goodwin v UK*, in which a company attempted to compel a journalist to reveal his source for a story about that company's financial difficulties, the ECtHR found that to force him to do so would breach his freedom of expression. The judgment read:

*"Protection of journalistic sources is one of the basic conditions for press freedom... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."<sup>66</sup>*

48. Likewise in *Financial Times v UK*, the ECtHR reiterated the importance of protecting journalists' sources. In *Goodwin*, disclosure of documents would have directly identified

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<sup>64</sup> See: *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101 and *Financial Times Ltd & others v. the United Kingdom* (Application No. 821/03).

<sup>65</sup> *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033 [38].

<sup>66</sup> *Goodwin v the United Kingdom* (Application no. 17488/90) [39].

the source in question, while in *Financial Times* the relevant documents only might have led to identification upon examination. The Court found that it did “not consider this distinction to be crucial. In this regard, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources. In the present case, it was sufficient that information or assistance was required under the disclosure order for the purpose of identifying X”.<sup>67</sup> The Court found that there had been a breach of Article 10, and the *Financial Times* was not compelled to reveal its source.

49. The protection of journalists’ sources therefore has been one of the many ways in which we have benefited from ECtHR jurisprudence in this country. This prompts the question as to why, if the Government wants to protect journalists’ sources, it is progressing with these plans for a BoR which will decouple the meaning of our rights from those in the Convention (question 1) and implement a process for overriding adverse Strasbourg rulings (question 28). It is hard to get past the conclusion that if the Government is serious about achieving the goal in this question, the first step would be to abandon these BoR plans altogether and retain the HRA in its current form.
50. The HRA has also protected journalists’ sources in other ways. At the local level, a reporter for the *Milton Keynes Citizen*, Sally Murrer, successfully relied on Article 10 to resist charges that she encouraged a police officer to leak information, stopping evidence of her sources being used against her at trial.<sup>68</sup> In more extreme circumstances, Article 2 arguments have been used to protect journalists’ sources where revealing them could be a threat to life, such as in the case of Suzanne Breen, who faced an attempt from Northern Ireland police to give up her interview notes and further information after conducting interviews with the Real IRA for the *Sunday Tribune*. Facing up to five years’ imprisonment for her refusal, she argued that she and her family could face reprisals from Republican groups were she to hand over the material, winning her case on Article 2 grounds.<sup>69</sup>
51. It is unclear why this should be a matter for a Bill of Rights. The current situation is working well, and attempting to shore it up in this manner rather than in normal legislation will cause problems, for example in considering exactly what a ‘journalist’ is.<sup>70</sup> Likewise, considering the conscientiousness of the courts in this area, if there is a problem to be

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<sup>67</sup> *Financial Times Ltd & others v. the United Kingdom* (Application No. 821/03) [70].

<sup>68</sup> *Milton Keynes Citizen*, ‘Charges dropped as judge criticises police’, 30 November 2008, <http://www.miltonkeynes.co.uk/news/local/charges-dropped-as-judge-criticises-police-1-867641>.

<sup>69</sup> *In the Matter of an Application by D/Inspector Justyn Galloway, PSNI, under Paragraph 5, Schedule 5 of the Terrorism Act 2000* [2009] NICty 4.

<sup>70</sup> See: *Hourani v Thomson & Ors* [2017] EWHC 173 (QB).

solved the conclusion must be that it is at the other end of the equation and that the appropriate reform would be to the legislation that gives the police that power, such as the Police and Criminal Evidence Act 1984 (PACE), the Terrorism Act 2000, or the Investigatory Powers Act 2016 (IPA). Liberty currently has a challenge to the IPA running, having been put on hold until the outcome of an appeal in *Big Brother Watch and others vs the UK* relating to IPA's forerunner, the Regulation of Investigatory Powers Act 2000 (RIPA). In *Big Brother Watch* the ECtHR found, among other things, that RIPA had inadequate safeguards for the protection of journalists' sources.<sup>71</sup> We contend that the safeguards in the IPA are woefully inadequate also. If the Government wants to protect journalists' sources, amending the IPA is a simple place to start.

52. Rather than improve protection for sources through the IPA, PACE, or the Terrorism Act, it appears that the Government intends instead to make matters worse by progressing with plans to treat journalists like spies in its reforms to the Official Secrets Acts. The Law Commission proposal for a public interest defence under the Official Secrets Act appears to be a much more specific and effective protection than anything in this consultation, and yet the Home Office has so far not only declined to take it forward, but also has proposed subjecting journalists to 14-year prison sentences for their reporting.<sup>72</sup> It is very difficult to square this and the proposed gutting of the Human Rights Act with the Government's professed desire to provide enhanced protection for journalistic sources.

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

53. We reject the idea that the Bill of Rights could effectively strengthen the protection for freedom of expression. If the proposals in the BoR pass in their entirety, this could give rise to divergence between the protections available for human rights in the UK versus those provided for under the ECHR as developed by the ECtHR and to increased barriers for people to make claims and access remedies. In relation to the Government's proposals on freedom of expression, we are concerned that they may have counterproductive and unintended consequences that may actually limit this right.
54. At the same time as consulting on reforms to the HRA, the Government is attempting to introduce multiple pieces of legislation that will have a far-reaching impact on freedom of

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<sup>71</sup> Leading to famous incidents such as the surveillance of Sun editor Tom Newton Dunn's mobile phone during the 'Plebgate' scandal. See: RIPA requests, Plebgate, and journalistic sources, 3 September 2014, <https://www.ft.com/content/c3a0089d-1c75-3ed6-b217-0955560b3897>.

<sup>72</sup> Home Office, *Legislation to Counter State Threats (Hostile State Activity)*, Government Consultation, 13 May 2021, <https://www.gov.uk/government/consultations/legislation-to-counter-state-threats>.



expression. If the Government is committed to strengthening the protection for freedom of expression, it can start by withdrawing these legislative proposals:

- **The Police, Crime, Sentencing and Courts Bill (PCSC Bill):** The PCSC Bill represents a significant attack on the right to protest. Among other measures, the Bill will give the police the power to impose noise-based restrictions on protest, lower the threshold for breaching a condition imposed on a protest (people can now breach a condition that they merely ‘ought to have known’ about, rather than actually knew about); and increasing sentences for such breaches.
- **Reform of the Official Secrets Acts (OSA):** The OSA makes it a criminal offence for anyone – including journalists – to publish leaked information covered by the legislation. In its upcoming reforms to the OSA, the Government has indicated that it does not intend to follow the recommendation of the Law Commission to introduce a public interest defence. A public interest defence is vital to ensure there is effective accountability in sensitive areas of Government activity. Refusal to introduce a public interest defence poses a risk to journalists and their sources – often whistleblowers – who are in danger of being viewed in the same way as those committing serious espionage.
- **Online Safety Bill (OSB):** The OSB defines new and imprecise categories of content, including “content that is legal but which has the potential to cause harm”, and subjects it to unprecedented forms of regulation. It also threatens encryption. This could have a chilling effect on freedom of expression.

## **RESTORING A SHARPER FOCUS ON PROTECTING FUNDAMENTAL RIGHTS**

**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.**

55. The consultation paper refers to a “proliferation of human rights claims under the Human Rights Act”<sup>73</sup> and suggests that the introduction of a permission stage would ensure that the courts focus on “genuine and credible” human rights claims. It fails to provide any

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<sup>73</sup> Human Rights Act Reform: A Modern Bill of Rights [220].

evidence of spurious claims nor provide any justification for the introduction of a permission threshold at the uniquely high level in UK law of “significant disadvantage”.

56. Further, the forum in which the Government envisages introducing this permission stage is unclear. The paper refers to case management conditions in the German Constitutional Court and the ECtHR as justification for its proposal,<sup>74</sup> but we note that the German Constitutional Court deals with applications equivalent to judicial review and does not have any power to award damages. As the authors of the consultation paper will be aware, a rigorous permission stage already exists in judicial review claims which raise human rights grounds; claims which are not arguable will fall at this hurdle. Liberty would strongly oppose any change that raises the existing permission threshold in judicial review; we note that in human rights claims the threshold is already higher than in cases brought on non-human rights grounds, as the claimant must be able to show that they are a victim of the unlawful act.

57. If the intention is to introduce a permission stage in the county court, we note that there already exist a number of mechanisms designed to filter out unmeritorious claims at an early stage. As above, claimants must already meet the ‘victim test’ provided by s.7(1)(b) of the HRA; it is unclear what further disadvantage they will have to prove beyond being a victim of a violation of their rights. We also note that the courts already have the power to strike out claims which have no reasonable prospects or are abusive, including cases where the benefit attainable by the claimant is of such limited value that “the game is not worth the candle”.<sup>75</sup> The consultation paper fails to provide any evidence that the strike out mechanism is not working effectively, remarking only that “we believe it is wrong that the burden is on public bodies to apply to courts to strike out frivolous or spurious claims”.<sup>76</sup>

58. We disagree that it is appropriate to shift the burden onto individuals, who are already at a disadvantage in bringing claims against the State. A permission stage will place a greater burden on claimants, who may have to demonstrate the merits of their claim before they have received full disclosure from the defendant public body. In cases where there is a parallel criminal investigation or an inquest, it may be years after the claim is issued that full disclosure is revealed.

59. An additional procedural stage will create a barrier to access to the courts and make it harder for individuals to enforce their rights, particularly for people who already

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<sup>74</sup> Human Rights Act Reform: A Modern Bill of Rights [222].

<sup>75</sup> *Jameel v Dow Jones and Co* [2005] EWCA Civ 75.

<sup>76</sup> Human Rights Act Reform: A Modern Bill of Rights [221].

experience barriers in accessing justice as a result of having protected characteristics. There is also real risk that it would increase the resources required of the courts and create inefficiency and delay, contrary to the stated aim of the consultation paper.

60. So far as the Government intends to mirror the admissibility criteria set out in Article 35 of the ECHR, we note that the ECtHR has chosen not to apply the “substantial disadvantage” test in cases concerning Articles 2, 3 and 5 of the ECHR<sup>77</sup> and has been extremely cautious in applying it to cases concerning Article 9, 10 and 11. Moreover, it is not appropriate to apply the case management conditions of an international court to the early domestic stages where individuals seek to enforce their rights.

61. In Liberty’s view it would be wholly inappropriate to introduce any permission stage in human rights claims, let alone one set at such a high threshold. Placing an additional burden on individuals shifts the balance of power towards the State, and will create a barrier to access to justice which will ultimately reduce rights protections.

**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.**

62. As set out above, Liberty rejects the proposal to introduce a permission stage in fora where one does not already exist. So far as this proposal attempts to mitigate the impact on access to justice of a permission hurdle, we disagree that it is an appropriate test. Human rights claims are the means by which *individuals* seek redress where the State has breached their rights. By their nature, individual and minority rights do not always align with the wider public interest, which was why the post-war founders of the ECHR sought to protect minority interests against the actions of a majority. It is entirely possible for the State to breach an individual’s rights in a way that requires redress but does not impact on the wider public.

63. Some claims will also raise issues of overriding public importance, but this exemption fails to recognise that the fundamental purpose of human rights protection is to protect individuals from abuses of state power.

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<sup>77</sup> Makuchyan v Azerbaijan (Application no. 17247/13); Y v Latvia (Application No 27853/09), Zelcs v Latvia (Application no. 65367/16).

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

64. This question is premised on the assumption that it is desirable to reduce the number of human rights-based claims brought in the UK courts. Liberty agrees, but only on the basis that the most effective way to do this would be for public bodies to ensure that they comply with their legal duties, do not abuse their powers and act compatibly with the rights of individuals. Embedding good public decision making and respect for human rights within public bodies and central government is the first step to ensuring that people have no need to rely on legal redress.
65. One way of helping to achieve this, which does not appear to have been taken up by the Government, would be to increase awareness of the HRA within public bodies. Liberty endorses IHRAR's recommendation for a programme of public education about the UK's constitution and rights framework.<sup>78</sup> In our view, improved education and communication about rights protection in the UK would not only benefit individuals and address misconceptions about human rights, but would also help to ensure that public bodies are aware of their duties and responsibilities and are therefore able to discharge them effectively.
66. However, rather than proposing a greater emphasis on respect for rights within public authorities, the consultation paper is instead proposing restricting the ability of individuals to challenge breaches of their rights in order to "reduce the numbers of human rights-based claims being made overall".<sup>79</sup> Liberty does not agree that it is desirable to make it more difficult for individuals to access legal remedies for breaches of their rights. Where the Government makes decisions interfere with the rights of individuals, it is vital that those individuals are able to seek redress.
67. The consultation paper proposes "strengthening" s.8(3) HRA to require claimants to pursue other causes of action before bringing rights-based claims.<sup>80</sup> As with the proposal to introduce a permission stage, the consultation paper fails to provide any evidential basis that claimants are routinely bringing "trivial" claims, or that human rights are being "misused to provide...compensation on top of other private law remedies".<sup>81</sup>
68. This proposal is flawed in four ways. Firstly, as the Government will be aware, s.8(3) HRA prevents the court from awarding damages in human rights claims if any other relief or

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<sup>78</sup> IHRAR [1.57].

<sup>79</sup> Human Rights Act Reform: A Modern Bill of Rights [226].

<sup>80</sup> Human Rights Act Reform: A Modern Bill of Rights [226].

<sup>81</sup> Human Rights Act Reform: A Modern Bill of Rights [227].

remedy has provided the claimant with just satisfaction for the same act. It is therefore wrong to say that the HRA is capable of being misused to provide additional compensation; it is simply not possible to do so. Secondly, this proposal does nothing to achieve the Government's stated aim elsewhere in the consultation of saving the courts' time and resources.<sup>82</sup> Requiring claimants to bring a separate claim, after the conclusion of any other tortious or common law claims, will add to, rather than reduce the courts' workload. Further, it is not in the interests of justice to create additional delays for claimants. For example, pleading an additional ground of breach of Article 5 ECHR in a false imprisonment claim creates significantly less work for the courts than requiring claimants to bring an entirely separate claim at a later date. A second set of proceedings would necessitate some kind of case management procedure to determine the extent to which the first, successful claim, has achieved just satisfaction for the claimant, and would disadvantage both claimants and defendants engaged in legal proceedings years after the act complained of.

69. Finally, if a public body has breached an individual's rights, that individual should be able to seek redress for that breach. It is not appropriate to bar claimants from doing so because they have a related cause of action. It is important to note that in addition to damages, an acknowledgement of the breach is often an extremely important part of a rights-based claim for an individual claimant, and it is not possible to obtain a declaration of a breach of human rights in civil claims. Even where claimants are seeking damages, it is fundamental to any system of rights protection that they must be able to bring a claim. A system of rights protection which prevents claimants from seeking redress when a public body breaches their rights is simply theoretical and offers no practical or effective guard against the abuse of state power at all.

**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.**

70. Apart from setting limits on the ability of State authorities to interfere with individual rights, the ECHR creates obligations on State authorities to take positive steps or measures to protect the Convention rights of individuals. This is rooted in the ethos of the Convention, whose aim is not only to protect individuals from an overbearing State but to safeguard human dignity. What this requires is "the 'effective' protection of human

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<sup>82</sup> Human Rights Act Reform: A Modern Bill of Rights [220].

rights, not the entrenchment of ‘theoretical’ or ‘illusory’ rights.”<sup>83</sup> Positive obligations have been crucial to securing protections for individuals’ rights, both through litigation and prompting legislative and policy change, for example in:

- **Enabling bereaved families and loved ones to seek justice for their loved ones:** Article 2 imposes on a state an “investigative duty” to investigate the circumstances of any death that occurs at the hands of the State, in state custody,<sup>84</sup> or with a nexus to state involvement, via a coroner’s inquest. The family of Zahid Mubarek, who was forced to share a cell with a racist cell mate in Feltham Young Offenders Institution and subsequently killed, relied on Article 2 to hold the prison authority to account for the failings that led to his death.<sup>85</sup> Later, the families of the 97 people who died in the Hillsborough disaster used Article 2 to establish that their loved ones had been unlawfully killed as a result of failings by the police and ambulance services.<sup>86</sup> In another case, a mother whose son died two weeks after being discharged from a mental health unit relied on Article 2 to highlight the inadequate support across local acute and mental health services that contributed to her son’s death.<sup>87</sup>
- **Ensuring that detained children are treated with humanity and dignity:** Articles 3 and 8 have been read to impose on the Prison Service positive obligations to take reasonable and appropriate measures to ensure that children detained in Young Offender Institutions are treated by Prison Staff and fellow inmates in a way that respects their inherent dignity and personal integrity and are not subject to torture or to inhuman or degrading treatment.<sup>88</sup>
- **Holding the police to account over failures to tackle violence against women and girls (VAWG):**<sup>89</sup> Article 3 creates a positive obligation to conduct a proper inquiry into behaviour amounting to breach of this right. The victims of the ‘black cab rapist’ John Worboys, with VAWG organisations intervening,

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<sup>83</sup> Pg. 145, Stamer, K., ‘Positive Obligations Under the Convention’ in *Understanding human rights principles* ed. Jowell, J. and Cooper, J., Hart Publishing, 2003.

<sup>84</sup> Wolfe-Robinson, M. and Bowcott, O., *Government to apologise to Alder family over police custody death*, The Guardian, 22 November 2011, <https://www.theguardian.com/uk/2011/nov/22/government-apologise-alder-family-police-death>.

<sup>85</sup> R v Secretary of State for the Home Department (Respondent) ex parte Amin (FC) [2003] UKHL 51.

<sup>86</sup> Conn, D., Hillsborough inquests jury rules 96 victims were unlawfully killed, *The Guardian*, 26 April 2016, <https://www.theguardian.com/uk-news/2016/apr/26/hillsborough-inquests-jury-says-96-victims-were-unlawfully-killed>.

<sup>87</sup> BIHR, Angela’s Story, 2021, <https://www.bih.org.uk/angelas-story>.

<sup>88</sup> The Queen (On the Application of the Howard League for Penal Reform) v The Secretary of State for the Home Department v Department of Health [2002] EWHC 2497 (Admin).

<sup>89</sup> Ofer, N. et al., Violence against women and girls: Protecting women’s human rights and holding the state to account, *End Violence Against Women Coalition*, October 2017, <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/Human-Rights-Act-report-Oct-2017.pdf>.

were able to use Article 3 to hold the police to account for failing to properly investigate more than 105 rapes and sexual assaults perpetrated by Worboys between 2002 and 2008.<sup>90</sup>

- **Protecting victims of modern slavery and human trafficking:** Liberty used Article 4 of the HRA to challenge the refusal of the Metropolitan Police to investigate a report of threats and violence against an employee, whose passport and wages had been withheld in breach of the prohibition on slavery and forced labour.<sup>91</sup> Subsequently, Parliament created the criminal offence of holding another in slavery or servitude. In its proposal for the offence, the Government stated that “the introduction of the specific offence of slavery, servitude and forced or compulsory labour, in section 71 of the Coroner's and Justice Act 2010, was as a result of concerns that the UK was not compliant with its obligations under Article 4.”<sup>92</sup>
- **Fighting for legal recognition of gender identity for trans people:** In *Goodwin v UK*, the ECtHR held that the UK's failure to provide legal recognition to the applicant who had undergone gender re-assignment was a violation of the positive obligation to secure her right to respect for private life, on the basis that the right to personal autonomy encompasses the right to establish one's identity as an individual human being. It said: “In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved.”<sup>93</sup>
- **Protecting Gypsies' and Travellers' way of life:** The ECtHR has held that Article 8 imposes a positive obligation on the UK to facilitate the Gypsy way of life, particularly due to “the vulnerable position of [G]ypsies as a minority mean[ing] that some special consideration should be given to their needs and

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<sup>90</sup> DSD and NBV v The Commissioner of Police for the Metropolis [2014] EWHC 436 (QB); End Violence Against Women Coalition & Southall Black Sisters, Human Rights Act an “essential tool” for women's protection, 2 November 2017, <https://www.endviolenceagainstwomen.org.uk/human-rights-act-an-essential-tool-for-womens-protection/>.

<sup>91</sup> See: “The Human Rights Act – Patience Asuquo”, YouTube, 18 Dec 2012, [https://www.youtube.com/watch?v=zGlaUDh\\_BJ4](https://www.youtube.com/watch?v=zGlaUDh_BJ4). Under Article 4 of the HRA, Liberty forced the police to investigate a report of threats and violence against an employee, whose passport and wages had been withheld in breach of the prohibition on slavery and forced labour. Also see: *Siliadin v France*; *VCL and AN v. UK* (Applications nos. 77587/12 and 74603/12).

<sup>92</sup> Secretary of State for the Home Department, *Draft Modern Slavery Command Paper*, June 2014, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/318771/CM8889DraftModernSlaveryBill.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/318771/CM8889DraftModernSlaveryBill.pdf).

<sup>93</sup> *Goodwin v UK* (Application no.28957/95) [90]. See also: *X v The former Yugoslav Republic of Macedonia*, (Application no.29683/16).

their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.”<sup>94</sup>

- **Protecting children from neglect and abuse:** Four siblings successfully complained that their local authority had failed to protect them from inhuman and degrading treatment where social services were aware of the neglect and abuse they suffered at home (before they were eventually taken into care).<sup>95</sup>

71. We note that IHRAR was not asked to consider the impact of positive obligations, nor did it identify any concerns in relation to positive obligations under the Convention. Nonetheless, the consultation states that “individually judicially enforceable human rights ha[ve] created significant problems”.<sup>96</sup> Specifically, the consultation states that:

*“the domestic application of the Human Rights Act, under sections 2 and 3, and the wider development of ‘positive obligations’ on government authorities, has given rise to considerable legal uncertainty, with incrementally expanding interpretations of the scope of certain rights and judicial amendment of legislation.”<sup>97</sup>*

72. The consultation also claims that the expansion of ‘positive obligations’, in creating uncertainty as to the scope of public bodies’ legal duties, has “fetter[ed] the way it can make operational decisions, determine policy in the wider public interest, and allocate finite taxpayer’s resources.”<sup>98</sup> The consultation argues that “authorities are often compelled to carry out measures solely to mitigate against the risk of costly litigation, rather than exercising common sense and professional judgement to determine operational priorities.”<sup>99</sup> The Government states that it would like to:

*“restrain the imposition and expansion of positive obligations, allowing the government and those delivering public services to take appropriate decisions for everyone in society, in order to avoid such decisions and priorities becoming distorted by the outcomes of individual litigation.”<sup>100</sup>*

73. The consultation highlights one of the benefits of its proposed Bill of Rights for “justice and public authorities” as follows: “Restricting the scope of positive obligations may

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<sup>94</sup> Connors v UK (Application no. 66746/01).

<sup>95</sup> Human Rights Futures Project, Protection of children’s rights under the Human Rights Act - some examples, *LSE*, May 2011, <https://www.lse.ac.uk/sociology/assets/documents/human-rights/HRF16-KlugHRACchildren.pdf>.

<sup>96</sup> Human Rights Act Reform: A Modern Bill of Rights [229].

<sup>97</sup> Human Rights Act Reform: A Modern Bill of Rights [133].

<sup>98</sup> Human Rights Act Reform: A Modern Bill of Rights [230].

<sup>99</sup> Human Rights Act Reform: A Modern Bill of Rights [142].

<sup>100</sup> Human Rights Act Reform: A Modern Bill of Rights [231].



reduce litigation against public authorities and the associated administrative burden.”<sup>101</sup>  
We will take each of these concerns in turn.

#### ‘Legal uncertainty’

74. The Government cites the case of *Rabone* and *R (Kent County Council)* to justify the claim that positive obligations have created “considerable legal uncertainty”. *Rabone* concerned a voluntary patient at a mental health facility, who died by suicide while on medically approved home leave. In that case, the Supreme Court considered the positive obligations established by Article 2, specifically whether the operational duty to take appropriate steps to safeguard life may exist to protect an informal (as opposed to a detained) psychiatric patient from the risk of suicide.<sup>102</sup>
75. We disagree that the operational duty under Article 2 is legally uncertain or unclear. First, the duty arises only where a public authority has assumed some form of responsibility over an individual, for example, where a health authority has detained an individual on mental health grounds, the State has detained an individual as a punishment after a criminal trial, or the military has instructed a soldier to undertake a particularly hazardous activity.<sup>103</sup> It is true that the operational duty is not *closed*, in the sense that the courts may in future find that public authorities may owe an operational duty in other situations, for example where it finds that there has been an assumption of responsibility in a new context; however, this creates no less uncertainty than when the courts are trying to determine, on an incremental basis, new situations in which a duty of care might be owed under the common law. As Lord Dyson put it in *Rabone*, it is not “altogether surprising” that the circumstances in which the operational duty is owed are not fixed, given that “[a]fter all, the common law of negligence develops incrementally and it is not always possible to predict whether the court will hold that a duty of care is owed in a situation which has not been previously considered”. By analogy, he noted that the ECtHR would continue to “explore” the boundaries of the operational duty “as new circumstances are presented to it for consideration.”<sup>104</sup>
76. Second, even if the circumstances are such that the duty may be engaged, it only crystallises where the public authority knows or ought to know that there is a real and immediate risk to the individual’s life.<sup>105</sup> Third, even where the duty has crystallised, the authority is under an obligation to do all that can be reasonably be expected in the

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<sup>101</sup> Human Rights Act Reform: A Modern Bill of Rights [Appendix 3, Paragraph 5].

<sup>102</sup> Human Rights Act Reform: A Modern Bill of Rights [134].

<sup>103</sup> See *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 [22]-[24].

<sup>104</sup> *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 [25].

<sup>105</sup> *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72 [35]-[41].

circumstances to mitigate the risk, which is analogous to the standard of care owed at common law.

77. Further, although the Government claims that the HRA has created difficulties for frontline workers such as “medical practitioners on the front line,” it does not provide any further evidence of this claim.<sup>106</sup> By contrast, healthcare workers who have been trained on their human rights obligations by BIHR have attested to the ways that the HRA actually assists them to deliver higher quality care: “Knowing more about Human Rights and Dementia can only improve how we deliver care, plan and provide for our patients at every level of their involvement with our service.”<sup>107</sup> A healthcare worker at an NHS Trust who participated in a Lived Experience event held by BIHR and Liberty with the IHRAR panel, said:

*“The duty to protect the right to life means that sometimes we will use restrictive practices to keep the person safe and alive so we will use interventions such as restraint and seclusion.*

*The HRA provides us with an objective legal framework for examining those decisions and ensuring that what we are doing and how we are doing it is a lawful, legitimate and proportionate restriction of Articles 8 (psychological and physical integrity) and 5 (liberty) and that we don't risk breaching people's Article 3 rights freedom from inhuman and degrading treatment.*

*We've made human rights part of the Trust's strategic aims. In its current form, the law is powerful and a framework for positive change for people and families accessing Trust services.”<sup>108</sup>*

78. Social workers also regularly use the HRA in decisions involving capacity and detention in order to ensure that any restriction of the right to liberty is lawful, legitimate and proportionate.<sup>109</sup> In one social worker's words, “Human rights are an essential thread in legally literate decision making.”<sup>110</sup>

79. The other example cited by the Government, *R (Kent County Council)*, was a first instance decision on a claim for judicial review that a Coroner's decision that an inquest should be

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<sup>106</sup> Human Rights Act Reform: A Modern Bill of Rights [134].

<sup>107</sup> British Institute of Human Rights, *Human Rights Learning Programme Impact Report: Tees, Esk and Wear Valleys NHS Foundation Trust: Foss Park Hospital (October 2020 – April 2021)*, May 2021, <https://www.bihar.org.uk/Handlers/Download.ashx?IDMF=734232a7-b826-4888-aef4-5706a522815b>.

<sup>108</sup> British Institute of Human Rights, *Sarah's Story*, <https://www.bihar.org.uk/sarahs-story>.

<sup>109</sup> British Institute of Human Rights, *Fazeela's Story*, 2021, <https://www.bihar.org.uk/fazeelas-story>.

<sup>110</sup> Foggin, J., *Why our Human Rights Act matters... in social work*, British Institute of Human Rights, 2022, <https://www.bihar.org.uk/blog/why-our-human-rights-act-matters-in-social-work>.

an Article 2 inquest. The court applied the well-established test on when Article 2 would create a procedural duty to investigate the State's protect an individual's right to life; there was no difficulty in identifying the principles nor any extension of any positive obligation.

80. It is worth noting that the consultation document refers specifically to “the domestic application of the Human Rights Act, under sections 2 and 3” in the incremental expansion of positive obligations as being one of the sources of legal uncertainty. The inference here is that the courts' adherence to ECtHR jurisprudence and tendency towards 'judicial activism' in interpreting public authorities' positive obligations has been problematic. In respect of the first point, we note that in *Rabone*, Lord Dyson's and Lady Hale's judgments referred mainly to the earlier Supreme Court case of *Savage* – which found that health authorities have an obligation under Article 2 to take precautions to prevent a detained patient from taking their own life – in making their findings on the extent of the operational duty, rather than ECtHR jurisprudence (which had not considered the issue). Their careful evaluation of the differing treatment of detained and voluntary patients in the two cases, and incremental development of the positive obligation under Article 2 by analogy, cannot be said to be 'judicial activism'.

#### 'Excessive burdens'

81. The Government claims that since the HRA came into force, public authorities “are more likely to find operational decisions challenged” and they are more likely to have a court “retrospectively second-guess their professional judgment exercised under considerable pressure.”<sup>111</sup> It claims that the “imposi[tion of] overly prescriptive 'positive obligations' on police forces, and other frontline public services across the UK, risks skewing operational priorities and requiring public services to allocate scarce resources to contest and mitigate legal liability — when that public money would be better spent on protecting the public.”<sup>112</sup>

82. The primary example used by the Government to justify this claim is the case of *Osman v UK*, an ECtHR case concerning a teacher who developed an obsession with a pupil, and who ended up shooting the pupil's father and injuring the pupil. While the ECtHR found that in this case, the police's failure to act did not breach the pupil and his father's Convention rights, it established that Article 2 can “imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational

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<sup>111</sup> Human Rights Act Reform: A Modern Bill of Rights [141].

<sup>112</sup> Human Rights Act Reform: A Modern Bill of Rights [150].

measures to protect an individual whose life is at risk from the criminal acts of another individual.”<sup>113</sup>

83. Nowhere in the consultation does the Government acknowledge that in interpreting the extent of positive obligations, the courts are required to consider such factors as resource limitations. For example, in *Osman*, the ECtHR said of the operational duty under Article 2:

*“[B]earing 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. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.”*<sup>114</sup>

84. The operational duty is therefore not absolute. As Lord Carswell explained in *Re Officer L*: “The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available. In this way the State is not expected to undertake an unduly burdensome obligation.”<sup>115</sup> In deciding whether the duty has been breached, the court must have regard to the resources and competing priorities of the public body which owes the duty; and will not find a public authority to be culpable for failing to take action where that action would have imposed a disproportionate burden on the authority.

85. The consultation ignores the courts’ careful analysis of the competing objectives faced by public authorities. For example, in the policing context, the House of Lords has previously held that the Royal Ulster Constabulary did not breach its operational duty by failing to prevent schoolchildren from being subjected to abuse from a hostile mob.<sup>116</sup> The House recognised the difficulties inherent in modern policing and held that the police must be afforded a “latitude of judgment”. This meant having regard to the fact that “the police had such responsibility and were uniquely placed through their experience and intelligence to make a judgment on the wisest course to take in all the circumstances. They had long and hard experience of the problems encountered in dealing with riotous situations in urban areas in Northern Ireland.”<sup>117</sup>

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<sup>113</sup> *Osman v UK* (87/1997/871/1083), 28 October 1998 [115].

<sup>114</sup> *Osman v UK* (87/1997/871/1083), 28 October 1998 [115].

<sup>115</sup> *Re Officer L* [2007] 1 WLR 2135 at [21].

<sup>116</sup> *In Re E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536.

<sup>117</sup> *In Re E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536 [58].

### 'Skewing operational priorities'

86. We note that the Government's concern is not only that resources are being used to protect people's Convention rights, but that they are being used to protect the rights of those who, in its view, do not deserve them. In relation to Threat to Life notifications, the Government states: "Given that, in such cases, substantial police time and effort is engaged in carrying out measures for *serious criminals*, this *displaces* the policing resources available for other serious crime perpetrated against *law-abiding citizens*, which inadvertently skews policing priorities."<sup>118</sup>
87. Apart from the rather obvious point that it makes sense that a disproportionate amount of police time would be taken up with dealing with the small minority of individuals involved in organised crime, we are highly concerned by the Government's attempt to distinguish people who deserve rights protections, from those who do not. This is similar to the argument made by Justice Secretary Dominic Raab in his 2009 book, *The Assault on Liberty*, that: "[T]hose who blight our society with drugs, human trafficking and murder – and choose the dangerous lifestyle that comes with it – should not be given a human rights guarantee that trumps the rest of society by forcing the police to prioritise protective services in their favour."<sup>119</sup> The act of having committed a crime does not disqualify someone from having their rights – including their right to life – protected. Indeed, it is the whole point of the HRA that its protections apply to everyone, regardless of who they are. The risk with any attempt to differentiate people on the basis of who deserves human rights is not only that those most at risk of violations – that is, those who are minoritised and marginalised – will bear the brunt, but that this will create a slippery slope for greater people to be deprived of their basic entitlements and protections.

### 'Costly litigation'

88. A significant plank of the Government's objection to positive obligations appears to be that they create the conditions for greater litigation against public bodies, albeit at no point does it substantiate this claim. However, it is a mistake to consider positive obligations solely from the perspective of litigation. As noted above, the HRA is used by public bodies and frontline workers to provide essential services and support.
89. The Government's goal should not simply be to reduce the quantity of human rights-based claims being brought against public authorities; the goal should instead be to work towards eliminating the conditions that create violations of human rights by improving

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<sup>118</sup> Human Rights Act Reform: A Modern Bill of Rights [148].

<sup>119</sup> Dominic Raab, *The Assault on Liberty: What Went Wrong with Rights*, Fourth Estate, 2009, p.146.

governance and public service delivery, and enhancing (rather than stripping away) access to justice and avenues of accountability.

## **PREVENTING THE INCREMENTAL EXPANSION OF RIGHTS WITHOUT PROPER DEMOCRATIC OVERSIGHT**

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.

90. A Bill of Rights containing no interpretative power would have no meaningful constitutional status. There would be no means by which the UK courts could correct human rights violations and individuals would be unable to enforce their rights through the courts. If the Government is committed to protecting rights under the BoR, it must provide a mechanism for the courts to interpret other legislation compatibly with those rights. Section 3 of the HRA was carefully constructed in a way which provides individuals facing human rights violations to gain effective relief while also preserving the proper role of Parliament. The UK courts have been cautious in their approach to s.3 HRA, using it to address narrow and specific rights violations, and issuing declarations of incompatibility where the rights violation engages more fundamental questions of policy. Any change would also represent a narrowing of the ordinary approach to statutory construction that is limited by the 'ordinary reading of the words used'. In our view, there is no case for change.

91. Section 3 of the HRA obliges the UK courts to go beyond the ordinary approach to statutory interpretation. As Lord Nicholls said in *Ghaidan*:

*"...In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of*

*difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.*"<sup>120</sup>

92. The proposals to replace section 3 of the HRA with either a very weak interpretative power or none at all appear to be based on a perception of a democratic deficit resulting from the judicial 'amendment' of legislation. The consultation paper states that the HRA has "moved too far towards judicial amendment of legislation which can contradict...the express will of Parliament".<sup>121</sup>
93. However, 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".<sup>122</sup> We also note that IHRAR rejected the view that section 3 had "reduced democratic accountability",<sup>123</sup> 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".<sup>124</sup> We also note the comments of Lady Hale, in her evidence to the Joint Committee on Human Rights (JCHR), that in her experience, once a provision of legislation was found by the court to be incompatible, the court would usually be led by the government's preferred remedy, which in *Ghaidan* was the use of the interpretative obligation rather than a declaration.<sup>125</sup>
94. In our view, the consultation paper fails to take into account the limits on the use of s.3. For example, while s.3 may be used to change unambiguous words in legislation, "so long as the Convention-compatible interpretation does not "go against the grain of the legislation",<sup>126</sup> a meaning which departs "substantially from a fundamental feature of the legislation"<sup>127</sup> is likely to cross the boundary from interpretation to amendment and will not be permissible. *Ghaidan* itself is an example of this principle: the relevant words to be interpreted were "living...as his or her wife or husband". Despite the absence of ambiguity (given the absence of same sex marriage as a legal institution at the time), the House of Lords held that this covered those in long term stable same sex relationships.

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<sup>120</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [2004] 2 AC 557.

<sup>121</sup> Human Rights Act Reform: A Modern Bill of Rights [233].

<sup>122</sup> Human Rights Act Reform: A Modern Bill of Rights [212].

<sup>123</sup> Human Rights Act Reform: A Modern Bill of Rights [213].

<sup>124</sup> Human Rights Act Reform: A Modern Bill of Rights [213].

<sup>125</sup> IHRAR [5.61-62].

<sup>126</sup> *R (Vanriel and anor) v Secretary of State for the Home Department* [2021] EWHC 3415 (Admin).

<sup>127</sup> *Re S (Care Order: Implementation of Care Plan)* [2002] UKHL 10.

The purpose of the legislation was security of tenure for cohabiting couples. There was nothing to suggest that a fundamental feature of the legislation intended to reserve this right to opposite sex couples only, given it was not confined to marriage, which at the relevant time was only available to opposite sex couples.

95. A second limit on the use of s.3 is the reluctance of the courts to it creatively in areas involving complex questions of social policy. For example, in *Bellinger*, the House of Lords held it was not possible under s.3 to construe the word “female” in the Matrimonial Causes Act 1975 to include a person registered male at birth and subsequently undergoing gender reassignment treatment. The court found that to use section 3 in that way would represent a “major change in the law” and that “the issues are altogether ill-suited for determination by courts and court procedures”.<sup>128</sup> Instead, a declaration of incompatibility was made, and subsequent law reform by the Gender Recognition Act 2004 followed.
96. Finally, it is not possible for the courts to make a Convention-compatible interpretation where that interpretation has been expressly rejected by Parliament. For example, in *WB*, the Court of Appeal said:

*“To interpret [the statute] afresh would not be to interpret those provisions but to give them a meaning which it is clear from the legislative history is contrary to that which Parliament intended. The absence of a Parliamentary intention to attach a Convention-compliant interpretation to legislation is not a bar to the courts adopting a Convention-compliant interpretation under HRA, s3, but a distinction must be drawn between that situation and one in which the Convention-compliant interpretation has been rejected by Parliament by express words or other inconsistent legislative action.”*<sup>129</sup>

These proposals are therefore based on perception of the use of s.3 which goes far beyond its application in practice.

97. IHRAR specifically considered and rejected the proposal to “amend section 3 so that it only applies where legislation is ambiguous”. In doing so, it stated that: (i) the proposed amendment would “restrict the operation of section 3...it would limit its operation to the approach established prior to the HRA’s enactment”, and (ii) if so enacted, it would “reduce the current level of Convention rights protection provided for by the HRA...[and] run the risk of upsetting the current devolution settlement, and the Northern Ireland

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<sup>128</sup> [2003] UKHL 21 [2003] 2 WLR 1174.

<sup>129</sup> *WB v DC* [2018] EWCA Civ 928.



Peace Agreement.”<sup>130</sup> Liberty agrees that there should be no change to the substantive content of section 3.

98. The consultation first proposes complete repeal of section 3, despite having stated above that it is minded not to do so.<sup>131</sup> Liberty would strongly oppose any attempt to water down rights protections by repealing section 3 of the HRA and replacing it with a BoR containing no interpretative power. Further, in our view the two draft clauses proposed at option 2 represent a thinly veiled attempt to achieve the same objective. If the Government is minded not to repeal section 3, in our view it should be equally minded not to enact either of these clauses.

99. The effect of both the proposed clauses is to remove the interpretative obligation currently provided by s.3 HRA from the BoR. They do not add anything: the clauses go no further than to give statutory effect to the existing common law presumption that the legislature intends to legislate compatibly with international law. The draft clauses thereby differ sharply from section 3, which allows interpretations which are not in any sense an ordinary meaning of the words used, whereas these draft clauses do not. The inevitable consequences of this are that public bodies will more often breach Convention rights and the ECtHR will more often rule against the UK.

100. The Government has also failed to recognise that s.3 HRA does not prevent Parliament from legislating in a way which is incompatible with Convention rights and therefore does not undermine democracy. It has failed to recognise that, where the courts have read in a Convention-compatible way using section 3, it is always open to Parliament to amend the legislation to make it clear that it is intended to be read in a Convention-incompatible way. The fact that Parliament has often chosen not to do so indicates that it has generally been content with the courts’ interpretation.

101. The proposed amendment would also inevitably increase the need for the courts to make declarations of incompatibility. The consultation favours an increased reliance on section 4 because it is perceived to go some way to cure an alleged “democratic deficit.”<sup>132</sup> The consultation fails to address the practical difficulties that an increase in declarations of incompatibility may create for Parliament. As the Grand Chamber recorded in *Burden v UK*:

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<sup>130</sup> IHRAR [5.138-143].

<sup>131</sup> Human Rights Act Reform: A Modern Bill of Rights [237].

<sup>132</sup> Human Rights Act Reform: A Modern Bill of Rights [95].

*“Once a declaration had been made (or once the European Court of Human Rights had found a violation based on a provision of domestic law), there [are] two alternative avenues for putting right the problem: either primary legislation could be introduced in Parliament, or the Minister concerned could exercise his summary power of amendment under s.10 of the Human Rights Act 1998”.*<sup>133</sup>

102. As the Lord Chancellor explained during the passage of the Human Rights Bill on 27 November 1997: “[W]e expect that the government and Parliament will in all cases almost certainly be prompted to change the law following a declaration of incompatibility.” Given that the Government’s avowed intention is that the UK should continue to respect Convention rights, we assume it remains committed to remedying the law following a s.4 HRA declaration. Elsewhere in the consultation, the Government proposes making changes to the remedial order power. We note the comments of the JCHR in its evidence to IHRAR that:

*“We did not receive any evidence suggesting there is an appetite from Parliamentarians for greater involvement in resolving human rights incompatibilities identifies by the courts. The pressure on the Parliamentary timetable is already great. Requiring the legislature to grapple with every instance of legislative incompatibility with the Convention, whether in a recent statute or one passed many years before the HRA came into force, would put a significant additional burden on the Government and Parliament (and the Parliamentary timetable). Were the role that Parliament plays in the remedial order process to be ‘enhanced’ in some way, this would occupy even more time that Parliamentarians may not feel they have available.”*<sup>134</sup>

103. Given that the proposal to amend s.3 HRA is predicated on a concern about protecting the democratic process, we are surprised that the consultation fails to address the consequences for Parliament of an increased number of declarations of incompatibility.

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

104. IHRAR notes that there is a “perception that sections 3 and 4 have weakened the UK Parliament in carrying out its role as the primary means of securing rights protection in the UK.” This is in spite of the fact that, in its view, the HRA “go[es] to great lengths to

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<sup>133</sup> *Burden v UK* (2008) 47 EHRR 38 [22].

<sup>134</sup> IHRAR [5.105].

preserve Parliamentary Sovereignty and... sections 3 and 4 gi[ve] expression to Parliamentary Sovereignty.”<sup>135</sup> To rectify this, IHRAR recommended that the role of the JCHR be enhanced, for example “that consideration is given by Parliament as to how the JCHR’s terms of reference may be expanded to enhance its scrutiny role of section 3 judgments, and how parliamentary consideration of such judgments and JCHR reports concerning them, could also properly be improved.”<sup>136</sup> It further recommended “the introduction of an arrangement analogous to that which currently operates in respect of the remedial order-making process,” so that there is a dialogue between the JCHR and the Government in respect of s.3 judgments.<sup>137</sup>

105. We agree in principle with the recommendation that Parliament’s role in engaging with and scrutinising section 3 judgments – and more generally, the human rights implications of legislation – should be enhanced, through greater resourcing and adequate time allocated for the consideration of these important issues.

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

106. IHRAR recommended that the courts, Government and Parliament (particularly through the JCHR) put in place a database identifying superior court judgments across the UK that rely on section 3 of the HRA to interpret legislation compatibility with Convention rights. In the panel’s view, this would provide greater clarity and transparency over the UK courts’ current use of section 3.<sup>138</sup> We agree with this recommendation.

**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?**

107. This question is very misleadingly phrased. The actual proposal in the consultation document is for “providing that declarations of incompatibility are also the *only* remedy available to courts in relation to certain secondary legislation.”<sup>139</sup> In other words, this would deprive the courts of their ability to strike down secondary legislation that is incompatible with the Convention. It is unclear why this question should be so misleading,

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<sup>135</sup> IHRAR [5.194-195].

<sup>136</sup> IHRAR [5.200].

<sup>137</sup> IHRAR [5.201].

<sup>138</sup> IHRAR [5.191-193].

<sup>139</sup> Human Rights Reform: A Modern Bill of Rights [250].

although it is notable that IHRAR considered and comprehensively rejected the actual proposal being put forth.<sup>140</sup>

108. It is well established that secondary legislation that breaches primary legislation is unlawful and of no effect.<sup>141</sup> The HRA is primary legislation, and so secondary legislation is required to be compatible with it.<sup>142</sup> Courts are careful not to disrupt wider frameworks and policies which surround subordinate legislation, often issuing a declaration in cases where offending provisions cannot be cleanly excised,<sup>143</sup> or if the situation demands it, disapplying a narrow provision but refusing to make a broader declaration and instead leaving it to the Government to decide how to respond more generally.<sup>144</sup> It is of course well within the Government's rights to introduce new legislation that achieves the same policy goal as that which was quashed, without violating human rights. This can be done swiftly through use of remedial orders under section 10 HRA, although the consultation paper proposes abolishing these orders (Q17). As we wrote in our IHRAR response:

*“Removing courts’ powers to determine and address the compatibility of subordinate legislation with the HRA would be a constitutional absurdity. Courts and tribunals would be compelled to apply subordinate legislation even though it breaches fundamental human rights and is contrary to primary legislation. To quote Lord Bingham: ‘I cannot accept that it can ever be proper for a court, whose purpose is to uphold, vindicate and apply the law, to act in a manner which a statute (here, section 6 of the Human Rights Act 1998) declares to be unlawful.’”<sup>145</sup>*

109. IHRAR considered this option in response to a Policy Exchange proposal and comprehensively rejected it on four grounds:

- a) Courts already can make a declaration of incompatibility relating to certain subordinate legislation, where the incompatibility is required by an Act of Parliament.<sup>146</sup> As IHRAR wrote, “the current position thus furnishes Parliament with

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<sup>140</sup> IHRAR [7.55-64].

<sup>141</sup> See, for example, *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 and *Boddington v British Transport Commission* [1999] 2 AC 143.

<sup>142</sup> See *A & Others v Secretary of State for the Home Department* ([2004] UKHL 56).

<sup>143</sup> *R. (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16, see at [230-231]; *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303, see at [31]; *Burnip v Birmingham City Council* [2012] EWCA Civ 629 at [24] applying *Francis* (Court of Appeal found a breach of Article 14 ECHR in respect of housing benefit regulations and granted declaratory relief only); *TP & AR No 1 v Secretary of State for Work & Pensions* [2018] EWHC 1474 (Admin); [2019] P.T.S.R. 238 at [92] (granting declaratory relief in respect of the Universal Credit (Transitional Provisions) Regulations 2014 to allow Government to consider the appropriate changes to the scheme).

<sup>144</sup> See for example *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 [49].

<sup>145</sup> *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68; [2004] 2 AC 72, 92.

<sup>146</sup> Section 4(3) HRA.

the means to provide specific and targeted exemptions from the UK Courts' general ability to quash incompatible subordinate legislation."<sup>147</sup>

- b) It would be offensive to constitutional norms and the rule of law to treat subordinate legislation on a par with Acts of Parliament. The report warned that this could "act as a potential incentive to Government to use the breadth of legislation (as defined in s.21 of the HRA) as a means to side-step the detailed scrutiny of Parliament... Reform ought not to provide a basis for the potential incentivisation of conduct that might undermine Convention rights compliance".<sup>148</sup>
- c) It would produce problems for devolution. Acts of the devolved legislatures can be quashed when incompatible with the Convention, so insulating secondary legislation passed in Westminster of this safeguard would in effect accord more deference to the decisions of individual ministers than primary legislation in the devolved administrations. Considering the reduced scrutiny, both relating to human rights and general scrutiny, that is afforded secondary legislation, this would be a remarkable and strongly undesirable state of affairs.
- d) Subordinate legislation is subject to less scrutiny of its compatibility with the Convention, making the quashing power an important safeguard.<sup>149</sup> IHRAR points out that there is no duty to make a statement of compatibility under section 19 for secondary legislation (although there is a practice that Ministers do so), and the JCHR and Joint Committee on Statutory Instruments do not "routinely carry out detailed Convention rights-compatibility assessments of subordinate legislation".<sup>150</sup> The strike down power is therefore left as a vitally important means for ensuring compatibility with the Convention.

110. It is important when considering this proposal to take into account also the recent proliferation of secondary legislation. In November 2021, the House of Lords Secondary Legislation Scrutiny Committee (SLSC) and Delegated Powers and Regulatory Reform Committee (DPRRC) on the same day published *Government by Diktat: A call to return power to Parliament*<sup>151</sup> and *Democracy Denied? The urgent need to rebalance power*

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<sup>147</sup> IHRAR, [7.60].

<sup>148</sup> IHRAR, [7.61].

<sup>149</sup> IHRAR, [7.55-7.64].

<sup>150</sup> IHRAR, [7.64].

<sup>151</sup> Secondary Legislation Scrutiny Committee, *Government by Diktat: A Call to return power to Parliament*, House of Lords, 24 November 2021, <https://committees.parliament.uk/publications/7941/documents/82225/default>.

*between Parliament and the Executive*<sup>152</sup> respectively. In the reports, the two committees issued “a blunt warning, that hundreds of laws are being imposed on all of us, in effect by government diktat, with no effective scrutiny and control by Parliament.”<sup>153</sup> The reports asserted that “the abuse of delegated powers is in effect an abuse of Parliament and an abuse of democracy”<sup>154</sup> and urged immediate change so that the balance between Parliament and the executive should be “be reset: not restored to how things were immediately before these exceptional recent events but reset afresh”.<sup>155</sup> In the context of these warnings, it seems foolish to consider undoing what is a genuine and effective safeguard against secondary legislation violating human rights.

**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.**

111. Suspended and prospective quashing orders have the potential to cause opportunities for injustice in individual cases, disincentivise future challenges, weaken the rule of law and introduce unnecessary layers of complexity into an already functioning system. They should not be introduced. We acknowledge that this was an IHRAR recommendation, with the justification that “UK courts’ approach to subordinate legislation under the HRA was supposed to be consistent with their approach to the judicial review of subordinate legislation generally”,<sup>156</sup> and so the BoR should be brought into line with the Judicial Review and Courts Bill (JRC Bill), which makes provision for quashing orders to come into date at a specified future date or without retrospective effect. We have sympathy for the desire for consistency but argue that this is aimed at the wrong end of the equation. Consistency should be maintained through the abandonment of clause 1 of the Judicial Review and Courts Bill.

112. We recognise that there may be certain rare and limited cases where it may make sense to suspend the effects of a quashing order. The IHRAR report names *Salvesen*<sup>157</sup> as a

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<sup>152</sup> Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, House of Lords, 24 November 2021, <https://committees.parliament.uk/publications/7960/documents/82286/default>.

<sup>153</sup> Secondary Legislation Scrutiny Committee, 24 November 2021, <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/news/159146/two-lords-reports-published-on-the-balance-of-power-between-parliament-and-the-executive/>.

<sup>154</sup> Pg. 5, DPRRC, *Democracy Denied?*

<sup>155</sup> Pg. 2, SLSC, *Government by Diktat*.

<sup>156</sup> IHRAR, [7.75].

<sup>157</sup> *Salvesen and Riddell & Anor v. The Lord Advocate (Scotland)* [2013] UKSC 22 (24 April 2013).

Scottish case in which the power was useful, and *Carmichael* as a UK case in which the power was not available.<sup>158</sup> IHRAR did not, however, advance any examples in favour of prospective orders, or even any argument in their favour beyond consistency. This is not surprising. During the JRC Bill's passage through the House of Commons, the Government advanced only one example in favour of prospective orders, a situation relating to licenses for shotguns.<sup>159</sup> Not only did the Minister not manage to offer a single other situation, real or hypothetical, in which a prospective order would be in the interests of justice, he also conceded that a suspended order "could also have been used" in this case, removing the need for the introduction of prospective orders.<sup>160</sup> The revoking of shotgun licences is not a human rights matter, but the principle carries over. The case for prospective remedies has not been set out.

113. If the case for prospective remedies is murky, the case against is clear. In imposing a prospective order, a situation is created in which two otherwise identical cases are treated entirely differently depending on whether they were affected before or after a court judgment. Those who were impacted by the unlawful decision before the judgment would have been just as wronged as those impacted after, but would not have recourse to any remedy. This means that an individual claimant bringing a case may help to overturn an unjust decision, but not improve their own situation. The Government is well aware that their proposals have the potential to deprive people of justice, including in potentially discriminatory ways. In a new equalities statement published after the Bill had completed its Commons stages, the Ministry of Justice admits "where in such a case a court ordered a prospective only quashing it may result in a less favourable outcome for the claimant".<sup>161</sup> This is likely to produce a chilling effect in which fewer claimants come forward as they may not consider a provision worth challenging. The knock-on effect would be for more risky and potentially rights-violating decision-making from Government and public bodies, should they feel the chance of a challenge is less likely.

114. In the Judicial Review and Courts Bill, the situation is made worse by the imposition of a presumption in favour of using the new remedies. It is important to be clear about what exactly is being proposed to be carried over to the BoR. The "proposals for suspended

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<sup>158</sup> The Secretary of State for Work And Pensions v Carmichael & Anor [2018] EWCA Civ 548 (20 March 2018).

<sup>159</sup> A 2019 situation in which Natural England revoked general licenses for shotguns in response to a threatened judicial review. It was seven weeks before new licenses could be issued, leaving farmers without legal certainty over how to protect their livestock.

<sup>160</sup> James Cartlidge MP, Judicial Review and Courts Bill, House of Commons, Second Reading, 26 October 2021, Col. 233, <https://hansard.parliament.uk/commons/2021-10-26/debates/273F4D6A-291D-4A73-8D7B-D6BE51F8448E/JudicialReviewAndCourtsBill>.

<sup>161</sup> Pg. 19, Ministry of Justice, Judicial Review and Courts Bill, equalities statement, February 2022, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1052144/equalities-statement-jr-courts-bill.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052144/equalities-statement-jr-courts-bill.pdf).

and prospective quashing orders put forward in the Judicial Review and Courts Bill” extend beyond their introduction as extra options for courts considering remedies, and so we must consider that the rest of clause 1 is also being considered in this consultation. Clause 1(9) of the JRC Bill states that if it appears to the court that the use of one of the new remedies would “as a matter of substance, offer adequate redress in relation to the relevant defect”, the court must make one, “unless it sees good reason not to do so”, based on a number of factors. This was not recommended by the Independent Review of Administrative Law (IRAL), whose report preceded the Bill. IRAL instead suggested just to “give courts the option” of making a suspended quashing order (the IRAL report did not recommend prospective orders either).<sup>162</sup> The imposition of this presumption constitutes a clear fettering of judicial discretion, directing courts to act in ways that may not be in the best interests of justice.

115. The list of factors at clause 1(8) likewise arouses concern. The Government states that these factors act as a safeguard, directing the courts to have regard to the interests and expectations of those people who have relied on the impugned act or would benefit from its quashing.<sup>163</sup> However, the court must also have regard to “any detriment to good administration that would result from exercising or failing to exercise the power”,<sup>164</sup> and “so far as appears to the court to be relevant, any action taken *or proposed to be taken*, or undertaking given, by a person with responsibility in connection with the impugned act” (emphasis added).<sup>165</sup> This profoundly dilutes any safeguard that regard to the ‘interests and expectations’ of affected persons may stand to have by having that weighed up against “detriment to good administration” (which the Bill’s explanatory notes explain can include “economic or financial instability resulting from the immediate quashing of a regulation”),<sup>166</sup> and actions that have only been “proposed to be taken” to rectify a public body’s unlawful decision – a provision that appears ripe for abuse.

116. It should be noted that the Judicial Review and Courts Bill is not yet law and these orders are opposed by all opposition parties other than the Democratic Unionist Party. The introduction of these orders is not inevitable and this discussion of whether they should be extended is, at the very best, premature.

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<sup>162</sup> The Independent Review of Administrative Law, March 2021, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/970797/IRAL-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf) [3.49].

<sup>163</sup> Judicial Review and Courts Bill, 1(8)(c) and 1(8)(d).

<sup>164</sup> Judicial Review and Courts Bill, 1(8)(b).

<sup>165</sup> Judicial Review and Courts Bill, 1(8)(e).

<sup>166</sup> Pg. 23, Ministry of Justice, Explanatory Notes, Judicial Review and Courts Bill, 2021, <https://publications.parliament.uk/pa/bills/cbill/58-02/0152/en/210152en.pdf>



## Question 17: Should the Bill of Rights contain a remedial order power?

117. We see no need for change to section 10 of the Human Rights Act. Remedial orders allow for Ministers to swiftly make simple, necessary changes to human rights-offending legislation without the need to wait for significant parliamentary time. The standard procedure's two-step process, laying the order before Parliament in draft for sixty days to allow for representations to be made before requiring the final version to be approved by each House, along with the requirements for information on the incompatibility and reasons for using the process, provides a balance between scrutiny and speed in issuing uncontroversial corrections to human rights violations. The urgent procedure is correctly seen as an extraordinary measure, saved for when there is a serious need for expedition of an uncontroversial correction. The orders work well and should be retained in their current form.

118. We note that IHRAR recommended only a minor reform to remedial orders, retaining them essentially in their current form but keeping them from being used to amend the HRA itself (IHRAR did not recommend a Bill of Rights). Only once has a remedial order been used to amend the HRA,<sup>167</sup> after a person wrongly committed to prison was denied damages under s.9(3) HRA, which was held to breach Article 13 ECHR.<sup>168</sup> This was an extremely unusual situation, but one in which a remedial order appeared to be in the best interests of justice.

119. Option C proposes restricting remedial orders only to those made under the 'urgent' procedure. This would undermine parliamentary scrutiny significantly. The urgent procedure is very rarely used – only three times since the Act came into force<sup>169</sup> – and it is correctly viewed as a last resort. Making it the only version would be a regressive step, with no real utility seeing as the urgent procedure is already an option open to Ministers when the situation demands it. The consultation document outlines 'a case' for retaining remedial orders under the urgent procedure only, saying:

*“There is a case for retaining remedial orders under the urgent procedure only, as a means of addressing urgent (and compelling) cases where leaving the law unamended, even for a short period, could be damaging. The government envisages that there will only be a few cases in which such a power would be needed, but without this, the only option for remedying the incompatibility in primary legislation would be*

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<sup>167</sup> Human Rights Act 1998 (Remedial) Order (SI 2020/1160).

<sup>168</sup> *Hammerton v UK* – 6287/10 [2012] ECHR 562.

<sup>169</sup> Mental Health Act 1983 (Remedial) Order 2001 (SI 2001/3712); the Naval Discipline Act 1957 (Remedial) Order 2004 (SI 2004/66); the Terrorism Act 2000 (Remedial) Order 2011 (SI 2011/631).

*to introduce a new Bill. This must be weighed, however, against the constitutional arguments against executive legislation, which may suggest removing the power entirely.”<sup>170</sup>*

120. It is hard to read this passage as anything other than an argument for retaining the current system of remedial orders, which takes the need for both urgency and scrutiny into account in providing the flexibility of three options – the urgent procedure, an ordinary remedial order, and normal legislation – for rectifying incompatible provisions. The issue is well-served by the situation as it is.

121. Option D would abolish remedial orders entirely, abolishing a tool that works well and performs a necessary function in resolving legislation to correct human rights violations. IHRAR specifically rejected this option, noting that “the remedial order provides an important mechanism for protecting rights where a declaration of incompatibility has been made”.<sup>171</sup> The consultation document says there should be “a strong presumption in favour of using more commonly used parliamentary procedures when legislating to address legislative incompatibilities with Convention rights”.<sup>172</sup> This is already the case. There have been 44 declarations of incompatibility issued since the HRA came into force (as of July 2021), ten of which were overturned on appeal. The majority of the rest were addressed by primary or secondary legislation. Ministers already have these alternatives open to them, there is no need to deny them of a useful tool.

**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.**

122. Section 19 of the HRA requires Ministers in charge of Bills in either House of Parliament to make a statement, either to the effect that in their view the provisions of the Bill are compatible with the Convention (s.19(1)(a) HRA); or that, although they are unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed with the Bill (s.19(1)(b) HRA). In practice, s.19 HRA operates through the issuing of a short statement on the part of the relevant Minister on the first page of a new Bill, which is usually accompanied by a separate human rights memorandum and/or additional elaboration on what the Minister believes to be the relevant human rights issues in the Explanatory Notes to the Bill.

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<sup>170</sup> Human Rights Act Reform: A Modern Bill of Rights [256].

<sup>171</sup> IHRAR [9.30].

<sup>172</sup> Human Rights Act Reform: A Modern Bill of Rights [256].

123. Section 19 of the HRA is important because it requires the Government to set out clearly whether, in its view, legislation is compatible with the HRA, and to provide an explanation to this effect. Indeed, IHRAR stated that the aim of s.19 HRA statements was to “enhance the depth and quality of parliamentary debate and scrutiny of legislation”,<sup>173</sup> noting that “[t]he substantive benefit of a statement of compatibility stems from the fact that it requires the Government to consider a Bill’s compatibility with Convention rights and to provide a focus for parliamentary discussion on the issue.”<sup>174</sup> The Cabinet Office states in its *Guide to making legislation* that “[t]here is no legal obligation on the minister to give a view on compatibility *other than as required by section 19* nor is there a specific requirement for the minister to reconsider compatibility issues at a later stage (emphasis added).”<sup>175</sup>

124. The Government claims there is a debate about whether s.19 HRA “strikes the right constitutional balance between government and Parliament, particularly in relation to ensuring human rights compatibility whilst also creating the space for innovative policies”.<sup>176</sup> It is hard to see how the exercise of issuing a declaration and providing a human rights analysis under s.19 HRA has any effect on this relationship. What this question actually appears to be getting at is the issue of whether Bills should be required to be compatible with the ECHR (and how that might somehow impinge on the “space for innovative policies”),<sup>177</sup> which, given that the UK remains a signatory to the ECHR, is moot.

### **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?**

125. By a considerable distance, the best way for the Bill of Rights to act in the interests of all constituent parts of the United Kingdom is for the plans to be ditched and the Human Rights Act retained in its current form. The “different interests, histories and legal traditions of all parts of the UK” are all but absent from the consultation document, with IHRAR – who were not asked about Scotland, Northern Ireland and Wales – much more alive to the harm that meddling with our human rights protections stands to do across the devolved administrations.<sup>178</sup>

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<sup>173</sup> IHRAR [5.30].

<sup>174</sup> IHRAR [5.161].

<sup>175</sup> Cabinet Office, *Guide to making legislation*, 2022, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1048567/guide-to-making-legislation-2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1048567/guide-to-making-legislation-2022.pdf).

<sup>176</sup> Human Rights Act Reform: A Modern Bill of Rights, [261].

<sup>177</sup> Human Rights Act Reform: A Modern Bill of Rights [261].

<sup>178</sup> See for example: IHRAR [1.50-1.51].

126. Expressing criticism of the Government’s failure to consider the Welsh and Scottish Governments’ comprehensive submissions to IHRAR, a recent joint letter from Scottish and Welsh Ministers to the Justice Secretary stated: “It is disappointing, if not perhaps surprising, that you should have decided to simply disregard that weight of evidence and expertise and to press ahead regardless with what amounts in practice to an ideologically-motivated attack on the freedoms and liberties protected by the Human Right Act.” It states, “The Scottish and Welsh Governments are very clear that under the current constitutional settlement the interests of the peoples of Scotland and Wales are best protected by retaining the Human Rights Act in its current form. Furthermore, as the Human Rights Act is fundamental to each of the devolution settlements of the UK, it would be a matter of the gravest concern if the UK Government was to contemplate acting in this area without the agreement of all of the UK’s national legislatures.”<sup>179</sup>

127. Throughout this response, we have raised some of the many ways that these proposals stand to cause serious problems relating to devolution. Below are a few more general points.

#### Scotland

128. Many of the proposals in this consultation were seemingly written without consideration of the differing legal system in Scotland. Scottish devolution was established through the Scotland Act 1998, which also sets out Scotland’s human rights framework. Section 29 of that Act provides that the Scottish Parliament cannot legislate in a manner that is incompatible with any of the Convention rights. If a court finds that an Act of the Scottish Parliament breaches this, it may declare it outside its legislative competence and strike it down in a manner similar to s.4 HRA’s treatment of secondary legislation. Section 101 of the Scotland Act provides for an interpretive power similar to s.3 HRA, while section 57 provides that Ministers must act compatibly with Convention rights.

129. Several of the Government’s proposals are problematic in this light. To take one example, question one’s proposed untethering of the meaning of rights in the ‘Bill of Rights’ from those in the ECHR would lead to considerable legal uncertainty within Scotland as two diverging sets of protections would develop – the Convention rights

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<sup>179</sup> Cabinet Secretary for Social Justice, Housing and Local Government of the Scottish Government, the Minister for Equalities and Older People of the Scottish Government and the Welsh Government’s Minister for Social Justice and Counsel General and Minister for the Constitution Human Rights Act: joint letter to the Lord Chancellor with Welsh Ministers - March 2022, 2 March 2022, <https://www.gov.scot/publications/human-rights-act-joint-letter-to-the-lord-chancellor-with-welsh-ministers-march-2022/>

manifested through the Scotland Act, and the corresponding rights in the UK-wide Bill of Rights, which do not necessarily mean the same thing. Likewise, the proposal in question 15 to remove the ability of courts to strike down secondary legislation that is incompatible with human rights would bring about the extremely undesirable situation of secondary legislation made by Ministers in Westminster taking on a higher and more protected status than Acts of the Scottish Parliament, which would remain susceptible to being struck down under s.29 of the Scotland Act. This is particularly worrying in regard to the considerably differing levels of scrutiny each receives, and would lead to what former Deputy President of the Supreme Court Lord Mance referred to in evidence to the Joint Committee on Human Rights as “a strange, unexpected and inappropriate situation” and “a real backward step”.<sup>180</sup>

130. There are also several proposals in the consultation that relate to areas of devolved competence for Scotland, such as question 3 on jury trials and those questions relating to administrative justice. More important than the individual proposals however is the cumulative effect of this attempt to dismember the Human Rights Act. As Deputy First Minister John Swinney wrote to Lord Chancellor Dominic Raab following the publication of the proposals:

*“The Human Rights Act is, in its current form, woven directly into the fabric of the current constitutional settlement. Any change to the existing statute would therefore itself be a constitutional matter with specific and direct implications for the exercise of both legislative and executive competence by devolved institutions. As such, I am very clear that proposals of this nature would require the legislative consent of the Parliament under the Sewel Convention.”<sup>181</sup>*

131. It is also important to consider the different directions that Scotland and Westminster are taking on human rights. While the UK Government explores how it can ‘overhaul’ the human rights of people in this country without actually withdrawing from the ECHR, the Scottish Government is looking to expand protections through the incorporation of international treaties.<sup>182</sup> Taken together, the proposals will produce legal uncertainty,

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<sup>180</sup> Joint Committee on Human Rights, Oral evidence: Human Rights Act Reform, HC 1033, 26 January 2022, <https://committees.parliament.uk/oralevidence/3353/pdf>.

<sup>181</sup> Deputy First Minister John Swinney, *Human Rights Act: letter to the Lord Chancellor*, 21 December 2021, <https://www.gov.scot/publications/human-rights-act-letter-to-the-lord-chancellor>.

<sup>182</sup> Smith, K.M., *Incorporation of International Human Rights Briefing Series: The International Covenant on Economic, Social and Cultural Rights*, Human Rights Consortium Scotland, November 2021, <https://hrcscotland.org/wp-content/uploads/2021/11/Final-ICESCR-briefing-Nov-2021.pdf>.

threaten the devolved settlement, cause considerable fragmentation and divergence and drive an ever-larger wedge between Scotland and the wider United Kingdom.

### Northern Ireland

132. Human rights and, in particular, direct and effective access to the rights enshrined in the ECHR, are deeply intertwined with Northern Ireland’s constitutional settlement. The “Rights, Safeguards and Equality of Opportunity” section of the Belfast (Good Friday) Agreement 1998 (‘GFA’) states that: “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.”<sup>183</sup> The HRA and the Northern Ireland Act 1998 (‘NIA’) satisfied these commitments, but these proposals threaten them.

133. Though the form that the Government’s proposals would actually take remains unclear, the paper repeatedly suggests that a ‘Bill of Rights’ would “*revise and replace*” the HRA. Due to the complicated interrelationship between the NIA and the HRA, to comply with the GFA, any new legislation that replaced the HRA would have to, at the very least, replicate incorporation of the ECHR. The ECHR was embedded in Northern Ireland’s devolution arrangements through the NIA, which imposes a series of limits on the powers of the Northern Ireland Assembly and Executive such that actions and decisions must be compatible with “Convention rights”.<sup>184</sup> Section 98(1) of the NIA defines this term as having “the same meaning as in the Human Rights Act 1998”. This dependency means that permitting dramatic changes to the fundamental meaning of the rights in the HRA could dramatically, and undemocratically, distort the limits on the power of the devolved administration beyond what is permitted under the GFA. As the Human Rights Centre at Queen’s University Belfast (‘QUB Human Rights Centre’) explained to IHRAR, if the replacement of the HRA precipitates amendments to the NIA, “the Northern Ireland constitutional settlement will be seen as collateral damage to a review that has little to do with the realities of human rights practice in Northern Ireland.”<sup>185</sup>

134. The consultation paper gives a range of assurances: from “any reform will keep the Convention rights incorporated” to the labyrinthine, lawyerly, “the rights protected under

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<sup>183</sup> Pg. 16, The Belfast (Good Friday) Agreement 1998, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1034123/The\\_Belfast\\_Agreement\\_An\\_Agreement\\_Reached\\_at\\_the\\_Multi-Party\\_Talks\\_on\\_Northern\\_Ireland.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034123/The_Belfast_Agreement_An_Agreement_Reached_at_the_Multi-Party_Talks_on_Northern_Ireland.pdf).

<sup>184</sup> The Northern Ireland Act 1998: see, in particular, s.6(2)(c) and s.24(1)(a).

<sup>185</sup> Queen’s University Belfast Human Rights Centre, *Evidence to the Independent Human Rights Act Review*, February 2021, <https://law.qub.ac.uk/schools/SchoolofLaw/filestore/Fileupload,1024760,en.pdf> [9].

the Bill of Rights will continue to be based on the rights protected under the Convention.”<sup>186</sup> Of course, neither formulation would be sufficient to discharge the commitment made in the GFA: that the ECHR itself, not just the rights it contains or the current government’s version of rights “based on” them, be incorporated in Northern Ireland law. Yet the draft clauses that the Government has provided to replace section 2 of the HRA, suggest that this is the explicit intention of the changes: the first proposal states that “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”.<sup>187</sup> To be clear, if this approach were adopted, it would breach the GFA.

135. The Government’s assertion that “our proposed reforms will not undermine [the GFA]”, seems to be based on an extremely originalist and reductive view of the ECHR. When the GFA was signed in 1998, it clearly envisaged providing people in Northern Ireland with access not just to the bare words of the ECHR as drafted in 1950, but the jurisprudence by which the ECtHR construed and construes those words. As Brian Gormally, Director of the Committee on the Administration of Justice, has said, in the GFA context, “‘incorporation’ cannot just mean repeating the text of the ECHR (or most of it) in a UK statute. It also involves ‘bringing in’ the institutions of the Convention and the jurisprudence developed by the Court and other Convention bodies.”<sup>188</sup> We would also observe that the commitment in the GFA is not just to incorporate, but to “complete incorporation” of the ECHR. But, if part of what the HRA achieved was ‘bringing in’ the ECHR, one of the stated objectives of this consultation paper is booting it back out again. If the Government reneges on its commitment to the “complete incorporation” of the ECHR, whether intentionally or otherwise, it will, again, be in breach of the GFA.

136. Taken together, the proposals would drive a wedge into our human rights, forcing the development of two parallel sets of increasingly divergent rights: those in the Bill of Rights which can be enforced before domestic courts, and the actual ECHR rights which can only be enforced in Strasbourg, as they are only recognised there. As IHRAR Chair Sir Peter Gross QC warned the Justice Committee, the Government’s draft clauses for the replacement of section 2 of the HRA risk opening a “more significant gap between rights you can enforce here and rights you can enforce in Strasbourg [...] we don’t want the gap to get out of hand”. He added that the HRA “contemplates that from time to time we might

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<sup>186</sup> Human Rights Act Reforms: A Modern Bill of Rights [38] and [35].

<sup>187</sup> Human Rights Act Reforms: A Modern Bill of Rights [Appendix 2].

<sup>188</sup> Pg.23, *The Impact of the HRA in Northern Ireland Conference Report*, <http://www.humanrightsconsortium.org/wp-content/uploads/2017/04/The-Impact-of-the-HRA-in-Northern-Ireland-Conference-Report-1.pdf>.

not follow Strasbourg”, but stated that, in general, “avoiding a significant gap is important”.<sup>189</sup>

137. The core contention of – in some ways the entire justification for – the consultation is that not just maintaining, but widening that “gap” is important. If the proposed Bill of Rights significantly restricts the scope of certain rights (Article 8 seems most explicitly at risk), this would also likely constitute a breach of the GFA itself; specifically, the requirement that there is incorporation of the ECHR that provides “direct access to the courts, and remedies for breach of the Convention”. If people in Northern Ireland only have direct access to the courts and remedies for breach of the Bill of Rights, and that does not include “complete incorporation” of the ECHR, then these parts of the GFA commitment would also be breached.

138. Further, the ECHR itself sits at the core of two of the five safeguards created by the GFA “to ensure that all sections of the community [...] are protected”.<sup>190</sup> The first safeguard is simply the ECHR and any Northern Ireland Bill of Rights “which neither the Assembly nor public bodies can infringe”. The second safeguard is that “arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland.” Both safeguards clearly envisage ECHR-compliance as a central plank in ensuring that the constitutional settlement in Northern Ireland remains safe and stable. If the ECHR is stripped out of domestic law and replaced by a Bill of Rights, containing rights with divergent meanings, those safeguards are themselves endangered. These safeguards are built on the connected commitment that individuals will have direct access to the courts to enforce their rights under the ECHR. If people can only enforce their rights under the Bill of Rights in domestic courts (assuming the HRA is replaced, as the consultation suggests), these safeguards become toothless: people in Northern Ireland could no longer challenge a public body or a key decision or piece of delegated legislation for its ECHR-compliance without going directly to the ECtHR. To do so requires huge financial and time commitments that are simply beyond the means of most ordinary people. The only way to maintain the equilibrium is to leave a system which is working well, well enough alone.

139. The impact of making changes which jeopardise the GFA play out not just on a national, but an international landscape. The GFA is a peace agreement between the various communities, but it also constitutes an international treaty between the UK and Ireland,

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<sup>189</sup> Pg.14, Oral evidence to the House of Commons Justice Committee, 1 February 2022, <https://committees.parliament.uk/oralevidence/3374/pdf/>.

<sup>190</sup> Pg.5, The Belfast (Good Friday) Agreement 1998.



lodged with the UN.<sup>191</sup> Under Article 2 of the GFA, the British and Irish governments commit “to support, and where appropriate implement, the provisions of the Multi-Party Agreement”, including those provisions of the GFA discussed above.<sup>192</sup> As the QUB Human Rights Centre has warned, this means that reform to the HRA which “leads to a diminution of rights will attract international attention and concern”.<sup>193</sup>

140. This international dimension is further complicated by the commitments made by the UK around Brexit. Article 2(1) of the Northern Ireland Protocol to the Withdrawal Agreement (‘the Protocol’), which the Government agreed as part of the UK’s withdrawal from the European Union, states that: “The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled *Rights, Safeguards and Equality of Opportunity* results from its withdrawal from the Union, including in the area of protection against discrimination.”<sup>194</sup> Similarly, Part Three of the Trade and Cooperation Agreement (‘TCA’) between the UK and the European Union, states that the cooperation of the parties is based on their “long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights *and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically*” (Emphasis added).<sup>195</sup> Again, the UK has not just reiterated its commitment to the ECHR, but to giving effect to the ECHR rights domestically. The Government states that “These proposals will be fully in line with our commitments under the Withdrawal Agreement, the Northern Ireland Protocol and the TCA.”<sup>196</sup> Asserting that compliance, however, does not make it so. Other international parties across Europe, the Atlantic, and the world, will be watching on with concern if changes to the HRA result in any diminution of *either* substantive rights, or effective access to those rights through incorporation of the ECHR into domestic law.

141. The HRA is a central pillar of the GFA and other international agreements, but it has also become a touchstone for the civil society, and many key institutions, in Northern Ireland. A particularly striking example is the Police Service of Northern Ireland (‘PSNI’). The PSNI

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<sup>191</sup> The British-Irish Agreement 1998.

<sup>192</sup> Pg. 28, The Belfast (Good Friday) Agreement 1998.

<sup>193</sup> Queen’s University Belfast Human Rights Centre, *Evidence to the Independent Human Rights Act Review*, February 2021, <https://law.qub.ac.uk/schools/SchoolofLaw/filestore/Filetoupload,1024760,en.pdf> [7].

<sup>194</sup> Pg.3, The Northern Ireland Protocol to the Withdrawal Agreement, [[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840230/Revised\\_Protocol\\_to\\_the\\_Withdrawal\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf)]

<sup>195</sup> Pg.283, Article LAW.GEN.3(1), ‘Trade and Cooperation Agreement’, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948119/EU-UK\\_Trade\\_and\\_Cooperation\\_Agreement\\_24.12.2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf)

<sup>196</sup> Human Rights Act Reforms: A Modern Bill of Rights [70].

has a bespoke oversight framework which is deeply intertwined with the HRA. For example, the Northern Ireland Policing Board has a statutory duty to monitor the performance of the PSNI in complying with the HRA.<sup>197</sup> Similarly, the PSNI Code of Ethics is, to a large extent, specifically built around ensuring compliance with the HRA and ECHR. As the foreword to the Code notes, it “is not merely a disciplinary tool. It is a comprehensive human rights document”.<sup>198</sup> A constant benchmarking of conduct to human rights (and specifically the HRA’s) standard is the distinguishing feature of the Code.<sup>199</sup>

142. Another issue with the government’s proposals is that they cut directly across an existing and ongoing process of developing a Northern Ireland Bill of Rights. This process has its roots in the GFA itself. Both of the GFA safeguards quoted above refer to a possible future Northern Ireland Bill of Rights. The GFA is extremely explicit that any such future document would contain “rights supplementary to those in the ECHR” and that “[t]hese additional rights [...] – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland.”<sup>200</sup> The New Decade, New Approach agreement, which re-established government in Stormont in January 2020, included a provision that a committee would be created to consider a Northern Ireland Bill of Rights: “that is faithful to the stated intention of the 1998 Agreement in that it contains rights supplementary to those contained in the European Convention on Human Rights (which are currently applicable)”.<sup>201</sup> The committee mentioned in the agreement undertook a wide-ranging public consultation, submitting its report in February 2022. The report notes strong support for a separate Northern Ireland Bill of Rights based closely on the GFA model, which would (among other things) “Enhance human rights protections”.<sup>202</sup> It specifically notes that “[a] large number of witnesses raised concerns about” the UK government’s review of the HRA and “[m]any witnesses emphasised that there should be no regression in terms of human rights, and expressed concern about the potential implications of the review.”<sup>203</sup> It is imperative that before imposing potentially destabilising reforms on

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<sup>197</sup> Section 3(3)(b)(ii), Policing (Northern Ireland) Act 2000.

<sup>198</sup> Pg.4, PSNI Code of Ethics, <https://www.nipolicingboard.org.uk/sites/nipb/files/publications/code-of-ethics.pdf>.

<sup>199</sup> Pg.10, PSNI Code of Ethics, <https://www.nipolicingboard.org.uk/sites/nipb/files/publications/code-of-ethics.pdf>.

<sup>200</sup> Pg. 17, The Belfast (Good Friday) Agreement 1998.

<sup>201</sup> Pg. 16, *The New Decade, New Approach Deal*, January 2020,

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/856998/2020-01-08\\_a\\_new\\_decade\\_a\\_new\\_approach.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf).

<sup>202</sup> Ad Hoc Committee on a Bill of Rights, *Report of the Ad Hoc Committee on a Bill of Rights*, 14 February 2022, <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/reports/report-of-the-ad-hoc-committee-on-a-bill-of-rights/> [22].

<sup>203</sup> Ad Hoc Committee on a Bill of Rights, *Report of the Ad Hoc Committee on a Bill of Rights*, 14 February 2022, <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/reports/report-of-the-ad-hoc-committee-on-a-bill-of-rights/> [394] and [396].

Northern Ireland’s human rights framework, the Government listens to the people of Northern Ireland.

143. This drive to enhance, rather than diminish, human rights protections in Northern Ireland is far from simply a political priority. It reflects the real nature of the consensus in Northern Ireland, right now. As the Chief Commissioner of the Northern Ireland Human Rights Commission (‘NIHRC’) commented in December 2021, “In all our engagement with the public, we learned that what people want is greater and more effective protection, not less. That is increasingly so in the midst of a pandemic.”<sup>204</sup> A wide range of legal and civil society groups made these points in their responses to IHRAR. The Law Society and Bar of Northern Ireland speaking of “unease” at the Government’s intentions and warning that “a significant dilution of human rights protections will impact on the delicate ecology of the Agreement. There is a need to benchmark any proposals in the review alongside the GFA”.<sup>205</sup> Setting aside the potential legal breaches of the GFA that may be precipitated by the Government’s proposals, any action that would breach the spirit, or the broader political consensus, around it, would equally be extremely irresponsible. The “delicate ecology” that exists both within and around the GFA is one that must continue to be carefully nurtured. The QUB Human Rights Centre echoed this point, warning that tinkering with the HRA “risks upsetting a delicate constitutional balance”.<sup>206</sup>

144. Likewise, the IHRAR report itself repeatedly warned about potential impacts on Northern Ireland – warnings that have seemingly been ignored by the Government. Question 12 suggests two options for changes to section 3 of the HRA. IHRAR roundly rejected Option 1 (the repeal of s.3), stating that: “importantly, such a repeal would raise real concern as to adversely affecting devolution and the Northern Ireland Peace Agreement.”<sup>207</sup> Option 2 is a more extreme, limited, version of another change that IHRAR also considered and rejected, also citing “the risk of upsetting the current devolution settlement, and the Northern Ireland Peace Agreement”.<sup>208</sup> In this context, the Government’s assertion that it remains “fully committed” to the GFA provides cold comfort.<sup>209</sup>

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<sup>204</sup> Northern Ireland Human Rights Commission, *NI Human Rights Chief Commissioner Responds to Proposed Replacement of the Human Rights Act*, 14 December 2021, <https://nihrc.org/news/detail/ni-human-rights-chief-commissioner-responds-to-proposed-replacement-of-the-human-rights-act>.

<sup>205</sup> IHRAR [Annex VIII].

<sup>206</sup> Queen’s University Belfast Human Rights Centre, *Evidence to the Independent Human Rights Act Review*, February 2021, <https://law.qub.ac.uk/schools/SchoolofLaw/filestore/Fileupload,1024760,en.pdf> [5].

<sup>207</sup> IHRAR [235].

<sup>208</sup> IHRAR [239].

<sup>209</sup> Human Rights Act Reforms: A Modern Bill of Rights [37].

145. The proposals in the consultation paper, taken together, arguably engage the Sewel Convention: the principle that the Government will not normally legislate on devolved matters (including the implementation of human rights), without gaining consent from the devolved legislature concerned. We agree with the JCHR, which concluded that “[t]he Government should not pursue reform of the HRA without the consent of the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly.”<sup>210</sup> When the Lord Chancellor appeared before the same Committee, he refused to commit to seeking such consent and not pursuing reform without it, claiming that the discussion was “a bit premature” before legislation had been produced.<sup>211</sup> Deflecting, rather than answering, such a simple question about the position that will be accorded to the devolved administrations, including the Northern Ireland Assembly, in this process, does not augur well.

146. As the Committee on the Administration of Justice (CAJ) told IHRAR, the GFA “was, in many ways, a promise to create a rights-based society”.<sup>212</sup> The centring of access to enforceable human rights through the HRA has been instrumental in delivering on that promise: from decriminalising consensual sexual activity,<sup>213</sup> to vindicating the rights of unmarried couples to adopt.<sup>214</sup> The importance of recourse to ECHR rights in domestic courts has not been limited to those in which a technical legal change is rendered. One significant example is the Supreme Court’s decision in the abortion case brought by the NIHRC.<sup>215</sup> The Supreme Court did not find that the NIHRC had standing to bring the case, but it made a clear statement that Northern Ireland law was in breach of Article 8 ECHR insofar as it criminalised abortion in situations where the woman has become pregnant through rape or incest and or if the foetus had a fatal foetal abnormality. This judgment led to legislation being brought forward to decriminalise abortion in Northern Ireland. As the QUB Human Rights Centre put it to IHRAR, this is “a classic instance of where a situation that was widely perceived as unjust was rectified directly because of the Human Rights Act”.<sup>216</sup>

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<sup>210</sup> Joint Committee on Human Rights, *Third Report on the Government’s Independent Review of the Human Rights Act*, <https://committees.parliament.uk/publications/6592/documents/71259/default/> [258].

<sup>211</sup> Pg. 15, Oral evidence to the Joint Committee on Human Rights, 8 December 2021, <https://committees.parliament.uk/oralevidence/3173/pdf/>.

<sup>212</sup> IHRAR [Annex VIII].

<sup>213</sup> *Re McR’s Application for Judicial Review* [2002] NIQB 58, [2003] N.I. 1. Following a declaration of incompatibility in this case, Section 62 of the Offences Against the Person Act 1861 (“*attempted buggery*”) was repealed in Northern Ireland specifically by parts of the Sexual Offences Act 2003.

<sup>214</sup> *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] AC 173.

<sup>215</sup> *Re Northern Ireland Human Rights Commission’s Application for Judicial Review* [2018] UKSC 27, [2019] 1 All E.R. 173.

<sup>216</sup> Queen’s University Belfast Human Rights Centre, *Evidence to the Independent Human Rights Act Review*, February 2021, <https://law.qub.ac.uk/schools/SchoolofLaw/filestore/Fileupload,1024760,en.pdf> [16].

147. Taken together, these proposals would have an extreme impact on Northern Ireland, but many of the individual proposals would have a particular and heightened negative impact in the Northern Irish context in and of themselves. Question 15 proposes to make declarations of incompatibility “the only remedy available to courts in relation to certain secondary legislation”,<sup>217</sup> which, as covered above, would significantly restrict the oversight that courts could exert over UK public authorities. It is important, therefore, that the Government appears to have carved devolved legislation out from the scope of this proposal,<sup>218</sup> however, this carve-out would create the perverse situation in which courts would be unable to strike down regulations that breach human rights if they were made unilaterally by an individual minister in Westminster subject to little (if any) democratic scrutiny, but able to strike down any piece of delegated legislation passed by the entire Northern Ireland Assembly, with the benefit of debate, amendment and real oversight. This proposal is made even more egregious as any regulations made in Westminster that were incompatible with human rights (but now impervious to legal challenge) could also bind people in Northern Ireland. Devaluing the institutions of Stormont cannot be the intention or an acceptable outcome of this consultation.

148. Another of the Government’s proposals (question 11) relates to positive obligations. The consultation paper discusses a very small number of pertinent cases (none of which relate to Northern Ireland) before seeking views on how best to free public authorities from these obligations.<sup>219</sup> The peace process in Northern Ireland has been intimately connected with the recognition and enforcement of positive obligations, particularly in the context of Article 2 ECHR. One striking example is the *McKerr* group of cases, which concerned the adequacy of the investigations into deaths in the 1980s and 1990s, which occurred either during security forces operations or in circumstances giving rise to suspicion of collusion with those forces. In a series of judgments beginning in 2001, the ECtHR repeatedly found that the UK had breached its positive obligation (under Article 2 ECHR) to conduct independent and effective investigations into these deaths. These cases helped develop the principle that, as the CAJ put it to IHRAR, “without a proper and independent investigative procedure, the substantive obligation to protect the right to life was meaningless, especially if the state might be implicated in a death”.<sup>220</sup> These cases, and this principle, have played an important part in the development of international human rights law. Recognition of some positive obligations, particularly in

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<sup>217</sup> Human Rights Act Reform: A Modern Bill of Rights [250].

<sup>218</sup> Human Rights Act Reform: A Modern Bill of Rights [247].

<sup>219</sup> Human Rights Act Reform: A Modern Bill of Rights [133-150].

<sup>220</sup> Pg. 15, CAJ, *Response to the Independent Human Rights Act Review (IHRAR)*, March 2021, <https://caj.org.uk/wp-content/uploads/2021/03/CAJ-Response-to-the-Independent-Human-Rights-Act-Review-Mar-21.pdf>.

the context of torture and killings that may be connected to the State, is now an absolute norm in human rights frameworks worldwide.

149. In the context of Northern Ireland, positive obligations are intimately linked to the resolution of ‘legacy cases’, which have their roots in the events of the Troubles. IHRAR recognised this point in its treatment of a proposal to legislate to limit the HRA’s temporal jurisdiction to events that occurred only after it came into force. IHRAR roundly rejected this proposal, citing first and specifically the “potential impact on the power or duties of authorities, particularly in Northern Ireland, to investigate issues in relation to conflict there arising prior to the enactment of the HRA.”<sup>221</sup> A move like this would have not just legal, but profound social and political implications. This point was emphasised at the Law Society and Bar of Northern Ireland roundtable: “[t]here is no perceived ‘line in the sand’ as crimes committed in the past cannot be ringfenced in peoples’ minds.”<sup>222</sup> Any attempt to slap a sell-by date on the positive obligation to investigate possible human rights abuses – above all those that include torture and death – must be resisted: both in the interests of justice, and to protect the ongoing healing of Northern Ireland’s social fabric.

150. We would echo the Chief Commissioner of the Northern Ireland Human Rights Commission’s call for “the UK Government to listen to the people of Northern Ireland before reaching any final decision” on these proposals.<sup>223</sup> The sensitivity of the “delicate ecology” through which it is proposing to cut such deep swathes, should not be underestimated.

## Wales

151. As with Scotland and Northern Ireland, the proposals to replace the HRA with a Bill of Rights fails to take into account the devolved settlement in Wales, which requires that legislation passed by the Senedd is compatible with the HRA. We note that the Welsh government has expressed “significant concerns” about the proposals and have said that “it would be a matter of gravest concern if the UK government was to contemplate acting in this area without the agreement of all of the UK’s national legislatures”.<sup>224</sup> The Welsh government has expressed concerns, with which Liberty agrees, that the BoR will not reflect all the key principles and protections contained in the HRA, and it is opposed to

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<sup>221</sup> IHRAR [8.104-107].

<sup>222</sup> IHRAR Report [8.84].

<sup>223</sup> Northern Ireland Human Rights Commission, *NI Human Rights Chief Commissioner Responds to Proposed Replacement of the Human Rights Act*, 14 December 2021, <https://nihrc.org/news/detail/ni-human-rights-chief-commissioner-responds-to-proposed-replacement-of-the-human-rights-act>.

<sup>224</sup> Jane Hutt MS and Mick Antoniw MS, *Written Statement: UK Government Proposal to Reform the Human Rights Act 1998*, 12 January 2022, <https://gov.wales/written-statement-uk-government-proposal-reform-human-rights-act-1998>.

the dilution of human rights in Wales that would result from these proposals. As is the case with the other devolved nations, there is a serious risk that the proposals will produce legal uncertainty, threaten the devolved settlement, and cause increasing fragmentation between the nations of the UK.

**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.**

152. In Liberty's view, the existing definition of public authorities is sufficiently certain and should be maintained. We note that IHRAR did not identify any problems arising from the definition of public authorities in the HRA and did not identify any case for reform.

153. The consultation paper states that it considers the range of bodies and functions to which the HRA currently applies to be "broadly right" and that "we intend to maintain this approach".<sup>225</sup> It also states 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".<sup>226</sup> Despite this, it suggests that there may be scope for "greater clarity" of the dividing line between the public and private spheres. The only "evidence" cited in support of this potential need for clarity is the case of *Ali v Serco*,<sup>227</sup> where the Outer House and Inner House of the Court of Session reached different conclusions on whether Serco, in providing accommodation to asylum seekers under a contract with the Home Secretary, was exercising public functions.

154. The consultation paper also refers to *LW v Sodexo*,<sup>228</sup> where the acceptance by Sodexo that it was acting as a public authority did not stop the Court from finding that the Ministry of Justice was in breach of Article 8. The implication in the consultation paper is that it was surprising that the MOJ should be treated as a public authority when the private prison operator had already accepted that it was a public authority. In Liberty's view, the authors of the consultation paper misunderstand this decision, which does not provide any evidence of a lack of clarity in the dividing line between public and private functions. The Convention breaches alleged against Sodexo and the Secretary of State were different: Sodexo admitted that its staff had conducted strip searches that were not in accordance with the law and therefore unjustifiably interfered with the prisoner's right to respect for private life under Article 8, whereas the Secretary of State had

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<sup>225</sup> Human Rights Act Reform: A Modern Bill of Rights [266].

<sup>226</sup> Human Rights Act Reform: A Modern Bill of Rights [268].

<sup>227</sup> *Ali v Serco* [2019] CSHI 54.

<sup>228</sup> *LW and others v Sodexo and the Secretary of State for Justice* [2019] 1 WLR 5654.

breached the positive obligation to take reasonable steps to avoid such breaches occurring in prisons.

155. The evidence for the need for any change is therefore paper thin. The domestic law on this issue is sufficiently clear, as set out in *R (Weaver) v London and Quadrant Housing Trust*.<sup>229</sup> The courts have identified the relevant principles in a way that enables a body to consider, with a reasonable degree of predictability, whether it will be subject to the HRA 1998 and in respect of which functions. We do not consider that the flexible and multi-factorial approach is a disadvantage, rather, it helps to avoid the arbitrary outcomes that are liable to result from bright-line rules, which would operate to the detriment of both individuals who hold rights and the bodies which are required to respect them. In *YL v Birmingham*, Lord Nicholls was quoted as saying: “Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today.”<sup>230</sup> Liberty agrees that the diverse ways in which governmental functions are now discharged (including increasingly fragmented privatisation) means that any other approach would be difficult, if not impossible, to devise.

156. Additionally, amending the definition of public authorities would likely result in increased litigation. The courts would be asked to identify the boundaries of the new definition, at considerable cost to government and individuals, just as the definition of public authorities was litigated in the years following the enactment of the HRA. In those circumstances, we consider that the Government would be well advised to follow the maxim that “if it ain’t broke, don’t fix it”.

157. Liberty also notes that s.150(5) of the Equality Act 2010 (EA) cross-refers to the definition of “public function” in the HRA, for the purposes of identifying bodies which owe the public sector equality duty. Accordingly, amending the HRA in this respect would have knock-on effects in other areas. On that basis and for the reasons above, we do not agree that there is any argument for amending the definition of public authorities in a Bill of Rights.

**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?**

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<sup>229</sup> *R (Weaver) v London and Quadrant Housing Trust* [2009] EWHC Civ 587.

<sup>230</sup> *YL v Birmingham City Council* [2007] UKHL 27.



**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.**

158. This proposal is based on a mistaken view of section 3 of the HRA. The consultation document states that “it is also important that public authorities are not subject to litigation where they are acting to give effect to the direction and will of Parliament. This is recognised in section 6(2) of the Human Rights Act, which provides that an act will not be unlawful if the public authority did not, as a result of primary legislation, have any discretion to act differently, or if it was giving effect to statutory provisions which cannot be read compatibly with the Convention rights.”<sup>231</sup> But, it continues, the operation of section 6(2)(b) is “undermined by the fact that it only applies where primary legislation cannot be read compatibly with the Convention rights” and that this means “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”. In our view, this assertion is based on a false premise. Section 3 does not require interpretation that is contrary to the ‘clear will’ of Parliament. The Government may disagree with the courts on what the ‘clear will’ of Parliament is. In such circumstances, a declaration of incompatibility would be made and a defence under section 6(2) would be made out.

159. The consultation paper provides two options to remedy the perceived problem that, as they put it: “we believe that broad public policy decisions are a matter for Parliament, and that public authorities should not be in the position of having to either act unlawfully or else forced to act contrary to the clear intentions of Parliament.”<sup>232</sup>

160. Option 2 is designed to reform section 6(2) in a way which mirrors reform of section 3 HRA. As we have set out above, the proposed ‘reforms’ to section 3 would have the effect of removing any meaningful interpretative power and would result in a weak BoR incapable of safeguarding human rights.

161. The consequences of option 1 depend on what is meant by “enforcing or giving effect to provisions of or made under primary legislation”. If by ‘giving effect to’ the authors of the consultation paper mean situations where the public body had no discretion, then this proposal mirrors option 2, and likewise weakens the protection provided by the BoR. However, if ‘giving effect to’ is intended to include situations where a public body is acting

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<sup>231</sup> Human Rights Act Reform: A Modern Bill of Rights [718].

<sup>232</sup> Human Rights Reform: A Modern Bill of Rights [273].

within its discretionary powers, the clause would demolish the existing scheme for securing the rights of individuals. It would lead to the position where *any* executive action which is within the basic public law principles would comply with the Bill of Rights. This would deny a domestic remedy to victims of human rights breaches and would place the UK in breach of its duties under the ECHR and would be completely irreconcilable with the Government's stated intention to comply with the Convention.

**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.**

162. Liberty welcomes the Government's acknowledgement that unilaterally restricting the territorial application of the Bill of Rights is not an option. As the consultation document recognises, attempting to do this would put the UK in conflict with the Convention, require significant other legislative change and result in an expanded role for Strasbourg in matters of sensitive national security.<sup>233</sup> We do not, however, agree that it is in any way desirable to attempt to work with Strasbourg and other States Parties to the Convention to restrict the territorial scope of the ECHR itself. If anything, we would suggest that the 'issue' with extraterritorial jurisdiction is that it does not go far enough, and leaves gaps in the Convention's protection. In any event we are clear that there must not be any weakening of the current position.

163. States Parties to the ECHR must "secure to everyone within their jurisdiction the rights and freedoms" set out in the Convention.<sup>234</sup> 'Jurisdiction' here has been interpreted as "primarily territorial"<sup>235</sup> but also applies where a State exercises effective control over an area outside its territory,<sup>236</sup> or physical control or authority over a person.<sup>237</sup> So while this does apply for example to detention centres, a person does not need to be formally detained to be within a State's jurisdiction.<sup>238</sup> Effective control over an area is a high bar to get over, and courts will attach "decisive weight" to the "reality of armed confrontation and fighting" when considering whether jurisdiction has been established,<sup>239</sup> while physical control over a person requires control to have been established prior to the use of lethal

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<sup>233</sup> Human Rights Reform: A Modern Bill of Rights [280].

<sup>234</sup> Article 1, European Convention on Human Rights.

<sup>235</sup> *Bankovic v Belgium & others* (Application no. 52207/99)

<sup>236</sup> *Ilaşcu and Others v. Republic of Moldova and Russia* (Application No. 48787/99).

<sup>237</sup> *Al-Skeini v United Kingdom* (Application No. 55721/07).

<sup>238</sup> *Al-Saadoon v Secretary of State for Defence and Rahmatullah v Secretary of State for Defence* [2016] EWCA Civ 811.

<sup>239</sup> *Georgia v Russia No.2* (Application No. 38263/08) para. 137.

force. The exercise of that force alone will not satisfy the criterion.<sup>240</sup> Furthermore, even when it has been established that a person falls within the UK's jurisdiction, this does not necessarily mean that a right has been violated, and in cases of armed conflict the ECtHR has been sensitive to the extraordinary circumstances in its judgments.<sup>241</sup>

164. It is worth taking a moment to consider who exactly is being protected by the extraterritorial application of the HRA. Much of the commentary around this issue is centred around the idea that its extraterritorial application restricts our armed forces, adding confusion to military operations and protecting only our 'enemies'. While we would of course reject the idea that these people would be any less deserving of human rights protection, it is important to recognise that insofar as this affects the military, it is often the armed forces themselves who benefit. In *Smith and Others vs the Ministry of Defence* (the 'Snatch Land Rover case'), the court held that the Convention applied to British soldiers serving in Iraq as they were under the effective authority and control of the United Kingdom.<sup>242</sup> This was not a case about military tactics or decisions made in the fog of war, but negligence in the form of drastically inadequate equipment endangering (and in this case ending) the lives of people serving in our armed forces.

165. Another important application of the HRA abroad to protect soldiers was the death of Corporal Anne-Marie Ellement after sustained bullying, rape, and mistreatment by her colleagues and chain of command on a base in Germany.<sup>243</sup> Entirely removed from the battlefield, it was the extraterritorial application of the HRA that allowed for her death to be properly investigated, for the breaches of Articles 2 and 3 ECHR to come to light, and for the resulting establishment of the Service Complaints Ombudsman, which continues to protect British soldiers across the world. It should also be noted that it is not only this proposal that could have left Anne-Marie Ellement's family without justice and closure after her death, and the armed forces without their Complaints Ombudsman, but question 11 also on positive obligations. As with this question, the Government attempts to portray positive obligations as a burden on institutions such as the armed forces, where they should be seen as necessary safeguards that protect us all.

166. Other proposals in the consultation paper need also to be taken into account when considering the extraterritorial scope of the Convention. We acknowledge IHRAR's recommendation for a "national conversation" together with "Governmental discussions

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<sup>240</sup> *Al-Saadoon v Secretary of State for Defence and Rahmatullah v Secretary of State for Defence* [2016] EWCA Civ 811. [69].

<sup>241</sup> See for example: *Hassan v United Kingdom* (Application No. 29750/09).

<sup>242</sup> *Smith & Ors v The Ministry of Defence* [2013] UKSC 41 (19 June 2013).

<sup>243</sup> Centre for Military Justice, Human Rights Stories No.1 - Cpl Anne-Marie Ellement, 19 October 2021, <https://centreformilitaryjustice.org.uk/human-rights-stories-no-1-cpl-anne-marie-ellement>.

in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR”.<sup>244</sup> This is a rare point of convergence between IHRAR and the consultation, with the Government agreeing that “this issue would need to be addressed in Strasbourg”.<sup>245</sup> With this in mind, it is ever more notable the extent to which other proposals in this consultation, such as question one, stand to weaken the influence that the United Kingdom has over the ECtHR. As is the case for so many of these questions, if the Government really wants to achieve what it says it does, the best option open to it is to abandon these plans all together.

167. This question must also be considered alongside the proposals in the Nationality and Borders Bill, currently going through Parliament, to provide for offshore processing of asylum claims. At present, the plans are unclear, with Albania,<sup>246</sup> Gibraltar,<sup>247</sup> and Ghana<sup>248</sup> among the countries that have been named as, and denied being, potential destinations for people seeking asylum to the United Kingdom to be processed. Without a specific proposal outlined in the consultation document, any attempt to water down the UK’s responsibility over people outside their territorial boundaries must be seen not only in the context of recent years, where cases relating to extraterritorial application have concerned armed conflict and military bases, but also in the light of a potential near future where people seeking asylum may be in the care of the British State many miles outside of its territorial boundaries.

168. Liberty’s view on the territorial scope of the Convention is that the current position actually does not go far enough and leaves a protection vacuum in situations where states exert force but do not necessarily have control over territory or person. We endorse the UN Human Rights Council position on the International Covenant on Civil and Political Rights (ICCPR) that control over a person’s “enjoyment of their right to life” should be the key consideration in whether they are subject to a State’s jurisdiction.<sup>249</sup> The ICCPR then applies to those whose right to life is “impacted” in a “direct and reasonably foreseeable manner.”<sup>250</sup> This would, for example, cover cases such as the assassination

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<sup>244</sup> IHRAR [8.4].

<sup>245</sup> Human Rights Act Reform: A Modern Bill of Rights, [281].

<sup>246</sup> Weaver, M. & Syal, R., *Albania angrily denies it would process asylum seekers for UK*, The Guardian, 18 November 2021, <https://www.theguardian.com/uk-news/2021/nov/18/uk-looking-at-ways-to-process-asylum-seekers-abroad-raab-confirms>.

<sup>247</sup> Gallardo, C., *Gibraltar rules out accepting asylum seekers in exchange for money from UK*, Politico, 18 March 2021, <https://www.politico.eu/article/gibraltar-rules-out-accepting-asylum-seekers-in-exchange-of-uk-money>.

<sup>248</sup> Hymas, C., *Ghana dismisses reports it could host processing centre for Channel migrants*, The Telegraph, 18 January 2022, <https://www.telegraph.co.uk/news/2022/01/18/migrant-crossings-already-three-times-higher-last-january-figures>.

<sup>249</sup> Human Rights Committee, General Comment 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, para 63.

<sup>250</sup> Ibid.

by State agents of dissidents abroad, which remarkably does not currently fall under the scope of the Convention. As we argued in our IHRAR response:

*“Adopting this approach would not mean placing an excessive burden on states. Firstly states could be held responsible for the breaches of the negative duty to respect human rights, in circumstances where it may not be under a duty to secure rights.”<sup>251</sup> Secondly, while a state’s obligations under one right might be engaged in a particular circumstance, it does not mean that every other right will be engaged. Thirdly the flexible and context specific nature of the Convention framework means that the substance of the analysis as regards whether a particular right was breached will be informed by the environment in which the state is operating.”<sup>252</sup>*

169. We do of course recognise that this is not a question for a BoR, and are clear that there must be no weakening of the current position.

**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.**

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<sup>251</sup> This is the approach advocated by Professor Milanovic in his seminal text on this issue. See *Milanovic, M., (2013). Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press (OUP).

<sup>252</sup> Liberty, *Response to the Independent Human Rights Act Review Call for Evidence*, March 2021, <https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-response-to-the-IHRAR-call-for-evidence-March-2021.pdf> [78].

170. The consultation paper’s proposal to provide guidance to the UK courts on how to balance qualified and limited rights (presumably under the new Bill of Rights) lacks any justification. The consultation paper states that when assessing proportionality, the courts have recognised “to some degree” the importance of giving due weight to the views of Parliament<sup>253</sup> but goes on to deprecate the “absence of clarity” in the HRA,<sup>254</sup> and to state that “where Parliament has expressed its clear will on complex and diverse issues relating to the public interest, this should be respected”.<sup>255</sup> The consultation paper makes no reference to IHRAR’s careful consideration of judicial deference, nor its conclusion that “[t]he UK Courts have, over the first twenty years of the HRA, developed and applied an approach that is principled and demonstrates proper consideration of their role and those of Parliament and the Government.”<sup>256</sup>

171. Liberty notes that the approach to assessing proportionality in cases where it is necessary to balance rights with the interests of society has been developed by the UK courts rather than by the ECtHR. In *Bank Mellat*,<sup>257</sup> Lord Reed said that “the approach to proportionality adopted in our domestic case law under the Human Rights Act 1998 has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has been adopted, derived from case law under the Commonwealth constitutions and Bill of Rights, including the Canadian Charter of Fundamental Rights and Freedoms of 1982.”

172. When the UK courts carry out the balancing exercise under this structured approach, the level of scrutiny applied to the justification for the rights-limiting measure varies according to context. Central to this approach is the principle of Parliamentary sovereignty, under which the court will place great weight on the views of Parliament. In the recent case of *SC v SSWP*, Lord Reed said that “the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process.”<sup>258</sup> The standard of review will vary according to the measure challenged; where, as in *SC v SSWP*, a measure has been scrutinised by Parliament, the courts will exercise great restraint, and a lighter touch will be applied to

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<sup>253</sup> Human Rights Act Reform: A Modern Bill of Rights, [285].

<sup>254</sup> Human Rights Act Reform: A Modern Bill of Rights, [288].

<sup>255</sup> Human Rights Act Reform: A Modern Bill of Rights, [291].

<sup>256</sup> IHRAR [3.2].

<sup>257</sup> *Bank Mellat (Appellant) v Her Majesty’s Treasury (Respondent)* [2013] UKSC 38 & [2013] UKSC 39 [72].

<sup>258</sup> *R (on the application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions and others (Respondents)* [2021] UKSC 26 [162].

secondary legislation than to executive measures which have not been before the legislature.

173. The UK courts will also apply a lighter standard of review if the measures specifically under challenge have been considered by Parliament or any other decision-maker. In *Re Brewster*, the Supreme Court said that “the margin of discretion may, of course, take on a rather different hue when, as here, it becomes clear that a particular measure is sought to be defended (at least in part) on grounds that were not present to the mind of the decision-maker at the time the decision was taken. In such circumstances, the court’s role in conducting a scrupulous examination of the objective justification of the impugned measure becomes more pronounced”.<sup>259</sup> But where the decision-maker has made its own judgement of the issues in question, the UK courts will take a different approach. In *SC v SSWP*, where the decision-maker was Parliament, Lord Reed said “if it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon interests protected by Convention rights, then that may be a relevant factor in the court’s assessment, because of the respect which the court will accord to the view of the legislature.”<sup>260</sup> Where Parliament has considered the matters before the court, the court is likely to place great weight on its view.

174. As described in our response to question 2 of this consultation, the UK courts also exercise deference to the views of public bodies, where for example, a case concerns a national security decision on which the executive has expertise,<sup>261</sup> and when it comes to general measures of economic or social strategy.<sup>262</sup>

175. The consultation paper relies on the outcome of the case of *Quila*<sup>263</sup> to justify its assertion that it is necessary to codify the approach to assessing proportionality.<sup>264</sup> In our view, there is no connection between the decision in that case and the proposals put forward by the consultation. The case concerned a decision by the executive rather than Parliament, and so does not support any argument that the UK courts should give greater weight to the views of Parliament. Secondly, the Supreme Court’s decision rested on the fact that the Home Secretary had not considered the adverse consequences of the

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<sup>259</sup> *Re Brewster for Judicial Review (Northern Ireland)* [2017] UKSC 8 [50].

<sup>260</sup> *R (on the application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions and others (Respondents)* [2021] UKSC 26.

<sup>261</sup> *R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant)* [2021] UKSC 7 [134].

<sup>262</sup> *R (on the application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions and others (Respondents)* [2021] UKSC 26.

<sup>263</sup> *Quila v SSHD* [2011] UKSC 45.

<sup>264</sup> *Human Rights Act Reform: A Modern Bill of Rights* [286].

measure; it cannot be right that the courts should defer to the judgement of the executive in cases where the executive has made no judgement on the issue.

176. The first draft clause requires the UK courts to give “great weight” to Parliament’s view when reviewing a decision made by a public body in accordance with primary or secondary legislation. However, where public bodies are required to act in a certain way by primary legislation, section 6(2) HRA already provides that they cannot be in breach of the HRA, and so this clause does not appear to affect the ability of the court to review any decision made on this basis. On the other hand, if a public body has discretion awarded by the legislation, it follows that the legislation has not prescribed how the public body should act in particular circumstances, and does not help the court in assessing the proportionality of that decision. We also note that “great weight” is not defined, but that as the UK courts already give very significant weight to Parliament’s view of what is necessary in a democratic society, it is unclear what this clause would alter.

177. The second draft clause is a broader requirement to give “great weight” to the fact that Parliament has passed legislation in the public interest and is intended to apply to limited rights in addition to qualified rights. As with the first draft clause, giving weight to the ‘fact’ that it was in the public interest to give a certain power to a public authority does not mean that great weight should be given to a context-specific decision to exercise the power, and does not help the courts determine whether an interference can be justified by an exception to a limited right.

178. In Liberty’s view, not only is there no justification for codifying the approach that should be taken to assessing proportionality, doing so in the way proposed would add nothing to the approach that is already being taken by the UK courts.

**Question 24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.**

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

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



**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.**

179. We reject the framing that human rights claims “frustrate” deportations. Being able to claim one’s most fundamental rights – including the right not to be subject to torture, or one’s right to private and family life – is of paramount importance. In particular, we are highly concerned by the Government’s specific targeting of the right to liberty and security (Article 5), the right to a fair trial (Article 6), and the right to respect for private and family life (Article 8) as fuelling “new and expanding human rights claims” that “systematically frustrate” deportations.<sup>265</sup> We note that the Government has provided limited to no evidence to back up its claims in this section, and endorse the response of the organisation Bail for Immigration Detainees (BID) in their analysis of the slanted presentation of the cases cited.<sup>266</sup>

180. It is worth noting that there are already safeguards in place to prevent abusive claims in the immigration context, including the powers to certify claims as clearly unfounded (s.94 Nationality, Immigration and Asylum Act 2002 (NIAA)); to remove a person while their appeal against deportation is still pending (s.94B NIAA); and to certify a claim as one which should have been, or was already, made earlier (s.96 NIAA).

181. There are significant restrictions on claimants who seek to rely on Article 8 in their deportation claims.<sup>267</sup> In his speech at Conservative Party conference, Justice Secretary Dominic Raab used the example of a “a drug dealer convicted of beating his ex-partner, a man who hadn’t paid maintenance for his daughter, then successfully claimed the right to family life to avoid deportation” to justify the “overhaul” of the HRA. This example appears to refer to a case from 2009, which preceded a change in the law in 2014 which provides guidance as to what the court should consider in relation to deportations involving Article 8.<sup>268</sup> The use of an old case based on old law is deeply disingenuous and

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<sup>265</sup> Human Rights Reform: A Modern Bill of Rights [292].

<sup>266</sup> Bail for Immigration Detainees, BID’s response to the consultation ‘Human Rights Act Reform: A Modern Bill of Rights’, 4 March 2022, <https://www.biduk.org/articles/bid-responds-to-the-moj-consultation-human-rights-act-reform-a-modern-bill-of-rights>.

<sup>267</sup> See: Fraser, M., *Deportation and Article 8 ECHR*, Landmark Chambers, 3 October 2018, <https://www.landmarkchambers.co.uk/wp-content/uploads/2018/10/Deportation-and-Article-8-ECHR-MF.pdf> and Turney, R., *Article 8 and deportation: Changes to the rules and areas of challenge*, Landmark Chambers, 25 October 2012, [https://www.landmarkchambers.co.uk/wp-content/uploads/2018/07/ARTICLE\\_8\\_AND\\_DEPORTATION-RT-1.pdf](https://www.landmarkchambers.co.uk/wp-content/uploads/2018/07/ARTICLE_8_AND_DEPORTATION-RT-1.pdf).

<sup>268</sup> Green, D.A., “We will overhaul the Human Rights Act” – What this means, and why the case cited by Raab for doing so may not be a sound example, The Law and Policy Blog, 5 October 2021, <https://davidallengreen.com/2021/10/we-will-overhaul-the-human-rights-act-what-this-means-and-why-the-case-cited-by-raab-for-doing-so-may-not-be-a-sound-example/>.

appears to be aimed at shoring up anti-migrant racism and xenophobia, in order to justify the wide-ranging and deleterious proposals in the consultation.

182. We note that criticisms of human rights claims as “frustrating” deportations both in this consultation and in the New Plan for Immigration consultation that preceded the Nationality and Borders Bill frequently neglect to mention well-documented issues with the Home Office’s own track record of poor decision-making: for example, in July 2021, the High Court ruled that the Home Secretary must return an asylum seeker from France to the UK after Liberty Investigates<sup>269</sup> – an editorially-independent investigative journalism unit – revealed that he had been subject to a shortened asylum screening interview where Home Office officials failed to ask him questions about his status as a potential victim of human trafficking.<sup>270</sup> In the last quarter for which statistics are available, 52% of human rights refusals were overturned on appeal.<sup>271</sup> These criticisms also ignore trenchant issues with migrants’ access to justice that prevent people from making the best possible case for themselves, in situations where an adverse decision could have a devastating impact on their lives.<sup>272</sup>

183. With those points in mind, we briefly consider the proposed options. Option 1 would appear to set a ‘cut-off point’ after which people would not be able to challenge their deportation based on the number of years they have been imprisoned; this is plainly arbitrary and unjust, going against the universality of human rights.

184. Option 2 appears to seek to separate out human rights in the migrants’ rights and deportation contexts from the general human rights framework. Human rights could only constrain deportation decisions if they were set out in “a separate legislative scheme expressly designed to balance the strong public interest in deportation against such rights.”<sup>273</sup> While it is not entirely clear what this would mean in practice, one implication could be that certain rights could only ever be used to prevent an individual’s deportation if they were circumscribed by other legislation, e.g. the Immigration Act 2014 which circumscribes the use of Article 8 (itself already a qualified right) in deportation

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<sup>269</sup> Walawalkar, A., Purkiss, J., Rose, E., and Townsend, M., Inside Esparto 11: The charter flight ejecting asylum seekers from the UK, Liberty Investigates, 29 May 2021, <https://libertyinvestigates.org.uk/articles/inside-esparto-11-the-charter-flight-ejecting-asylum-seekers-from-the-uk/>.

<sup>270</sup> Taylor, D., Judge tells Priti Patel to bring asylum seeker back to UK, 6 July 2021, <https://www.theguardian.com/uk-news/2021/jul/06/asylum-seeker-removed-by-priti-patel-must-be-brought-back-to-uk>.

<sup>271</sup> Ministry of Justice, *Tribunal Statistics Quarterly, July to September 2021*, 9 December 2021, <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021/tribunal-statistics-quarterly-july-to-september-2021/>

<sup>272</sup> Fouzder, M., *News focus: Red alert on legal advice deserts*, Law Society Gazette, 4 October 2021, <https://www.lawgazette.co.uk/news-focus/news-focus-red-alert-on-legal-advice-deserts/5110020.article>.

<sup>273</sup> Human Rights Reform: A Modern Bill of Rights [295]

proceedings. Yet again, this is totally contrary to the basic principle that everyone has the same human rights.

185. Option 3 appears to be a form of ‘ouster clause’ that would preclude a certain subset of decisions from challenge (i.e. by judicial review), effectively locking swathes of people out of access to justice, on issues engaging their fundamental rights, and in some cases, life or death.

**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?**

186. We reject the premise of this question, specifically the framing of the ECHR and HRA as “impediments”; and the demonisation of migrants that recurs throughout the HRA consultation, the Nationality and Borders Bill, and the Judicial Review and Courts Bill, which are going through Parliament at the same time as this consultation. We note that the United Nations High Commissioner for Refugees,<sup>274</sup> multiple UN Special Rapporteurs,<sup>275</sup> and legal experts<sup>276</sup> have all stated that the Nationality and Borders Bill in particular is likely to violate the UK’s international obligations, with devastating consequences. For example, legal experts have said that the proposed inadmissibility regime, that could see refugees being denied the right to seek asylum in the UK on the basis of their mode of entry, risks breaching the UK’s obligations under Article 33(1) of the Refugee Convention 1951 and Articles 2, 3, and 4 ECHR.<sup>277</sup> Other highly concerning proposals include those to introduce marine pushbacks, which would be inconsistent with the prohibition on collective expulsion in Article 4 Protocol 4 ECHR and the absolute

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<sup>274</sup> UNHCR, *UK asylum bill would break international law, damaging refugees and global co-operation*, September 2021, <https://www.unhcr.org/uk/news/press/2021/9/614c163f4/unhcr-uk-asylum-bill-would-break-international-law-damaging-refugees-and.html>.

<sup>275</sup> OHCHR, *United Kingdom Nationality and Borders Bill undermines rights of victims of trafficking and modern slavery*, UN experts say, 14 January 2022, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28027&LangID=E>; Electronic Immigration Network, *United Nations Special Rapporteurs express concerns over impact of Nationality and Borders Bill on the human rights of victims of trafficking*, 15 November 2021, <https://www.ein.org.uk/news/united-nations-special-rapporteurs-express-concerns-over-impact-nationality-and-borders-bill>.

<sup>276</sup> Raza Husain QC, Jason Pobjoy, Eleanor Mitchell, Sarah Dobbie, *Joint Opinion, Nationality and Borders Bill*, Freedom from Torture, October 2021, <https://www.freedomfromtorture.org/sites/default/files/2021-10/Joint%20Opinion%2C%20Nationality%20and%20Borders%20Bill%2C%20October%202021.pdf>, Stephanie Harrison QC, Emma Fitzsimons, Ubah Dirie and Hannah Lynes, *Nationality and Borders Bill: Advice to Women for Refugee Women*, Women for Refugee Women, 23 November 2021, <https://www.refugeewomen.co.uk/wp-content/uploads/2021/11/Garden-Court-legal-opinion-on-Nationality-and-Borders-Bill.pdf>

<sup>277</sup> Raza Husain QC, Jason Pobjoy, Eleanor Mitchell, Sarah Dobbie, *Joint Opinion, Nationality and Borders Bill*, Freedom from Torture, October 2021: <https://www.freedomfromtorture.org/sites/default/files/2021-10/Joint%20Opinion%2C%20Nationality%20and%20Borders%20Bill%2C%20October%202021.pdf>.

prohibition on exposing individuals to a real risk of torture or inhuman or degrading treatment or punishment in Article 3 (as well as maritime law)<sup>278</sup> and offshore processing of asylum claims.<sup>279</sup>

187. We reiterate that human rights are universal; to remove them of this essential quality is to ignore their entire ethos. Any attempt to water down protections for a particular community or group will inevitably affect the extent and effectiveness of protections for everyone. The racist scapegoating of migrants and minoritised and marginalised groups has historically been a politically convenient tool to usher in erosions of rights protections. At the same time, the goalposts can and do shift, and more and more people may eventually find themselves caught in the dragnet. Significant amounts of parliamentary time and public money have been poured into legislative proposals which are fundamentally unnecessary, oppressive, and which risk putting the UK in breach of its international obligations, at the cost of practical and meaningful measures that would enhance rights protections for all.

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

- a. the impact on the provision of public services;**
- b. the extent to which the statutory obligation had been discharged;**
- c. the extent of the breach; and**
- d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.**

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

188. In Liberty's view, no change is required to the principles applicable to the award and assessment of damages under the HRA. It is important to note that there is no automatic entitlement to damages in a claim under the Human Rights Act. The starting point for the court is that no award of damages should be made, unless taking into account other relief

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<sup>278</sup> Joint Committee on Human Rights, *New powers to pushback and criminalise Channel crossings breach UK's human rights obligations*, JCHR finds, 1 December 2021, <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/159292/new-powers-to-pushback-and-criminalise-channel-crossings-breach-uks-human-rights-obligations-jchr-finds/>.

<sup>279</sup> Detention Action, *Offshore detention: What you need to know*, 12 November 2021, <https://detentionaction.org.uk/2021/11/12/offshore-detention-what-you-need-to-know/>.

granted, the court is satisfied that “the award is necessary to afford just satisfaction to the person in whose favour it is made.”<sup>280</sup>

189. In many cases a declaration that their rights have been violated will be the primary objective for claimants. However, there will be cases where damages are a vital part of affording claimants an effective remedy. In those cases, the primary factor for assessing damages is the amount of compensation should reflect the harm caused. In *Alseran*, Leggatt J said that where harm has been suffered, to “decline to award damages, or to make an award which affords only partial reparation, would be to deny the claimant an effective remedy.”<sup>281</sup> We note in relation to the proposals at question 10 of the consultation paper, that where a claimant receives damages for a parallel civil claim, there will usually be no basis to make a further damages award under the HRA. As we set out in our response to that question, the availability of a cause of action under the HRA remains vital even where additional damages will not be available, because of the importance of a declaration as a formal vindication of a human rights violation.

190. Where it is necessary to award damages in an HRA claim in order to afford just satisfaction, the courts have developed an approach which takes into account the extent of the breach, or harm suffered, as well as the conduct of the public body.

191. In assessing the amount of damages, the general approach is to restore the claimant to the position they would have been in if not for the breach.<sup>282</sup> If it is not possible to demonstrate harm arising from the violation, no damages may be awarded. For example, in Article 6 cases, if the claimant cannot show that the outcome of the trial would have been different but for the breach, no damages will be awarded.<sup>283</sup>

192. The conduct of the State will also be taken into account, and the amount of damages may be increased to reflect the seriousness of the breach. In *Al-Jedda v UK*, the Grand Chamber described that its award of non-pecuniary damage “serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage.”<sup>284</sup> Conversely, this means that in cases where, as proposed above, the public body was clearly trying to give

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<sup>280</sup> Section 8(3)(b) Human Rights Act 1998.

<sup>281</sup> *Alseran v Ministry of Defence* [2019] QB 1251 at [933].

<sup>282</sup> *Anufrijeva v London Borough of Southwark* [2004] 2 WLR 603.

<sup>283</sup> *Regina v. Secretary of State for the Home Department (Respondent) ex parte Greenfield (FC) (Appellant)* [2005] 1 WLR 673 [8].

<sup>284</sup> *Al-Jedda v UK* (2011) 53 EHRR 789 at [114].

effect to express provisions, this will already be taken into account by the courts when assessing damages.

193. In respect of the proposal to take account of the impact on the provision on public services, it would be wrong to bar the courts from making damages awards where otherwise required, simply to avoid financial impact on public services. As noted in our response to question 10, the most effective way to avoid the financial consequences of a human rights claim is for public body to act in a way which does not violate those rights. In any event, the position taken by the UK courts in line with the ECtHR's approach is that the primary purpose of damages is to compensate the claimant for the harm suffered, rather than to punish the public body. As the ECtHR said in *Varnava*, the awards seek to reflect the severity of the damages and "are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the contracting party concerned."<sup>285</sup> Damages awards in human rights claims are generally low, but in many cases they will be an important part of providing redress where harm has been suffered as a result of the State's actions. The current approach is flexible, and ensures that relevant considerations are taken into account. Any additional considerations which would hamper the ability of the court to award damages if it would impact on public services would risk providing public bodies with an incentive to take their duties and responsibilities towards individual rights less seriously.

## **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**

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<sup>285</sup> Reports of Judgments and Decisions 2009-V, p 13 at [224].

194. This framing of this section of the consultation is extremely concerning, and advances a model of human rights with which we fundamentally disagree. Human rights are not earned, nor contingent on a person's conduct or character, but are attached to a person by virtue of their humanity. Though the specifics of this proposal are focussed on the remedies regime, government also wants to include "an overarching provision in the Bill of Rights"<sup>286</sup> focussed on applicants' responsibilities. The consequences of this proposal would shift the court's focus from the abuse committed by a public authority to an examination of the life of the abused party. Our human rights regime exists as a bulwark against abuse by the State and to protect the powerless individual from the extreme power of the State, not to appraise that individual's social conscience or history. This proposal would fundamentally alter our understanding of what human rights are.

195. The narrative of this section of the consultation betrays either a fairly fundamental misunderstanding, or an enthusiastic disregard, of the concept of damages in our legal system. When the Government says it wants courts to "avoid rewarding undeserving claimants",<sup>287</sup> it mischaracterises the nature of damages. Damages are not something one 'deserves'; they are not a 'reward'. The purpose of damages is to compensate for the damage done when a person has been wronged. A basic principle of our common law system is that people are equal before the law. Just as anyone, even the Prime Minister, can be found guilty of a crime and face a penalty for it, anyone whose rights the State has infringed can bring a claim against it, and be compensated for the injury they have suffered. The nature and extent of the injury does not depend on the prior conduct of the injured party.

196. The Government narrative of undeserving claimants bringing human rights claims for monetary gain bears no relation to reality. As the Court of Appeal stated in *Anufrijeva*, "[w]here an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance."<sup>288</sup> This is for the obvious reason that the primary concern in a case of human rights infringements is usually that the infringement be stopped, usually through public law remedies. As set out above, under the HRA there is no automatic entitlement to an award of damages; in fact, the starting presumption under section 8(3) of the HRA is that no damages will be awarded.

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<sup>286</sup> Human Rights Act Reform: A Modern Bill of Rights [304].

<sup>287</sup> Human Rights Act Reform: A Modern Bill of Rights [308].

<sup>288</sup> *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406 [53].

197. Where damages are awarded, they are generally modest and always compensatory in nature. There are, however, exceptional cases, in which the courts have made substantial damages awards for breaches of human rights. One example is the recent ‘Spycops’ case, in which the claimant, an environmental activist, was deceived into a years-long sexual relationship with an undercover police officer which entailed a “formidable list” of violations of her ECHR rights.<sup>289</sup> The court ordered that the claimant be paid substantial damages in just satisfaction for the staggering breaches of her rights under Articles 3, 8, 10, 11 and 14 ECHR, over a number of years.<sup>290</sup> Where the wrong done to someone has affected their life so profoundly and there is no other way to compensate them for that damage other than by financial approximation, it is, of course, important that judges are free to grant damages in order to provide an effective remedy.<sup>291</sup>

198. Given the lack of any evidential basis for reforming the operation of damages in human rights claims, it is not surprising that the two options offered would do and mean such extremely different things. Option 2 asks whether there should be “any limits, temporal or otherwise, as to the conduct to be considered” in potentially reducing the damages to be awarded to someone wronged by the State. This would allow the remedy given to individuals in compensation for infringements of their human rights to be reduced or withheld altogether on the basis of anything they have ever done. No draft clause has been provided but Option 2 does not seem to require that conduct the court considers to be criminal, let alone relevant to the case at hand. Such conduct could, for example, include particular forms of political or religious expression, or employment in a particular profession. This is likely to have a particularly disproportionate effect on already marginalised groups, such as asylum seekers and members of over-policed communities. Having ever entered the country illegally, even if you were subsequently given refugee status, could deprive you of compensation for the State breaching your human rights forty years later. Breaking the link between the substance of the case and the remedy given, and turning it into a wider judicial referendum on the applicant’s life, is surely a dangerous and anti-democratic path to go down. We wholeheartedly reject Option 2.

199. Section 8(1) HRA already confers a broad power on the courts to consider the context of the case in determining the appropriate remedy. Having found that a public authority’s act is unlawful, a court “may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.” Then there is an additional bar which must be cleared before a court can grant damages. S.8(3) HRA states that: “No

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<sup>289</sup> *Wilson v Commissioner of Police of the Metropolis* [2021] UKIPTrib IPT\_11\_167\_H [344].

<sup>290</sup> Remedy Order (dated 24 January 2022) in *Wilson v Commissioner of Police of the Metropolis* [IPT/11/167/H].

<sup>291</sup> *Alseran v Ministry of Defence* [2019] QB 1251 [933].



award of damages is to be made unless, taking account of all the circumstances of the case, [...] the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.” We do not see how Option 1 would greatly increase the scope of the existing wording in s.8 HRA.

200. What it would do, however, is place undue emphasis on an element of that existing discretion, which the courts currently exercise with caution. This point is illustrated neatly by one of the cases the Government cites: *Downing*,<sup>292</sup> in which the applicant, who had been imprisoned for murder, claimed for compensation after his parole hearing was delayed a year and a half beyond his mandatory tariff. The consultation paper quotes the High Court as stating that the seriousness of the claimant’s original offence “must be taken into account” in assessing damages,<sup>293</sup> but omits the rest of that sentence: “as part of the wide discretion which I have”.<sup>294</sup> The High Court was clear that it already had the discretion to consider the claimant’s original offence. Moreover, it explicitly and repeatedly identified section 8 of the HRA as the source of this discretion: “this case falls full square within the application of section 8”.<sup>295</sup> Importantly, though, *Downing* is an outlier. There is no dispute that “all the circumstances of the case” can be considered by the court, but it is also clear that courts have generally included factors like the seriousness of previous offences sparingly. Two years after *Downing*, a different High Court was confronted with very similar facts. In this case, *Degainis*, the High Court judge commented on *Downing* that: “I do not think that in normal circumstances the seriousness of the offence will be a relevant consideration as to whether to award damages”.<sup>296</sup>

201. The Government claims that its proposals “will serve to put on a statutory footing those considerations which the courts have already recognised as being relevant to the determination of remedies.”<sup>297</sup> As discussed above, *Downing* states quite clearly that the court could consider the relevant factors because this power was already on a statutory footing, within section 8 HRA. The Government only identifies two other cases to illustrate what the “courts have already recognised as being relevant”. Neither of them comes anywhere close to legitimating the approach suggested in Option 2. For example, the Government cites paragraph 65 of *Anufrijeva* to substantiate the claim that “[t]he domestic courts have also acknowledged the possibility of a claimant’s conduct, including

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<sup>292</sup> R (*Downing*) v Parole Board for England and Wales [2008] EWHC 3198 (Admin).

<sup>293</sup> Human Rights Act Reforms: A Modern Bill of Rights [306].

<sup>294</sup> R (*Downing*) v Parole Board for England and Wales [2008] EWHC 3198 (Admin) [29].

<sup>295</sup> R (*Downing*) v Parole Board for England and Wales [2008] EWHC 3198 (Admin) [12] and [56].

<sup>296</sup> R (*Michael Degainis*) v The Secretary of State for Justice [2010] EWHC 137 (Admin) [19].

<sup>297</sup> Human Rights Act Reform: A Modern Bill of Rights [308].

criminal conduct, being taken into account when determining remedies”.<sup>298</sup> The substance of the paragraph reads:

*“[...] especially at first instance, courts dealing with claims for damages for maladministration should adopt a broad-brush approach. Where there is no pecuniary loss involved, the question whether the other remedies that have been granted to a successful complainant are sufficient to vindicate the right that has been infringed, taking into account the complainant's own responsibility for what has occurred, should be decided without a close examination of the authorities or an extensive and prolonged examination of the facts. In many cases the seriousness of the maladministration and whether there is a need for damages should be capable of being ascertained by an examination of the correspondence and the witness statements.”*<sup>299</sup> (emphasis added)

202. The Government appears to be interested in the underlined portion only, and to ignore the first and third sentences which essentially *contradict* its proposals: endorsing a “broad-brush” approach to damages, without an “extensive and prolonged examination of the facts” and stating that in many cases a damages assessment could be conducted on the basis of correspondence and witness statements only. But even the underlined portion clearly frames the claimant’s conduct as relevant only insofar as it has a causal effect on the substance of the claim itself. It is similar to a description of contributory negligence in a tortious claim. Again, this passage comes nowhere close to supporting the concept contained in Option 2.

203. The final case cited by the Government is *McCann v UK*, an ECtHR case which predates the HRA.<sup>300</sup> *McCann* concerned three terrorist suspects that were killed by the SAS in Gibraltar. The families of the dead took a claim to the ECtHR, which found that the UK had breached Article 2 ECHR. The ECtHR declined to award damages, “having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar”.<sup>301</sup> Like *Downing*, this case provides nothing resembling a legal precedent for Option 2. The conduct which the ECtHR notes in its judgment is clearly one of the “circumstances of the case” on which it was substantively ruling. The Government cites *McCann* in support of its proposition that “the Strasbourg Court allows compensation to be reduced for ‘undeserving’ claimants, acknowledging the responsibility that a claimant has towards others”. This is misleading. The ECtHR did not

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<sup>298</sup> Human Rights Act Reform: A Modern Bill of Rights [306].

<sup>299</sup> *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406 [65].

<sup>300</sup> *McCann v United Kingdom* [1995] 21 EHRR 1997.

<sup>301</sup> *McCann v United Kingdom* [1995] 21 EHRR 1997 [219].

provide any reasoning, it simply stated that it did not consider damages “appropriate” given the above conduct. It is also important to note that the ‘claimants’ in this case were bereaved families. The ECtHR passed no comment about their conduct or how ‘undeserving’ they were.

204. The Government’s assertion that its proposals “will serve to put on a statutory footing those considerations which the courts have already recognised as being relevant to the determination of remedies” is an empty one. The cases it has identified actually emphasise the adaptability of the existing statutory framework, one that would not be added to by Option 1. None of the cited cases contemplate anything like Option 2: a *carte blanche* for the courts to deny people remedies due to historic conduct that has no impact or bearing on the case whatsoever.

205. This proposal is underpinned by an extremely dangerous false equivalence. The Government states that courts would be directed to “avoid rewarding undeserving claimants who may themselves have infringed the rights of others.”<sup>302</sup> Giving the State the freedom to violate the rights of the “undeserving” without consequence is a terrifying prospect. The value of the HRA is that it provides a tool with which individuals – all individuals – can hold power to account, and protect themselves and their families from the overreach of that vast power. The idea that entirely unconnected, lawful, prior conduct by an individual could mitigate the State’s abuse should seriously worry us all.

## **FACILITATING CONSIDERATION OF AND DIALOGUE WITH STRASBOURG**

**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.**

206. There is an apparent disconnect between the assertions made by the Government in the consultation paper in relation to this question, and the proposed reform – as set out in the draft clause at page 101 - which would significantly undermine the obligation on the State to implement adverse rulings from the European Court of Human Rights.

207. There can be no dispute that “democratic responsibility for legislation, and the power to legislate, ultimately lies with Parliament”.<sup>303</sup> The fact that the Government coordinates all the steps for implementing a final Strasbourg judgment does not undermine this, and

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<sup>302</sup> Human Rights Act Reform: A Modern Bill of Rights [308].

<sup>303</sup> Human Rights Act Reform: A Modern Bill of Rights [311].

thus there is no need to change the system as it stands. As confirmed in the consultation document, this already includes “proposing legislative amendments to Parliament if the judgment needs more than an operational or administrative response”.<sup>304</sup> Creating a “formal requirement for government to lay notice of such [adverse] judgments before Parliament, for the purposes of enabling general Parliamentary consideration” may well represent a “formal way for Parliament to play a stronger role in responding to Strasbourg when the Court makes a final adverse ruling against the UK”.

208. However, this does not justify legislation that “affirms that the judgments and decisions of the European Court of Human Rights... are not part of the law of any part of the United Kingdom and cannot affect the right of Parliament to legislate or otherwise affect the constitutional principle of Parliamentary sovereignty”. The decisions of Strasbourg are binding and States Parties are obliged to implement them (Article 46 of the Convention). This in no way runs counter to Parliament’s “right to legislate”, nor does it “affect the constitutional principle of Parliamentary sovereignty”. There is no problem here that needs a solution.

209. Moreover, the “solution” proposed would significantly undermine the UK’s compliance with rulings from Strasbourg. This proposal, if passed, will have wider international implications. The previous secretary general of the Council of Europe, commenting on the situation in Azerbaijan after a series of adverse ECtHR rulings in 2014, noted that “proposals to render the binding decisions of the Strasbourg court merely advisory, if enacted, will be welcomed by regimes less committed to human rights than the UK.”<sup>305</sup> In 2015, shortly after pledges on the part of the Conservative Government to scrap the Human Rights Act,<sup>306</sup> Russia passed a law which enables the Duma (Russia’s lower house of parliament) to overrule judgements from the ECtHR.<sup>307</sup>

210. In any event, there is already scope for States Parties to negotiate over the implementation of ECtHR judgments as illustrated by the compromise reached on the issue of prisoner voting rights, i.e. Parliament decided the extent to which the law should be amended to implement the adverse judgment on that issue. The Committee of Ministers of the Council of Europe, which oversees the implementation of Strasbourg judgments, accepted the compromise plans on prisoner voting rights. A process for

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<sup>304</sup> Human Rights Act Reform: A Modern Bill of Rights [310].

<sup>305</sup> 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>.

<sup>306</sup> Bowcott, O., *Cameron’s pledge to scrap Human Rights Act angers civil rights groups*, The Guardian, 1 Oct 2014, <https://www.theguardian.com/politics/2014/oct/01/cameron-pledge-scrap-human-rights-act-civil-rights-groups>.

<sup>307</sup> BBC News, *Russia passes law to overrule European human rights court*, 4 Dec 2015, <https://www.bbc.co.uk/news/world-europe-35007059>.

dialogue between the UK and Strasbourg over adverse judgments and their implementation already exists, and works adequately.<sup>308</sup> If the Government remains committed to implementing adverse judgments within this flexible framework, then there is no need to change the current arrangements.

## **COSTS, BENEFITS, 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.**

*A. What do you consider to be the likely costs and benefits of the proposed Bill of Rights?*

211. We reject the premise of this consultation into overhauling the HRA, which is highly divisive, and seeks to restrict people's rights and access to justice on the basis of flawed, or in some cases, no, evidence. We therefore do not consider it appropriate to consider the costs and benefits of the proposed Bill of Rights.

*B. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform?*

212. Section 149 of the Equality Act 2010 requires 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; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and foster good relations between people who share a relevant protected characteristic and persons who do not share it. In spite of the wide-ranging nature of this consultation – which spans 123 pages in total – and notwithstanding the fact that this is an initial

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<sup>308</sup> Liberty does not accept that the agreed reform on prisoner voting rights adequately implements the ECtHR judgment on that issue, but notes that the Committee has accepted the compromise proposal from the UK government.

assessment, the Government has dedicated less than two pages to its potential impact on people with protected characteristics.<sup>309</sup>

213. The Government claims in the consultation that the proposals in this consultation will “potentially have an impact on all individuals who are within the UK, regardless of their protected characteristics.”<sup>310</sup> To the contrary, while the undermining of the protections in the HRA – which the proposals in this consultation seek to do – will affect everyone, we believe they will have a disproportionate effect on people with protected characteristics who may already encounter difficulties accessing their rights and justice. We are perturbed by the Government’s superficial assessment of these proposals’ potential to cause direct and indirect discrimination.<sup>311</sup>

214. Article 14 of the ECHR as incorporated in the HRA provides that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, (...) or other status.” There can be a breach of Article 14 in connection with another Article of the Convention where it is established that there has not been equal enjoyment of the underlying protected right. The list of grounds on which a person must not be discriminated against under Article 14 ECHR is not exhaustive and includes the protected characteristics under the EA. We are concerned that the consultation has failed to consider how, in seeking to alter the substance of the rights individuals enjoy in the UK, this may have discriminatory effects.

215. In terms of advancing equality of opportunity, the Government makes short shrift of its obligations by simply saying that the proposals will “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.”<sup>312</sup> No part of this statement explains or even attempts to address the relationship between the proposals and equality of opportunity.

216. The Government states, in relation to “fostering good relations”, that “effective human rights legislation provides a strong bedrock on which to foster good relations – by putting into law that everyone’s rights are to be respected and upheld.”<sup>313</sup> It is unclear what is meant by this. In our view, the HRA provides the strongest framework of rights protections, which in turn is a core part of our democracy.

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<sup>309</sup> Human Rights Act Reform: A Modern Bill of Rights [Appendix 3, paragraphs 10 to 20].

<sup>310</sup> Human Rights Act Reform: A Modern Bill of Rights [Appendix 3, paragraph 11].

<sup>311</sup> Human Rights Act Reform: A Modern Bill of Rights [Appendix 3, paragraph 17].

<sup>312</sup> Human Rights Act Reform: A Modern Bill of Rights [Appendix 3, paragraph 18].

<sup>313</sup> Human Rights Act Reform: A Modern Bill of Rights [Appendix 3, paragraph 19].

217. Notwithstanding the Government’s superficial analysis of the equalities impacts of its proposals, we have assessed that the proposals in the consultation may have the following, non-exhaustive impacts on people with protected characteristics.

## Intersectionality

218. One of the potentially significant developments of ECtHR jurisprudence has been its increasing consideration of forms of intersectional discrimination – that is, forms of discrimination levied against individuals on the basis of multiple intersecting forms of structural injustice,<sup>314</sup> although we note that some groups such as Muslim women may not yet benefit from advances in this area.<sup>315</sup> For example, in *B.S. v Spain*, the applicant was a woman of Nigerian origin, lawfully resident in Spain, who worked as a sex worker in Mallorca. She suffered harassment, racial insults, and assaults by the police on two separate occasions. In finding that the Spanish authorities had failed to comply with their duty under Article 14 in conjunction with Article 3 to ascertain whether a discriminatory attitude might have played a role in the applicant’s mistreatment at the hands of the authorities, the ECtHR considered the “particular vulnerability inherent” in the applicant’s position as an African woman engaging in sex work.<sup>316</sup> In other words, “the Court understood that B.S. was racially profiled and harassed not only because she is of African origin but also because she was a sex worker. The combination of these factors meant that she was particularly vulnerable compared to other sex workers of Spanish or European origin or other African women living and working in Spain.”<sup>317</sup> Other examples can be found in the judgements of Judge Mijovic in *V.C. v Slovakia* and *N.B. v Slovakia* involving the forced sterilisation of Roma women.

219. An intersectional approach is important because it more accurately reflects and addresses the lived reality of structural oppression for individuals. In the UK context, the jurisprudence of the ECtHR is particularly important given the fact that the EA, which protects people against discrimination on the basis of their protected characteristics, does not yet enable people to bring claims of discrimination on the basis of a combination of two (or more) relevant protected characteristics. The Government has not commenced s.14 of the EA, in spite of its recognition of the existence of intersectional

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<sup>314</sup> Yoshida, K., *Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain*, 8 September 2013, <https://link.springer.com/article/10.1007/s10691-013-9241-1>.

<sup>315</sup> A qualitative study of ECtHR case law on Article 9(2) based on intersectional categories showed that Muslim women were systematically defeated in the cases they presented. See: Castillo-Ortiz, Ali, A., and Samanta, N., *Gender, intersectionality, and religious manifestation before the European Court of Human Rights*, 2019, <https://www.tandfonline.com/doi/full/10.1080/14754835.2019.1581054>.

<sup>316</sup> *B.S. v. Spain*, (Application no. 47159/08) [62].

<sup>317</sup> Yoshida, K., *Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain*, 8 September 2013, <https://link.springer.com/article/10.1007/s10691-013-9241-1>.

discrimination and the Government Equalities Office's aspiration in 2009 that s.14 would "provide protection for some of the most vulnerable people in society, for whom it is currently difficult, complicated, and sometimes even impossible to secure a remedy for the discrimination they experience."<sup>318</sup>

220. Arguments about the intersectional nature of discrimination in a human rights context have been made in the UK context but have not as of yet been widely accepted.<sup>319</sup> We are concerned that any divergence between the rights protections afforded by the ECHR and the rights framework in the UK may scupper any further progress in this area, to the detriment of those who experiencing intersecting forms of structural oppression.

### Proposals on freedom of expression (Questions 4-7)

221. Any attempt to weaken the protections provided by Article 8 stands to affect LGBT+ people who have relied upon these rights to resist being outed, for example in the recent case of *BVC v EWF*, in which a man who was born in and currently lives in a country where same-sex relationships are criminalised was able to get an injunction taking down a website created by his ex-boyfriend in order to harass and expose him.<sup>320</sup> It may also have knock-on effects, for example by eroding protections against surveillance and safeguards for data privacy rights, which are not only important in and of themselves but have wider implications for access to justice and freedom of expression and assembly.<sup>321</sup>

### Permission stage (Questions 8-9)

222. The establishment of a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the BoR will have a disproportionate impact on access to justice, especially for people who already experience obstacles to obtaining redress for human rights abuses, such as those who cannot afford the prohibitive costs of litigation.<sup>322</sup>

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<sup>318</sup> Government Equalities Office, *Explaining the Equality Bill: Dual Discrimination*, 2009, <http://data.parliament.uk/DepositedPapers/Files/DEP2010-0103/DEP2010-0103.pdf>.

<sup>319</sup> In *MM (Lebanon) v Secretary of State for the Home Department*, the applicant contended that the Minimum Income Requirement was not only a violation of her Convention rights under Articles 8 and 12 but the MIR was indirectly discriminatory against women, and in particular British Asian women, who suffer from significantly lower rates of pay and employment than others. See *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 [32].

<sup>320</sup> *BVC v EWF* [2019] EWHC 2506 (QB).

<sup>321</sup> Liberty's response to the Department of Digital, Culture, Media, and Sport's consultation *Data: A new direction*, November 2021, <https://www.libertyhumanrights.org.uk/wp-content/uploads/2021/11/Libertys-response-to-the-Department-of-Digital-Culture-Media-and-Sports-consultation-into-Data-A-new-direction.pdf>.

<sup>322</sup> Hickman, T., *Public law's disgrace*, 9 February 2017, <https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/>.



223. We note that the ‘overriding public importance’ limb of the permission stage test is designed to enable exceptional cases to be heard even if an applicant fails to meet the ‘significant disadvantage’ threshold. As covered in our response to question 9, we do not consider this to be in any way adequate.

### Positive obligations (Question 10)

224. One of the founding principles of the ECHR, rooted in the Universal Declaration of Human Rights, is the importance of protecting minorities from the rule of the majority. Positive obligations, which stem from the ECHR, have been used by people with protected characteristics to obtain redress, particularly in circumstances where existing systems have ignored or neglected their rights.

225. Attempts to limit positive obligations could deleteriously impact women (including survivors and victims of domestic abuse) by preventing them from holding the State to account over failures to protect their rights.<sup>323</sup> This is a particularly pertinent issue in the aftermath of the murder of Sarah Everard,<sup>324</sup> controversies over the inconsistent enforcement and investigation of Covid regulations,<sup>325</sup> recent revelations of institutional racism and misogyny in the Met.<sup>326</sup> Indeed, almost half of women have less trust in the police following Sarah Everard’s murder,<sup>327</sup> and a recent YouGov poll found that only 44% of ethnic minority Britons have trust in the police.<sup>328</sup> Closing down a crucial avenue of redress is also likely to further exacerbate mistrust in public institutions.

226. People of colour are disproportionately more likely to die as a result of use of force or restraint by the police.<sup>329</sup> Any attempts to erode Article 2 positive obligations will have a disproportionate impact on families seeking justice for the deaths of their loved ones.

### Reforms to s.3 HRA (Question 12)

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<sup>323</sup> End Violence Against Women coalition, *Human Rights Act an “essential tool” for women’s protection*, 2 November 2017, <https://www.endviolenceagainstwomen.org.uk/human-rights-act-an-essential-tool-for-womens-protection/>.

<sup>324</sup> End Violence Against Women Coalition, *Almost half of women have less trust in police following Sarah Everard murder*, 2021, <https://www.endviolenceagainstwomen.org.uk/almost-half-of-women-have-less-trust-in-police-following-sarah-everard-murder/>.

<sup>325</sup> Walker, A., *Downing Street party: Met Police faces mounting pressure to investigate drinks event attended by Boris Johnson*, i news, 13 January 2022, <https://inews.co.uk/news/downing-street-party-met-police-investigate-boris-johnson-drinks-event-1398216>.

<sup>326</sup> Giordano, C., *Met Police racism, misogyny and harassment uncovered by watchdog’s probe*, The Independent, 2 Feb 2022, <https://www.independent.co.uk/news/uk/home-news/met-police-racist-sexist-report-b2004886.html>.

<sup>327</sup> End Violence Against Women coalition, *Almost half of women have less trust in police following Sarah Everard murder*, 2021, <https://www.endviolenceagainstwomen.org.uk/almost-half-of-women-have-less-trust-in-police-following-sarah-everard-murder/>.

<sup>328</sup> White, N., *Most minority ethnic Britons no longer trust police, poll finds*, The Independent, 14 December 2021, <https://www.independent.co.uk/news/uk/home-news/police-trust-black-lives-matter-b1973053.html>.

<sup>329</sup> Inquest, *BAME deaths in police custody*, 6 January 2022, <https://www.inquest.org.uk/bame-deaths-in-police-custody>

227. Section 3 of the HRA is an important tool in protecting the rights of people with protected characteristics. The most famous case remains *Ghaidan*, in which the House of Lords read into Schedule 1 of the Rent Act 1977 to establish that a same-sex couple who had been living together in a close and stable relationship could be treated the same as a heterosexual couple would for the purposes of succeeding in a statutory tenancy.<sup>330</sup> Section 3 has also been used to protect disabled people, with provisions of the Mental Health Act 1983 interpreted by the courts in order to ensure patients are informed of the reasons for treatment without consent,<sup>331</sup> and that the obligation to consult the nearest relative is upheld.<sup>332</sup> In the devolved administrations, reading in to marriage law has provided for humanist weddings to be recognised in Scotland and Northern Ireland.<sup>333</sup>

### Qualified and limited rights (Question 23)

228. The right to respect for private and family life has been crucial to enabling people with protected characteristics to access vital services and support and to secure equal and dignified treatment. For example, Article 8 has been crucial in enabling trans people to secure their rights, with the landmark case *Goodwin* establishing that the UK's failure to give legal recognition to the applicant's gender re-assignment was a breach of her rights.<sup>334</sup> In light of this decision, the Government introduced the Gender Recognition Act 2004. In another case, the ECtHR found that UK law providing different ages for consent for homosexual and heterosexual activity was a violation of Article 8 read in conjunction with the prohibition on discrimination in Article 14.<sup>335</sup> Article 8 has also been important for securing the rights of disabled people, such as in the case of *Bernard*, where the High Court found that the failure of Enfield Council to provide suitably-adapted accommodation for a woman with severe disabilities was a breach of her rights.<sup>336</sup> Gypsy and Traveller communities' way of life is also protected under Article 8.<sup>337</sup>

229. The HRA assists people with protected characteristics every day, with most cases not actually resulting in litigation. For example, in one case, a parent of a child with learning difficulties approached the school that the child attended to explain that its failure to provide transport was a disproportionate interference with the child's right to respect

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<sup>330</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

<sup>331</sup> *R (Wooder) v Feggetter* [2002] EWCA Civ 554, [2002] 3 WLR 591.

<sup>332</sup> *TW v Enfield London Borough Council* [2014] EWCA Civ 362, [2014] 1 WLR 3665.

<sup>333</sup> Politics.co.uk, Proposed Human Rights Act reforms would fundamentally undermine the rights of humanists, 15 December 2021, <https://www.politics.co.uk/opinion-former/press-release/2021/12/15/proposed-human-rights-act-reforms-would-fundamentally-undermine-the-rights-of-humanists>.

<sup>334</sup> See: *Goodwin v United Kingdom* (2002) 35 EHRR 18.

<sup>335</sup> See: *BB v United Kingdom* (2004) 39 EHRR 30.

<sup>336</sup> See: *Bernard v LB Enfield* [2002] EWHC 2282 (Admin).

<sup>337</sup> *Connors v UK* (Application no. 66746/01).

for private life. The decision was subsequently reversed, and the child was provided with transport to and from school from then on.<sup>338</sup> In another case, a woman fleeing domestic violence with her children used Article 8 to challenge social services' decision to place her children in foster care. Social services originally made its decision on the basis that the woman was making her family intentionally homeless, even though the reason that she was constantly moving was in order to escape her abuser. With the support of a charity, the woman successfully persuaded social services to reconsider the issue, and specifically to take the family's human rights into account. Social services ultimately agreed that the family should be kept together and that they should support the family to cover some of the essential costs of securing privately rented accommodation.<sup>339</sup>

230. There are countless examples demonstrating the HRA's important role in fostering a culture of respect for human rights across society and public life. Any changes to substantive rights protections including under qualified and limited rights could therefore have a deleterious impact, which makes the Government's failure to elucidate the potential consequences of its proposals even more egregious.

### Deportations and asylum (Questions 24-25)

231. The EHRC has previously found that the Home Office has acted unlawfully, as a result of its failure to comply with its duties under the Public Sector Equality Duty while developing, implementing, and monitoring its hostile environment policies.<sup>340</sup>

232. We are concerned that the Government's proposals will result in indirect discrimination against people of colour, who may be more likely to be migrants. This will result in the further entrenchment of the hostile environment, and have knock-on effects, for example negative health impacts on families and wider communities.<sup>341</sup> We are also concerned about the impact that these proposals may have on survivors and victims of human trafficking and modern slavery, for example by preventing such survivors and victims from being able to seek an effective remedy for violations of their rights after they have been subject to deportation.

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<sup>338</sup> British Institute of Human Rights, *Challenging a blanket policy that led to a learning disabled girl being unable to get to school*, <https://www.bih.org.uk/FAQs/challenging-a-blanket-policy-that-led-to-a-learning-disabled-girl-being-unable-to-get-to-school>.

<sup>339</sup> British Institute of Human Rights, *Securing safe housing for a family fleeing domestic violence*, <https://www.bih.org.uk/FAQs/safe-housing-domestic-violence>.

<sup>340</sup> Equality and Human Rights Commission, *Assessment of hostile environment policies*, 26 November 2020, <https://www.equalityhumanrights.com/en/inquiries-and-investigations/assessment-hostile-environment-policies>.

<sup>341</sup> Weller, S. and Aldridge, R., *The UK government's "hostile environment" is harming public health*, *The BMJ Opinion*, 23 July 2019, <https://blogs.bmj.com/bmj/2019/07/23/the-uk-governments-hostile-environment-is-harming-public-health>.

*C. How might any negative impacts be mitigated?*

233. The only way to mitigate the wide-ranging and devastating impacts of the proposals within this consultation is to withdraw them and stop them from becoming law.

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