



**The Law Society response to the Ministry of Justice
'Human Rights Act reform: A Modern Bill of Rights'
consultation**

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Summary of response

The Human Rights Act (HRA) is a legal instrument of great constitutional importance. It confirms the rights and freedoms owed to all people in the UK and provides robust protection for these, allowing individuals to access their rights at home in domestic courts. We do not believe there is a case for the sweeping reforms proposed and are concerned they omit recognising the very significant benefits for access to justice and the rule of law that have been achieved for British society through the HRA.

As the representative body for the solicitors’ profession, our analysis is based on practical experience of applying the HRA and approached through concern for upholding the rule of law and access to justice and of ensuring the practical workability of the proposals.

Our position, that the case for reform is not made out, is supported by the fact that the proposals put forward by the government go much further than the recommendations of the Independent Human Rights Act Review (IHRAR), which made only modest suggestions. Many of the proposals either have no basis in the IHRAR’s recommendations, directly contradict them, or were not included in the Review’s terms of reference at all and so have received no consideration.

On the whole, we reject the vast majority of the proposals. This is on the basis of the following overarching concerns, which recur throughout the proposals:

- **Damage to the rule of law** – a significant number of the proposals work to either reduce government accountability or to shield public bodies from it. This undermines a crucial element of the rule of law, preventing people from challenging illegitimate uses of power and undermining good governance. This includes proposals to exclude issues from the courts’ consideration, reduce public body liability, remove the ability to quash secondary legislation and restrict extraterritorial application of the HRA.
- **Damage to international reputation** – the UK’s attractiveness as a place for the world to do its business is dependent in a large part on our clear commitment to the rule of law. Decisions about where to do business depend on adherence to the rule of law, access to justice, legal certainty and cross-border consistency. Any threat to these commitments, either real or perceived, will be seized upon by our global competitors looking to supplant the UK as a hub for global business. In particular, proposals such as amending section 2 and creating a process for responding to adverse judgments from the European Court of Human Rights (ECtHR) which can be perceived as asserting the right not to abide by them risk undermining international

confidence in our commitment to human rights and opening the door to competitors to take business away from the UK.

- **Preventing access to justice** – reducing government accountability undermines the ability to access justice. Several proposals – including removing or amending section 3, introducing a permission stage with a ‘significant disadvantage’ threshold, restricting positive obligations, introducing prospective quashing orders and limiting the availability of damages – would make it harder to access the courts’ protection to enforce rights or reduce the availability of effective remedies.
- **Removing or reducing rights** – it is alarming that proposals include the removal of rights on a blanket basis from certain categories of individuals. Others would reduce protections or lead to an overall lowering of human rights standards, such as restricting positive obligations, the principle of proportionality and the liability of public bodies.
- **Conflict with the European Convention of Human Rights (ECHR) and the ECtHR** – restricting human rights protections below what is required by the ECHR, diminishing the ability to enforce rights in court, and removing the domestic courts’ ability to keep pace with ECtHR jurisprudence all undermine the UK’s compliance with its international obligations. This makes it inevitable that more cases will proceed to the ECtHR and greatly increases the likelihood of adverse rulings against the UK. Of particular concern are proposals to amend section 2, limiting section 3, excluding foreign national offenders facing deportation from rights protections, and restricting extraterritorial application.
- **Impact on devolution** – amending the HRA fundamentally impacts the devolution settlements across Wales, Scotland and Northern Ireland and has implications for their functioning. The devolved governments have been clear they do not support amendment and so the proposed reforms, if progressed without the consent of the devolved nations, present a very real risk to ongoing relations.
- **Reduction of legal certainty** – the sum total of wide-ranging reforms such as those put forward is to create an extended period of uncertainty while new standards, parameters and procedures are tested through litigation. This is particularly true where the proposals seek to introduce new definitions or would otherwise result in significant divergence from the ECHR and established practice, such as amendments to sections 2 and 3.
- **Increased costs and complexity** – the net result of these reforms will be to increase costs – for the courts, public bodies and claimants – in a number of ways: through increased procedural complexity; through creating uncertainty, leading to a rise in litigation; by risking duplication; and by likely increasing applications to the ECtHR, which are more costly and take longer to resolve. Many proposals would be complicated and likely impractical to implement. In particular, this includes the introduction of a permission stage and considering ‘wider’ claimant conduct when assessing damages.

The proposals that we support are:

- Introducing a database of judgments where the section 3 interpretive duty is applied, which will allow greater understanding and scrutiny of the use of section 3.
- Amending the remedial order process so that it cannot be used to amend the HRA itself.

We further make the following recommendations to government:

- Implement the recommendation of the IHRAR to develop a programme of civic and constitutional education to improve understanding of the HRA, its place in our constitution and the rights and freedoms contained within it.
- Introduce representative actions for human rights claims, allowing a single case to be brought by a representative claimant/NGO where there are multiple claims on the same issue and with common facts.
- Create a role for the Joint Committee of Human Rights in monitoring and scrutinising section 3 judgments entered into the proposed database.
- Consider creating a mechanism for reviewing human rights judgments and evaluating where legislative or policy changes are required.
- Provide additional training to support public bodies to understand and apply their obligations under the HRA. This should be specific to the context of the public body, delivered by a legal professional with specific expertise and should address the importance of human rights obligations and where they may arise in practice.
- Create a system of independent judicial oversight of detention decisions of suspected insurgents abroad.

Introduction

1. The Law Society is responding to this consultation in its representative capacity as the independent professional body for solicitors in England and Wales. Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law. On behalf of the profession, we influence the legislative and regulatory environment in the public interest. At home we promote the profession, and the vital role legal services play in our economy. Around the world we promote England and Wales as a global legal centre, open new markets for our members and defend human rights.
2. We welcome the opportunity to respond to this call for evidence. The Law Society's response has been informed by in-depth consultation with our members. It has been produced in collaboration with our expert Human Rights Committee as well as benefitting from consultation with further leading human rights practitioners and those with an interest in upholding the rule of law from across the solicitors' profession.
3. The Human Rights Act (HRA) is a legal instrument of great constitutional importance. It confirms the rights and freedoms owed to all people in the UK and provides robust

protection for these, allowing people in Britain to access their rights at home in domestic courts. It is subtle and carefully constructed to create a framework which works to strike the right balance between the judiciary, executive and Parliament, and between the national legal order and the European Court of Human Rights (ECtHR).

4. Human rights are the hallmark of a mature democracy. However, to have meaning, there must be robust laws in place and systems to ensure that the obligations of the state are met and, if they are not, that ordinary people can access justice to enforce their rights. We believe that this is achieved by the HRA.
5. If there is any crucial flaw that needs to be urgently addressed, it is that the HRA is misunderstood, and all too often misrepresented. We would therefore urge the government to give effect to the Independent Human Rights Act Review's (IHRAR) recommendation to develop a programme of civic and constitutional education that explains the HRA, its place in our constitution and the rights and freedoms contained within it.
6. Given the importance of the HRA in our constitution and the careful balance it strikes, any proposals to amend it require careful consideration and clear justification. The IHRAR was charged with undertaking this careful consideration and spent a year extensively assessing the need for reform, including hearing evidence from experts across the UK. Their conclusion was clear that, overall, the HRA is working well. They discouraged sweeping reforms, making only modest recommendations. The proposals put forward by the government go much further than this, with many either having no basis in the IHRAR's recommendations, directly contradicting them, or going beyond what was included in the Review's terms of reference and so having received no consideration. We are concerned that there is a trend emerging of disregarding expert evidence, even from those specifically empowered by the government to undertake extensive reviews. In a remarkable echo of Lord Faulk's comments following the conclusion of the Independent Review of Administrative Law (IRAL)¹, the IHRAR's Chair, Sir Peter Gross, when asked by the Justice Committee whether this consultation could be characterised as a response to his panel's report simply answered: "No."²
7. In light of this and on its own merits, we do not believe that the government has provided persuasive evidence-based arguments which justify the extent of the reforms proposed.
8. The wide-ranging and far-reaching proposals made in the consultation raise many specific concerns, which we address in detail in the body of this response. However, distinctly noticeable themes arise across the proposals:

¹ Law in Action – Reforming Judicial Review, BBC Radio 4 programme (25 March 2021). Available at: <https://www.bbc.co.uk/programmes/m000td1g>

² Sir Peter Gross giving oral evidence to Justice Select Committee (1 February 2022). Transcript available at: <https://committees.parliament.uk/event/6718/formal-meeting-oral-evidence-session/>

- **Damage to the rule of law** – a significant number of the proposals work to either reduce government accountability or to shield public bodies from it. This undermines a crucial element of the rule of law, preventing people from challenging illegitimate uses of power and undermining good governance. This includes proposals to exclude issues from the courts’ consideration, reduce public body liability, remove the ability to quash secondary legislation and reduce extraterritorial application of the HRA.
- **Damage to international reputation** – the UK’s attractiveness as a global hub for business is dependent in a large part on our clear commitment to the rule of law. Decisions about where to do business depend on adherence to the rule of law, access to justice, legal certainty, and cross-border consistency. Any threat to these commitments, either real or perceived, will be seized upon by our global competitors looking to supplant the UK as a hub for global business. In particular, proposals such as amending section 2 and creating a process for responding to adverse judgments from the European Court of Human Rights (ECtHR), which can be perceived as asserting the right not to abide by them, risk undermining international confidence in our commitment to human rights, opening the door to competitors to take business away from the UK and setting a dangerous precedent to other countries.
- **Preventing access to justice** – reducing government accountability undermines the ability to access justice. Several proposals – including removing or amending section 3, introducing a permission stage with a ‘significant disadvantage’ threshold, restricting positive obligations, introducing prospective quashing orders, and limiting the availability of damages – would make it harder to access the courts’ protection to enforce rights or reduce the availability of effective remedies.
- **Removing or reducing rights** – it is alarming that proposals include the removal of rights on a blanket basis from certain categories of individuals. Others would reduce protections or lead to an overall lowering of human rights standards, such as restricting positive obligations, the principle of proportionality and the liability of public bodies.
- **Conflict with the European Convention of Human Rights (ECHR) and the ECtHR** – restricting human rights protections below what is required by the ECHR, diminishing the ability to enforce rights in court, and removing the domestic courts’ ability to keep pace with ECtHR jurisprudence all undermine the UK’s compliance with its international obligations. This makes it inevitable that more cases will proceed to the ECtHR and greatly increases the likelihood of adverse rulings against the UK. Of particular concern are proposals to amend section 2, limiting section 3, excluding foreign national offenders facing deportation from rights protections, and restricting extraterritorial application.
- **Impact on devolution** – amending the HRA fundamentally impacts the devolution settlements across Wales, Scotland and Northern Ireland and has

implications for their functioning. The devolved governments have been clear they do not support amendment and so the proposed reforms, if progressed without the consent of the devolved nations, present a very real risk to ongoing relations.

- **Reduction of legal certainty** – the sum total of wide-ranging reforms is to create an extended period of uncertainty while new standards, parameters and procedures are tested through litigation. This is particularly true where the proposals seek to introduce new definitions or would otherwise result in significant divergence from the ECHR and established practice, such as amendments to sections 2 and 3.
- **Increased costs and complexity** – the net result of these reforms will be to increase costs – for the courts, public bodies, and claimants – in a number of ways: through increased procedural complexity; through creating uncertainty, leading to a rise in litigation; by risking duplication; and by likely increasing applications to the ECtHR, which are more costly and take longer to resolve. Many proposals would be complicated and likely impractical to implement. In particular, this includes the introduction of a permission stage and considering ‘wider’ claimant conduct when assessing damages.

9. We also note that a number of the issues consulted on are done so through open-ended questions with no proposals put forward to analyse here. Other proposals do not contain sufficient detail to offer an informed view. We urge the government to conduct further consultation if or when it produces concrete proposals in these areas.

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

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

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

10. While the Law Society agrees with the point made here and by the IHRAR that courts should be able to draw on a wide range of law when reaching decisions on human rights issues, we reject the government’s narrative that domestic courts “blindly” follow ECtHR jurisprudence. This is categorically false and a damaging mischaracterisation of the intensive scrutiny of the available law and its careful application to the facts of a case that judges perform.
11. In our submission to the IHRAR³ we discussed at length why the balanced and nuanced approach the courts have taken is the correct one and repeat this again in a

³ Available at: <https://www.lawsociety.org.uk/campaigns/consultation-responses/independent-human-rights-act-review-call-for-evidence--law-society-response>

shorter form below. We therefore do not support the overall thrust of the proposed approaches in the draft illustrative clauses. We explain below the key areas of concern.

The current approach to section 2

1. As stated above, we believe that the courts' current approach to section 2 is the right one. This approach holds that ECtHR jurisprudence may be the basis of a judgment or persuasive to a degree, but ultimately it is not binding in the same way as judicial precedent is within the domestic legal system.
2. There are plenty of examples where the courts have declined to follow ECtHR jurisprudence, which show that domestic courts do not “blindly” follow Strasbourg. Classic examples include *Horncastle*⁴ and *Animal Defenders International*,⁵ which were decided (respectively) on the basis of a particular point of English law and legal practice which judges declined to displace, and through the prioritisation of a value judgment made by the UK parliament in passing particular legislation.
3. However, it is the case of *Hallam v Secretary of State*⁶ that provides a substantial and instructive list of circumstances in which domestic courts are prepared to depart from ECtHR jurisprudence.⁷ Firstly, a minority of the Justices suggested that the ECtHR authority was inapplicable on its facts.⁸ Secondly, it was argued that there was no settled or consistent line of jurisprudence to follow.⁹ Third, Lord Mance suggested that the ECtHR had misunderstood some aspect of domestic law.¹⁰ Further secondary reasons for departing were also outlined: that the ECtHR authority was irrelevant to the outcome; that the authority was poorly reasoned;¹¹ that departure is acceptable where the court believes the ECtHR decision to be wrong, unjust or unfair.¹²
4. The caveat to the overriding principle that ECtHR case law is not binding is that where there is “clear and consistent jurisprudence”¹³ from the ECtHR, UK judges should follow this (otherwise known as the ‘mirror principle’). This is by no means a strict rule, and even where a strong line of authority exists UK judges may still decline to follow it if there is good reason to do so.
5. However, as a rule of thumb, we consider it to be the correct one. Its primary purpose is to ensure that national human rights law develops in harmony with the regional

⁴ R v Horncastle and Others [2009] UKSC 14

⁵ R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15

⁶ R (Hallam) v Secretary of State for Justice [2019] UKSC 2

⁷ These are helpfully summarised in Lewis Graham, ‘Hallam v Secretary of State – Under what circumstances can the Supreme Court depart from Strasbourg authority?’ (UKCLA, 4 February 2019). Available at: <https://ukconstitutionallaw.org/2019/02/04/lewis-graham-hallam-v-secretary-of-state-under-what-circumstances-can-the-supreme-court-depart-from-strasbourg-authority/>

⁸ R (Hallam) v Secretary of State for Justice, paras 70 and 137-138

⁹ *Ibid.*, paras 73, 79 and 126

¹⁰ *Ibid.*, para 58

¹¹ *Ibid.*, para 85

¹² *Ibid.*, paras 90 and 126

¹³ R v Special Adjudicator ex parte Ullah [2004] UKHL 26, para.

system of which the UK is a member, thereby meeting UK obligations under the ECHR and reducing the likelihood of cases proceeding to the ECtHR. It provides a good degree of certainty to claimants and defendants alike and has been the largely settled approach of domestic courts for some time.

6. We therefore believe that the current approach retains sufficient nuance to allow a balancing of the UK's obligations under the ECHR with protection of national interests and law. We would urge the government to reconsider its proposals and preserve established practice with regards to section 2.

Removing the relationship with ECtHR jurisprudence

7. The effect of both the options put forward would be to divorce the UK from ECtHR jurisprudence almost entirely. Option 1 makes no specific mention of retaining a relationship with ECtHR jurisprudence, except in the negative sense that a domestic court is "not required" to follow an ECtHR ruling. It would retain relevance only insofar as the courts are permitted to "have regard" to rulings from a judicial authority made under international law. Option 2 does specifically list rulings from the ECtHR as a source that courts "may have regard" to, which gives somewhat greater recognition of its importance. However, this effect is largely cosmetic.
8. The wording of "may have regard to" is significantly weaker when compared to the current section 2 wording, "must take account of". It is therefore a marked downgrading of the importance of ECtHR jurisprudence in the domestic interpretation of rights. This, of course, is intentional on the government's part. However, we believe that such a significant step will have profound negative consequences for access to justice, legal certainty, business interests, the UK's standing as a good faith member of the ECHR and our nation's wider international reputation.
9. If domestic courts systematically and significantly depart from ECtHR positions, this will inevitably lead to more claimants progressing with their case to the regional level. This undermines the intention of the HRA, which still stands today, to ensure that people in the UK can enforce their rights at home, in domestic courts. It would have a very real and detrimental impact on access to justice, as both claimants and the government (as the defendant) would face significantly higher costs and longer delays in their cases reaching a conclusion. The costs could preclude some claimants from enforcing their rights, therefore barring some individuals from asserting their rights.
10. Both options put forward in these proposals will also create significant legal uncertainty. Firstly, they expressly entitle domestic courts to reverse precedents set under the HRA and ECtHR. This will invite litigation even in settled areas of human rights law. Given the government's emphasis on improving certainty in the law, we consider this to be incongruous with their aims. Secondly, it will create inconsistency across borders where, as a consequence, the decisions of domestic courts diverge significantly from those of the ECtHR and the standards applied throughout Council of Europe member states.

11. This is likely to have an impact on the UK's economic prospects. Law Society members are themselves large, multi-national businesses who represent and advise the largest companies in the world. We have consulted extensively with them to understand how this could affect their clients' interests. What we heard from them is that when choosing a jurisdiction in which to do business, great weight is placed on a country having a strong respect for the rule of law, access to justice and the ability to ensure legal certainty and stability, so that they can predict the outcome or impact of legal proceedings in the event they need to bring them. Multi-national companies value legal consistency across borders in creating a level playing field which is conducive to conducting their business with ease. The changes proposed here would undermine this and several aspects of the reforms have already caused significant concerns amongst the global business community. There is therefore a real risk in the proposed changes that it will affect our competitiveness and ability to attract international investment, which is crucial in the current post-Brexit, post-pandemic context.
12. Our international reputation may also suffer more widely as a result of changes to section 2. While it is welcome that the government has stated its ongoing commitment to remaining a member of the ECHR, it is crucial that we continue to be viewed as an active participant that is giving effect to the Convention in good faith. Severing the link to interpretations of Convention rights from the ECtHR, as the ultimate arbiter of the Convention, reflects badly on this and could set a dangerous example to other Council of Europe member states.
13. The likelihood of more applications being made to the ECtHR as a result of significantly weakening the link to ECtHR jurisprudence, mentioned above, would also undermine our reputation and standing. Currently, the UK's record before the ECtHR is very good. Applications to the ECtHR from the UK have been on a general downward trend for the past 10 years, from 1542 applications in 2011 to 301 in 2020.¹⁴ In the ECtHR's calculations, which measure the number of cases per 10,000 population, the UK has an average of 0.03% - the lowest of all 47 ECHR member states.¹⁵ In 2020, only 4 adverse judgments were made against the UK.¹⁶ Changing the relationship with ECtHR jurisprudence risks reversing this trend and damaging our international standing as a country that respects human rights. This would undermine our ability to champion human rights abroad and hold other countries to account for abuses.

¹⁴ Ministry of Justice, *Responding to human rights judgments Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2020–2021* (December 2021), p.9. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038220/human-rights-judgments-response-2021.pdf

¹⁵ Judge Robert Spano in J. Rosenberg, 'Human Rights Act ain't broke so why fix it, asks the European court's most senior judge', A Lawyer Writes. Available at: https://rozenberg.substack.com/p/human-rights-act-aint-broke?utm_source=url

¹⁶ Ministry of Justice, *Responding to human rights judgments Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2020–2021* (December 2021), p.10. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038220/human-rights-judgments-response-2021.pdf

Original intent approach to interpretation

14. Option 2 directs the courts to take an approach to interpreting rights that is limited by the original intent when the ECHR was drafted. It does so by stating that the courts “must have particular regard to the text of the right or freedom, and in construing the text may have regard to the preparatory work of the European Convention on Human Rights.” We do not agree with this approach to interpreting Convention rights.
15. Firstly, it is out of step with the way the ECtHR interprets rights, which is grounded in the ‘living instrument’ doctrine and therefore risks conflicting with this. It is not necessary for domestic courts to take exactly the same approach to interpretation as the ECtHR. Indeed, the principle of subsidiarity and margin of appreciation work together to emphasise that domestic courts should interpret rights within the national context and enjoy a degree of leeway when doing so. However, combining a strict original intent approach to interpretation with decoupling UK jurisprudence from that of the ECtHR makes it likely that domestic law will be increasingly at odds with that under the ECHR. This again increases the likelihood of a rise in applications to the ECtHR, accompanied by the same risks to access to justice and the UK’s global reputation discussed above.
16. It should be noted that such an approach is also out of step with the Vienna Convention on the Law of Treaties, which states that reference to travaux préparatoires is only relevant to treaty interpretation as a supplementary means.
17. An original intent approach to interpretation goes against the approach used in the common law. While the original intent of legislation often acts as the outer limits of what can be achieved through judicial interpretation, it has always been recognised that the courts play a fundamental role in ensuring the law is kept up to date with modern standards. Strictly limiting this could lead to stagnation in human rights law. This therefore goes against our constitutional understanding of the role of judges and the UK’s proud history of spearheading a common law approach which has been adopted by countries throughout the world.
18. Interpreting human rights law for a modern age on the basis of a historical context that existed 70 years ago is unworkable and misunderstands how human rights instruments are intended to operate. Human rights instruments are necessarily high level and general, to allow the broad minimum standards of treatment they create to apply to a wider range of facts and circumstances, and to enable them to remain fit for purpose over time. The welcome advancements we have seen in technology, in society and in the role of the state could not have been foreseen by the drafters of the Convention but nevertheless have human rights implications. Interpretive methods must be up to the task of adapting the law to fit new circumstances. Without this ability, the proposed Bill of Rights (BoR) will fail to be future proof.

Utilising jurisprudence from international adjudicative bodies and other countries

19. Both Options 1 and 2 propose that judicial decisions of other international courts beyond the ECtHR or decisions of other countries may be at a domestic judge's disposal, so far as they are relevant to the case at hand. As indicated above, we broadly agree in principle that judges must be able to draw from a range of legal sources when adjudicating.
20. Broadening the sources available to a judge in the way proposed may have benefits in learning from the experience of other countries who have considered similar rights issues. Other countries and international courts may have taken a more expansive approach on certain issues, and so allowing these to be considered could in some instances lead to a strengthening of rights protections.
21. However, this could create greater uncertainty, it being less clear which legal authority would prevail. It could also therefore inspire more litigation to test where and how international decisions will be applied.

The position of the Supreme Court

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

22. The Law Society is strongly opposed to the proposal accompanying this question that areas falling outside the institutional competence of the domestic courts should be defined in statute.¹⁷ Not only did the IHRAR reject this proposal, but the government will be well aware that similar proposals were also considered by the IRAL and by its own subsequent consultation on judicial review reforms but not taken forward.
23. Specifying large subject matter areas to be outside the competencies of a court, and therefore not capable of legal challenge, would amount to a sweeping ouster clause which would raise profound concerns for the rule of law and accountability of government. This would be unacceptable. Where there are legal questions, especially those concerning fundamental rights, affected parties must have the right to ask the court's opinion and the court must be able to answer them.
24. Courts and judges are sensitive to the limits of their competencies and to the express need not to encroach on political matters. In our response to the IHRAR, we gave the example of *R (Nicklinson) v Director of Public Prosecutions*, which concerned the absolute prohibition on assisted dying in domestic statute.¹⁸ This is an example where

¹⁷ Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (14 December 2021), p.60, para 201. Available at: <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights>

¹⁸ *R (Nicklinson) v Director of Public Prosecutions* [2014] UKSC 38

the courts exercised restraint on “contentious moral or ethical issues”,¹⁹ by declining to find a human rights violation as it required a moral assessment which is better left to parliament.

25. This is far from the only case where domestic courts have deferred on similar grounds. While it is difficult to be exhaustive, examples of areas where the courts have previously indicated that they are likely to show substantial deference to executive decisions include cases involving: questions of national security and immigration;²⁰ foreign affairs and diplomatic relations;²¹ policy choices dependent on party politics or political philosophy;²² broad questions of economic and social policy;²³ welfare policy;²⁴ issues involving the allocation of finite public resources;²⁵ and policy preferences in the area of social security and welfare.²⁶ We therefore do not consider that a concern has been established that needs addressing in the way the government proposes.

Trial by Jury

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

26. We do not consider recognising a qualified right to jury trial in the BoR to be necessary.
27. The right to jury trial is already considered to be a fundamental right, primarily in criminal law. Indeed, its historic importance to our criminal justice system and the longevity of its protected status – which is rightly acknowledged by the government – is the very reason change is unnecessary. It is firmly embedded through both the common law and replicated in legislation. As a result, its requirements and parameters are already well understood and need no further clarification. This was the clear opinion of criminal solicitors that we consulted, notably including those which act for the defence.
28. Recognising the qualified right to jury trial in a BoR could, conversely, create difficulties and unintended consequences. Firstly, it would be necessary to define jury trial and the qualifications to be made to it. This would be problematic given differences between the devolved justice systems in how jury trial is given expression. It would also require acknowledging the instances in which jury trial is available in civil matters,

¹⁹ Sir Peter Gross et al., *The Independent Human Rights Act Review* (December 2021), p.119, para 32(d). Available at: <https://www.gov.uk/guidance/independent-human-rights-act-review>

²⁰ *Rehman v Secretary of State for Home Department* [2003] 1 AC 153

²¹ *R (Lord Carlile) v Secretary of State for Home Department* [2014] UKSC 60

²² *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras. 75-76

²³ *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, para. 70

²⁴ *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16

²⁵ *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, para. 41

²⁶ *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73

where even those matters that are eligible may be refused a trial by jury if the judge considers the case to be too complex.

29. Codifying the right to jury trial and the applicable qualifications in either criminal or civil law could give rise to litigation to test the parameters set. This would risk unsettling an otherwise firmly settled area of law.
30. Codification of the right to jury trial in criminal law would further be a significant constitutional change. We have reservations that doing so could open the door to governments in the future reducing its availability, for instance by expanding the qualifications made or limiting the types of cases eligible for jury trial.
31. Constitutional change should only be undertaken when there is a clear need. We consider that the right to jury trial is adequately protected and it is appropriate within the bounds of our constitution to keep it uncodified. Including it in a BoR would therefore be largely performative. There is nothing to be lost in maintaining the status quo and, in our opinion, little to be materially gained in changing it except potential risks.

Freedom of Expression

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

32. The Law Society believes the protection provided under section 12 of the HRA is adequate and that no amendment to the established position has been shown to be necessary.
33. Freedom of expression is already given enhanced protection in the HRA. This is set out in section 12, which directs courts to have particular regard to the importance of freedom of expression. In relation to injunctions, section 12(3) provides additional protection to freedom of expression by prohibiting interim orders 'unless the court is satisfied that the applicant is likely to establish that publication should not be allowed'. This therefore requires the claimant to show at an early stage and before the full facts are considered that their claim is sufficiently strong that there is good reason to believe they would be successful if the case proceeds to a full hearing. This therefore offers a strong degree of protection to the press and other publishers.
34. We do not believe the government has evidenced a need for any change. In the consultation document it cites only a case from the ECtHR, which would in any event be unaffected by a change to domestic legislation. It has not provided any evidence to suggest that the domestic courts are not mindful of the importance of the right to freedom of expression when considering applications for injunctions or other relief against the press or other publishers.

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?

35. We do not believe that any additional measures are required to further confine the scope for interference with article 10. As noted above, freedom of expression is already given enhanced protection under the HRA, and the courts are seen to be sensitive to this.

36. It is important to note that article 10 of the Convention and the HRA did not establish new law in the UK. Instead, they reinforce and give greater weight to principles already established in the common law.²⁷ As the Supreme Court has observed, in the field of freedom of speech there is no difference in principle between English law and Article 10 and we should not focus exclusively on Convention rights without also looking at the common law approach.²⁸ This therefore shows that the government's preferred approach of emphasising the role of the common law is already being taken in this area, and that the courts respect the role of freedom of expression as one that is embedded within domestic law.

37. Our domestic courts have long recognised that the right of freedom of expression is fundamental. As the House of Lords noted:

*"Modern democratic government means government of the people, by the people, for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments."*²⁹

38. However, they also acknowledge this was not an absolute right, even before the HRA's introduction:

"Despite the high importance attached to it, the right to free expression was never regarded in domestic law as absolute. Publication could render a party liable to civil or criminal penalties or restraints on a number of grounds which included, for instance, libel, breach of confidence, incitement to racial hatred, blasphemy, publication of pornography and, as noted above, disclosure of official secrets."

39. This is the same within article 10. The right to freedom of expression may be limited, provided that the limitation meets the established criteria. Article 10(2) therefore expressly provides for a sophisticated balancing exercise which requires close consideration of the facts and context of each individual case, of each legitimate aim

²⁷ Venables v News Group Newspapers Ltd [2001] WLR 1038, para 36

²⁸ Kennedy v The Charity Commission [2014] UKSC 20, para 46

²⁹ R v Shayler [2002] UKHL 11, para 21

listed in article 10(2) and of certain other threshold principles (including section 12 of the HRA).

40. This balancing exercise under article 10(2) also specifically provides for the situation where competing Convention rights are at play. This exercise requires an "intense focus" on the comparative importance of the specific rights being claimed in the individual case, as Lord Steyn noted in *Re (S) (A Child)* concerning the interplay of articles 10 and 8.³⁰
41. Our domestic courts are experts at conducting this balancing exercise with the necessary intense focus. Any legislative changes to this balancing exercise on a broad scale – which were not part of the IHRAR's detailed review – require very careful consideration and the establishment of a broad consensus. Other legislation is currently being proposed on the issue of Strategic Litigation Against Public Participation (SLAPPs) that concerns freedom of expression, and it is being considered how to strike the right balance within a confined context. However, applying a fixed order of priority will likely lack the necessary nuance needed to address the wide range of factual scenarios that can arise in human rights cases and turn out to be too blunt a tool in practice.
42. For example, there is one area where it is possible to foresee likely unintended consequences. The government states in its consultation document that it is "*committed to ensuring that the biggest social media companies protect users from abuse and harm*". However, providing greater protection for freedom of expression over other rights could have the opposite effect of this intention and in practice provide greater protection for social media companies. It could become harder to hold social media companies accountable for actions by users on their platforms, reducing their responsibilities or even ability to monitor and remove harmful content.

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

43. We do not believe it is appropriate that protection for journalists' sources be included in the BoR. The purpose of the HRA, and therefore also the BoR, is to confirm the rights owed to all people in the UK. We therefore do not think it is appropriate to address a specific group in this.
44. Protection for journalists' sources is already provided in section 10 of the Contempt of Court Act 1981. This works together with the article 10 right to freedom of expression. If there is a case for change, this should be evidenced more fully, and changes made to existing legislation outside of the HRA.

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

³⁰ *Re S (A Child)* [2005] 1 AC 593, para 17

45. As stated above, we do not believe that the government has established a need to take further steps to strengthen protection for freedom of expression.

II. Restoring a sharper focus on protecting fundamental rights

A permission stage for human rights claims

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

46. The Law Society is strongly opposed to the introduction of an additional permission stage for human rights claims as it would place an undue obstacle to accessing justice. We do not consider it to be necessary and believe that it would instead have the unintended consequences of increasing costs and delay to both claimants and defendants, increasing complexity and placing a greater burden on scarce court resources. We have based our response on our members' extensive knowledge of how legal procedures operate in this context.

'Significant disadvantage' threshold

47. We are particularly concerned by the proposed "significant disadvantage" threshold. Arguably, human rights violations do, by definition, cause significant disadvantage, because human rights protect minimum standards in relation to the most fundamental aspects of human existence. There is no indication given of what would qualify as "significant" and whether this would be comparable to limits in other areas of law, or higher. For example, section 212(2) of the Equality Act 2010 imposes a "substantial disadvantage" threshold, which is defined as meaning merely more than minor or trivial.

48. If the intent is to set a much higher threshold it would risk disenfranchising many individuals who have suffered violations of their fundamental rights by preventing meritorious claims from being considered by the courts. If such a threshold was introduced, it would be a serious threat to access to justice and undermine the very intention of both the HRA and the proposed BoR to ensure that people in the UK can enforce their rights in domestic courts.

49. We are also concerned about the repercussions this threshold would have for public body accountability. It would, in effect, create a class of 'acceptable' human rights abuses that would permit routine violations. This would allow public bodies to act with impunity in 'lower-level' cases and undo the progress that has been made towards authorities embedding human rights considerations into their decision-making. Claimants may be discouraged from pursuing claims, therefore creating a chilling effect on justice, and leaving genuine human rights abuses (potentially even those that would meet a "significant disadvantage" threshold) unchallenged and unaddressed.

50. In turn, this has an impact by undermining good governance. The possibility of legal challenge encourages focus on the rights of individuals affected by public body decisions that can be forgotten or side-lined in the pursuit of higher-level policy aims. Significantly reducing the ability to challenge public body decisions could therefore undermine this benefit and encourage risk-taking. Moreover, there are vital learnings to be gained through the consideration by a court of human rights issues and how they play out in practice. It allows guidance to be provided to public authorities on the scope of their duties and the human rights impacts that could result, which then encourages improvements in their decision-making. This is demonstrated in empirical research conducted in the field of judicial review which shows that legal challenge to local authorities through judicial review is linked to improvements in their performance measured against official quality indicators.³¹ We are therefore concerned that such a move would negatively impact the quality of decision-making by public bodies, leading to an overall lowering of human rights standards.
51. It would also create considerable uncertainty for both claimants and public bodies. In terms of decision-making, public bodies when deciding a course of action would have an additional layer of considerations to weigh up – not only if an action would breach human rights, but also then how far it would breach them. Those that decide to take a risk, banking on their action falling below the threshold, may later find that this doesn't pay off and the courts decide differently.
52. When a claim arises, solicitors for both parties may face difficulty in advising their clients how this threshold will be applied, particularly as the factual circumstances in human rights cases can vary widely. Determining the parameters of the threshold would likely lead to satellite litigation, which increases costs and delays.
53. It must also be borne in mind that if a stringent threshold is put in place and access to domestic courts is made more difficult, the inevitable result will be those cases that have been excluded progressing to the ECtHR. Those 'lower-level' human rights cases that could have been quickly and easily dealt with in a domestic court then become ones that incur more cost to both parties and gains the attention of not just the ECtHR, but other countries that are watching the UK's track record closely.

Existing 'filters' on human rights claims

54. We do not believe that the government has properly established why a permission stage is required. We do not consider it to be necessary, given the existence of other mechanisms that work to ensure the courts only focus on meritorious claims and which, from the consultation document, do not appear to have been taken into account.

³¹ Lucinda Platt, Maurice Sunkin and Kerman Calvo, 'The Positive Effect of Judicial Review on the Quality of Local Government' (2010) 15(4) *Judicial Review* 337-342; Lucinda Platt, Maurice Sunkin and Kerman Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales' *Journal of Administration Research and Theory* (2010) 20:i 243-i260.

55. When bringing a human rights claim, there is already the requirement to establish that you are a victim (often referred to as ‘the victim test’) under section 7 of the HRA. This requires the claimant to evidence that they have, or would, personally and materially suffered as a result of a violation of their rights under the HRA. This therefore already acts as a limitation on who can bring a human rights claim and under what circumstances. This is also reflected in admissibility criteria for claims made to the ECtHR.
56. Many human rights cases are also raised within judicial review, where there is already a permission stage in place. The effectiveness of this permission stage has only recently been scrutinised by the IRAL and a subsequent government consultation, where it was found to be working well. This permission stage allows the Administrative Court to refuse permission on particular heads of claims so that, for example, a case may be allowed to proceed for ‘unlawful detention’ but be denied permission on HRA claims under articles 3 and 8 of the ECHR. It should be added that the Administrative Court has the power to award costs against applicants in cases which it deems ‘totally without merit’ and if permission is refused legal aid costs are not recoverable for a publicly funded applicant. This therefore puts an onus on claimants and claimant solicitors to seriously consider the veracity of their claim before submitting it to the Court.
57. In addition to this, many claimants in human rights cases will be funded by legal aid or exceptional case funding which places strict limits on which cases are eligible. We note that some of the cases and legal article references in the consultation paper pre-date legal aid reforms brought in by the Legal Aid, Sentencing and Punishment of Offenders Act 2012(LASPO).
58. This imposed a merits test for awarding legal aid funding, which is generally weighted at 50% and has a threshold which has an analogous approach to having suffered “significant disadvantage”. Sections 32(b) and 33(b) of The Civil Legal Aid (Merits Criteria) Regulations 2013 contain a test as to whether there is sufficient benefit to the individual to justify the provision of funding for legal advice and representation. Section 19(3) of Part 1 of Schedule 1 in LASPO also states that proceedings for judicial review are excluded from the scope of legal aid if they do “not have the potential to produce a benefit for the individual, a member of the individual’s family or the environment”. In *R (FF) v Director of Legal Aid Casework*³² the Administrative Court defined this as meaning ‘material benefit’. Whilst this differs from a significant disadvantage test, it operates in a similar way and, when combined with other legal aid requirements such as proportionality, applies a strict gateway which limits the ability to bring legal aid funded human rights claims.

Practical difficulties and consequences

³² EWHC 95 (Admin); [2020] 4 WLR 40

59. We do not believe that a permission stage can be introduced in human rights claims under the HRA without increasing delays, complexity, and costs to the parties and to the courts.
60. Any permission stage, even one that works efficiently, necessarily involves additional delays. A risk of delays where fundamental human rights are at stake should not be taken lightly. Where the case is particularly urgent, involving the life, liberty, or safety of a person, a permission stage would likely not be appropriate at all, and exceptions would need to be made.
61. Claims under the HRA are also rarely made on their own. It is not clear whether the permission stage would apply only to human rights claims made under the proposed BoR, or whether this would include human rights claims arising from the common law or other legislation.
62. Law Society members report that in many civil cases, the pleading combines common law and/or non-HRA statutory law claims together with HRA claims. It may be the case that the HRA claim forms only a minor part of the case and those arguments are only considered briefly or if the other aspects fall away. A practical example of this is where a claim for damages for false imprisonment is combined with a HRA claim under ECHR articles 5 (right to liberty) or 8 (right to private and family life), where the emphasis even under the HRA is on aspects of these rights that also exist in the common law. Damages would normally be awarded under the false imprisonment claim, with the court unlikely to consider article 5 in any detail.
63. If a permission stage was introduced this would require the HRA aspect of the claim to be specifically considered separately and before the full case is even heard. This would therefore add an additional arm to the proceedings which would otherwise have been unnecessary, wasting the time and resources of public bodies, claimant lawyers and the court. It would also have the additional unintended consequence of diverting attention from the common law claim, which the government has indicated it is keen to emphasise in their reforms as a whole.
64. As human rights claims often intersect with those arising in other areas of law, they are heard in a variety of courts. It would therefore be necessary to consider how and where a permission stage would fit into each of these proceedings, making a uniform approach impracticable. For example, in the Immigration Tribunal there are already case management stages for asylum and removal cases. In the Employment Tribunal, a case can bring up human rights issues without them necessarily being pleaded at the outset. This calls into question at which point the permission stage is to be introduced in each context.
65. For courts that receive a significant number of litigants in person – such as the Employment Tribunal, which is a less formal venue – this will be especially pertinent. Litigants in person may be unsure of whether human rights are relevant to their case and so not know to argue this at the outset. If these are raised at a later stage, it would

then be necessary to pause the proceedings while permission is applied for with respect of the human rights element to their claim. This would not only be difficult to navigate for someone without legal representation but would also lead to extra delays.

66. There is also a real risk of duplication, which unnecessarily increases costs. Human rights cases tend to be fact heavy. To be able to make a decision at permission stage, especially one that accurately establishes whether significant disadvantage has been suffered, it would be necessary for some level of disclosure of evidence to be made, for this and a wider range of evidence to be presented to the court, along with submissions containing a not insubstantial amount of detail. This could effectively lead to the case being considered twice, with little variation in the arguments. It is therefore hard to see the benefit of a two-stage process.

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.

67. As stated above, the Law Society does not agree with the introduction of a permission stage.
68. If one were to be introduced, a route would be necessary to ensure that access to justice in cases of exceptional importance was maintained. In relation to the proposed exception of “overriding public importance” we would first note that this appears to be higher than the Supreme Court’s test of ‘general public importance’.
69. However, we consider that any exception would only have limited effect in remedying the overall problem that the permission stage and proposed “significant disadvantage” threshold creates of preventing access to justice. Those claimants who fall below the threshold and whose case does not hold wider significance may nevertheless have suffered a violation of their fundamental rights and find themselves barred from remedying this in court.

Judicial Remedies: section 8 of the Human Rights Act

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

70. The government’s consultation document and underlying rationale to this question alleges that there has been an increase in spurious or unmeritorious human rights cases being brought. We do not consider that the government has evidenced this allegation beyond anecdotal cases either in the consultation document or elsewhere.
71. However, to ensure a more efficient system of human rights protections, we would recommend that the government consider introducing a procedure for representative actions. Where there are multiple claims on the same issue with common factual

circumstances, this would enable a single representative action to be brought by a representative claimant or an NGO/representative organisation, seeking a single judgment. This would avoid multiple claims being brought on the same issue, therefore conserving court and public body resources.

72. In addition, to identify systemic issues and drive improvements – thus avoiding multiple cases on the same or similar issues – we recommend that the government consider creating a mechanism for reviewing human rights judgments and considering where legislative or policy changes are required.

Positive obligations

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

73. To ensure that rights are not just “theoretical or illusory but [...] practical and effective”³³, it is necessary that public authorities must take positive steps to secure them. The division of ‘negative’ and ‘positive’ obligations is unhelpful and causes more concern than is warranted.
74. It has long been accepted that even rights that operate predominantly in the negative sense – requiring the state to refrain from interfering with a freedom, such as the right not to be tortured, enslaved or have undue restrictions placed on free speech – also necessarily entail positive obligations. This may include the state being required to set up systems, such as criminal justice and court systems, to prevent or punish interferences, or to otherwise facilitate the exercise of that right. The recognition and fulfilment of positive obligations is therefore essential to full realisation of human rights. Positive and negative obligations are inextricable and attempting to delineate and separate these in statute would prove difficult without creating unintended consequences.
75. The proposal to limit positive obligations is out of touch with not only the understanding of human rights under the ECHR, but also throughout international human rights law and in countries across the globe. Neglecting positive obligations would lead to a significant lowering of human rights standards in contravention of the ECHR and reflect badly on the UK as a nation that proudly upholds full rights protections.
76. Limiting the courts’ ability to offer protection for rights where a positive obligation is concerned would disproportionately impact some groups with protected characteristics defined in equalities legislation. Positive obligations can often arise in the context of provision of services, such as healthcare, social care, and education. Restricting these could then deny vital services needed by disabled people, the elderly, and children to live in dignity and safety.

³³ Airey v Ireland, App No. 6289/73, ECHR 1979, para 24

77. Furthermore, the pessimistic assessment presented by the government fails to acknowledge where positive obligations have contributed in a substantial, tangible way to ensuring access to justice: in ensuring the rights of victims of ‘black cab rapist’ John Worboys were upheld;³⁴ enabling the relatives of a person who has died in state custody to achieve justice for their loved ones;³⁵ protecting victims of modern slavery;³⁶ and ensuring disabled people receive the services they need to live with physical integrity and dignity.³⁷ We urge the government to consider what would be lost and to reconsider its stance.

78. Where positive obligations do arise, courts are highly attuned to the limits of their competencies and the need not to impose unrealistic burdens or interfere with policy decisions about spending or how public services are prioritised. As stated above in our response to Question 2, there are numerous examples of where the courts have declined to find a violation of human rights on the basis that to do so would stray into policy issues concerning questions of resource allocation. Judges exercise restraint on these issues with regularity, as exemplified in the recent case included in the government’s consultation document of *R (SC and others) v SSWP*.³⁸ We therefore do not consider that the government’s case for change has been sufficiently evidenced.

Deprivation of liberty/ liberty protection safeguards

79. The government notes in its consultation document the Supreme Court judgment in *Cheshire West*,³⁹ and expresses the view “that this judicial change to social policy took place without public discussion or debate in Parliament”.

80. This decision was reached within the context of the Mental Capacity Act 2005, which expressly requires, in section 64(5), reference to the concept of deprivation of liberty in article 5 ECHR. This requires references to deprivation of liberty in that Act to be given the same meaning as in article 5 ECHR. In other words, it was the will of Parliament that the scope of protections provided in the context of those with impaired decision-making capacity be determined by the courts, interpreting article 5(1) ECHR.

81. Following *Cheshire West*, parliament has enacted legislation – the Mental Capacity (Amendment) Act 2019 – which maintains the position in s.64(5). There has, therefore, been debate in Parliament about precisely the issue set out in the consultation paper. In introducing the 2019 Act the Government made clear that:

³⁴ *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] UKSC 11

³⁵ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51. See also *R (Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10; *R (Takoushis) v HM Coroner for Inner North London et al* [2005] EWCA Civ 1440 and *D v Secretary of State for the Home Department* [2006] EWCA Civ 143

³⁶ *O.O.O (and others) v Commissioner of Police for the Metropolis* [2011] EWHC 1246

³⁷ *R (Bernard) v Enfield* [2002] EWHC 2282 Admin

³⁸ *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26

³⁹ *P v Cheshire West and Chester Council; P and Q v Surrey County Council* [2014] UKSC 19

“... treating people with respect and dignity, no matter what their disability or condition, are touchstones of our civilised society. Those are virtues that we all seek to promote, but sometimes, even with the best intentions, they do not always materialise. For that reason, the Government have now introduced legislation [the Mental Capacity (Amendment) Act 2019] to reform and improve the current deprivation of liberty safeguards system.”⁴⁰

82. It is unclear whether the Government intends to bring forward legislation to amend (further) the Mental Capacity Act to provide a different definition of deprivation of liberty. If it does, any such legislation should be the subject of appropriate consultation.

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

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

Question 12: We would welcome your views on the options for section 3.

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

Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.

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

83. In answering this question, it is first necessary to state that the Law Society does not agree with the government’s characterisation of the courts’ approach to interpretation under section 3 HRA as leading to an incremental expansion of rights beyond what is appropriate and within the confines of the duty placed on them by parliament. Indeed, creating a culture of human rights was part of the original objective of the HRA⁴¹, and section 3 makes a significant contribution to this.

84. We therefore strongly oppose the suggestion that section 3 should be repealed altogether. We further do not support the proposal in Option 2 to the extent it changes the section 3 duty to requiring interpretation in a way that is compatible with the BoR, rather than the ECHR, as this risks creating divergence which will negatively impact access to justice.

Option 1

⁴⁰ Lord O’Shaughnessy (Parliamentary Under-Secretary of State) introducing the 2019 Bill at second reading in the House of Lords: Hansard (House of Lords), 16 July 2018, Vol.792, Col.1059

⁴¹ Lord Irvine of Lairg (Lord Chancellor) introducing the Human Rights Bill at second reading in the House of Lords: HL Deb 03 November 1997 vol 582 col 1228

85. As stated above, we are strongly opposed to Option 1. It should also be noted that the IHRAR, after careful deliberation, explicitly rejected removing section 3.
86. The interpretive duty created in section 3 is a cornerstone of the framework created in the HRA. It provides robust protection for the rights contained in the HRA by enabling an immediate remedy to the individual, therefore ensuring swift access to justice. Above and beyond this, it is a means of successfully mainstreaming human rights considerations and embedding them into our legal system. Simply put, removing section 3 would immeasurably weaken the system of human rights protections in the UK.
87. Section 3 was intended to enable unforeseen consequences of legislation or oversights within it to be corrected with minimal disruption to Parliament. Evidence suggests that it performs this function well. Indeed, members report that the government itself when defending a claim under the HRA often requests section 3 interpretations to be made by the court over a declaration of incompatibility (under section 4 HRA) for this reason. This was even the case in *Ghaidan v Godin-Mendoza*,⁴² which has been the focus of concern in this area.⁴³
88. Removing the interpretive duty on courts would mean losing the benefits of this efficiency for both parties and upsetting the carefully crafted balance between section 3 and section 4. Where a challenge is made to primary legislation and a section 3 interpretation is not possible, the courts may issue a declaration of incompatibility. If section 3 were to be removed, this places greater reliance on declarations of incompatibility for remedying a human rights violation in primary law.
89. The substantial increase in the numbers of declarations made as a result will inevitably create delays in human rights claims reaching a final resolution, impacting access to justice. When combined with the proposal made elsewhere in the consultation to extend declarations of incompatibility to secondary legislation, the likelihood of this becomes even more certain. As it is the legislature's responsibility to respond to declarations of incompatibility, receiving a higher number of these will increase pressure on the parliamentary timetable. Significant delays in remedial action being taken by the executive and legislature already exist, with it taking upwards of 2 years for a resolution to be achieved in many cases.⁴⁴ This will likely result in one of two scenarios: either parliamentary time and attention is taken away from other activities it would be better focused on, or a backlog of declarations that need to be resolved will form.

⁴² *Ghaidan v Godin-Mendoza* [2004] UKHL 30

⁴³ Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (14 December 2021), p. 69, para 236. Available at: <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights>

⁴⁴ J. King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' (2015), p.5-8 Available at: <https://discovery.ucl.ac.uk/id/eprint/10072227/>

90. Such delays would undermine the effectiveness of our national system of human rights protections. As declarations of incompatibility do not affect the validity of the infringing legislation, this means there is a continuing breach of human rights obligations that could affect people beyond the original litigant, and that the original litigant is deprived of a remedy throughout the duration of any delay. This possible impact on the effectiveness of section 4 would then increase the likelihood that the disappointed litigant would resort to seeking those remedies before the ECtHR.
91. It should also be noted that, while declarations of incompatibility are a crucial part of the HRA framework and an expression of parliamentary sovereignty, they are a much weaker remedy. The ECtHR has previously stated that declarations of incompatibility (without an accompanying constitutional convention that the executive and legislative are required to respond) are not an effective remedy due to their non-binding nature.⁴⁵ So far, government has always responded to declarations of incompatibility. However, it is clear that without another mechanism to balance it, government would be under more pressure to respond efficiently.
92. Removing section 3 would therefore present serious risks to access to justice, the overall protection of human rights and parliamentary capacity. With these repercussions in mind – and even without them – we do not believe that the case for removing section 3 has been made out. Deciding a case using an expansive approach to their interpretive duty under the HRA is not something courts do with any frequency. There have certainly been no instances of broad section 3 interpretations in recent years; besides *Ghaidan v Godin-Mendoza*⁴⁶ and *R v A*⁴⁷ (an early case decided in 2001), there are few notable examples. Moreover, it always remains open to parliament to legislate to change an interpretation provided by the courts with which it disagrees – therefore the ultimate sovereignty of parliament is maintained.
93. When employing section 3 interpretations, courts remain sensible of their limits and will decline to provide an interpretation where doing so would transgress their competencies. Examples of this can be found in *Bellinger v Bellinger*⁴⁸ (where a section 3 interpretation was specifically denied because the court considered it would cross the line from interpreting to legislating) and *Nicklinson*⁴⁹ (a case concerning assisted dying where the courts declined to find a violation on the grounds that not only was it a deeply contentious issue, it was one which Parliament was already actively considering and required a moral assessment which is best left to the democratically accountable legislature).

Option 2

⁴⁵ *Burden and Burden v UK*, App. 13378/05, ECHR 2008, paras 40 and 43

⁴⁶ *Ghaidan v Godin-Mendoza* [2004] UKHL 30

⁴⁷ *R v A* [2001] UKHL 25

⁴⁸ *Bellinger v Bellinger* [2003] UKHL 21

⁴⁹ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38

94. As stated above, we do not consider any amendment to section 3 to be necessary. However, we acknowledge the recommendation of the IHRAR on clarifying the limits of section 3 to recognise the current approach in domestic jurisprudence.
95. We acknowledge that this could have some benefits in providing guidance to judges when utilising section 3, therefore helping avoid judgments that may attract criticism in the future by defining clear parameters to their duty. This could foster improvements in the perception of both human rights judgments and the proposed BoR as a whole.
96. It appears that the intention behind Option 2 is to provide this clarification. We consider the parameters given to be broadly reflective of the approach already taken.
97. However, there is a key difference in the new formulation of section 3 put forward in the draft clause for Option 2. This is that it changes the duty to interpret and give effect to legislation in a way that is compatible with Convention rights, to a way that is compatible with the BoR. As we state throughout this response, there are a number of proposals which would create significant divergence between the rights protected in the ECHR and BoR. As a result, by changing the duty in section 3 to requiring interpretation compatibly with the BoR, the efficacy of section 3 in allowing people to assert their rights under the ECHR is undermined. It is therefore likely that a claimant would have to pursue their case to the ECtHR and bear the resulting additional costs and delays in accessing justice. Again, this also carries the risk of an increase in adverse judgments against the UK and harm to our international reputation. We therefore cannot support Option 2.

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

98. In relation to the proposal in Question 14 to create a database of judgments which rely on section 3, we believe there could be a role for the Joint Committee of Human Rights (JCHR) in monitoring this database. This role could be similar to that which it already plays in relation to monitoring remedial orders. This could involve monitoring the judgments entered into the database and reporting any of concern to parliament, along with its recommendations for how parliament should respond. Even if it does not find any judgments of concern, it would be helpful if the JCHR would also produce a periodic report on section 3 judgments which is made publicly available to aid transparency.

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

99. We support the proposal to introduce a new database on which all judgments that rely on section 3 are recorded.
100. There would be several benefits to this. Firstly, it would enable better understanding of the empirical evidence around the use of section 3. From this would flow the ability of parliament to engage with and scrutinise the use of section 3, as outlined above. Its availability could also be used to enhance public education and

understanding of judicial role in applying human rights, with the aim of improving trust in the judiciary in this regard and the system of human rights protections as a whole.

101. Within individual cases, it would also be a useful resource for lawyers seeking to advise claimants and defendants alike as to the likely outcome of a case. It would also increase the understanding of litigants in person on how human rights cases are decided, thereby assisting (albeit in a limited way) the more efficient use of court time and resources. It would further benefit decision-making by public authorities who will better be able to predict the legal consequences of their actions.
102. There would be a number of options for how this could be accomplished. However, to achieve its full potential, it is imperative that any such database be made publicly available.

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

Declarations of incompatibility

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

103. We do not agree that courts should be able to make a declaration of incompatibility for all secondary legislation.
104. This proposal would remove the ability of courts to quash secondary legislation in human rights claims. The HRA draws a clear and careful distinction between primary and secondary legislation. While both primary and secondary legislation are subject to the section 3 interpretive duty, where a compatible reading is not possible in respect of primary legislation the courts are limited to issuing a declaration of compatibility. However, where this is the case with secondary legislation, courts have the ability either to quash the whole regulations in some circumstances or set aside the offending part of the legislation. Usually, the approach taken is specific to the offending part and very rarely are whole sets of regulations set aside because of human rights challenges.
105. It is a constitutional principle that secondary legislation is afforded a lower status than primary legislation. This is in recognition of the disparity in the democratic mandate each has; whereas primary legislation is passed by parliament and therefore possesses fuller democratic authority, secondary legislation does not command this same authority by virtue of its being made by the executive. Unlike primary legislation, secondary legislation is not subject to full parliamentary scrutiny, so the legislature's ability to evaluate any human rights implications is significantly reduced. Often when such legislation is examined by the courts it is the first time it will have received rigorous scrutiny.

106. The HRA as it stands respects this distinction and upholds parliamentary sovereignty. To remove the ability to quash secondary legislation in claims arising under the HRA would result in an unacceptable expansion of executive power by removing a vital check and protection for individual rights provided by the courts. As warned by the IHRAR, it could also act as an incentive to ministers to make greater use of secondary legislation as a way to side-step the detailed scrutiny of parliament.⁵⁰ When teamed with the already expanding use of secondary legislation that has been seen in recent years, this cautionary observation gathers more weight.

Inconsistencies in the law

107. The power to quash secondary legislation is not unique to the HRA. The ability to quash or set aside provisions of secondary legislation is a power that already exists in administrative law, where it has been long established as a remedy available in judicial review. Removing this power in respect of the HRA would therefore create an illogical inconsistency in the law and, worryingly, would reduce the status of human rights as compared to those arising from other areas of law. It would result in a situation whereby secondary legislation could be quashed due to its incompatibility with human rights established in the common law, but not on the basis of similar statutory rights in the HRA.

Impact on devolution

108. A further inconsistency would arise in respect of the devolved settlements. As noted by the Cambridge University Centre for Public Law and the IHRAR, the result would be that secondary legislation which is incompatible with the HRA but made by government ministers in Westminster could not be quashed, whereas primary legislation made by devolved legislatures could on the similar grounds that it is incompatible with the HRA and therefore beyond their scope of power.⁵¹ This therefore poses a risk to the devolved settlements and has already caused significant concern amongst devolved governments.⁵²

Lack of evidence to suggest necessity

109. This proposal is not supported by the recommendations of the IHRAR, being explicitly rejected, and appears to originate from concerns that courts use the ability to quash secondary legislation too willingly and that the HRA has encouraged this. These concerns are not supported by evidence. Quashing of secondary legislation is a discretionary remedy, and therefore a finding that secondary legislation is incompatible with the HRA does not always mean it will be overturned. Case law analysis shows that courts take a conservative approach to subordinate legislation and rarely use their power to quash or set aside provisions. In fact, analysis shows that domestic courts have only exercised this power 14 times in the past 7 years in respect of the HRA,

⁵⁰ Sir Peter Gross et al., *The Independent Human Rights Act Review* (December 2021), p.323, para 61. Available at: <https://www.gov.uk/guidance/independent-human-rights-act-review>

⁵¹ *Ibid.*, p.323, para 62

⁵² See, for example: <https://gov.wales/written-statement-uk-government-proposal-reform-human-rights-act-1998>

being more likely to award other remedies.⁵³ Furthermore, even where this power is used by the courts, they do so restrictively and, wherever possible, limit their finding to setting aside the relevant provisions, rather than quashing the whole order.

110. As stated above, the ability to quash or set aside provisions of subordinate legislation only arises where a section 3 interpretation is not possible. The interplay with the section 3 interpretative duty is therefore important, as it reduces the need to exercise this power. This again demonstrates how the remedies available under the HRA provide a balanced framework of measures to protect fundamental human rights. Any amendment to section 3 – which we do not consider necessary – would potentially increase instances where secondary legislation is quashed or set aside.

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. We acknowledge the reasoning of the IHRAR when recommending the extension of suspended and prospective quashing orders that maintaining consistency in the law is advisable. As the consultation notes, these measures have already been put forward in the Judicial Review and Courts Bill which is currently being considered by parliament.

112. Our position as to whether suspended and prospective quashing orders should be extended to proceedings under the Bill of Rights is the same as we have already expressed during the course of the Judicial Review and Courts Bill, namely that we support the introduction of suspended orders in exceptional circumstances but do not support the use of prospective orders.

Suspended quashing orders

113. Suspended quashing orders could provide benefits through greater remedial flexibility. We consider them to be a pragmatic solution that would allow public bodies to take steps to anticipate and minimise disruption resulting from a quashing order. That such an order would still take effect after a period of time meanwhile offers protection to the successful claimant. However, as the suspension does not provide an immediate remedy to the claimant and allows for an unlawful decision to remain in place and a human rights violation to continue – albeit temporarily – we consider that their use should be exceptional and subject to judicial discretion.

Prospective quashing orders

⁵³ J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', U.K. Const. L. Blog (22nd Feb. 2021). Available at: <https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/>

114. In respect of prospective quashing orders, we consider there to be a number of considerations that result in them denying full redress to claimants. This leads us to oppose their introduction. Our view is supported by a majority of solicitors, 67% of whom (in a survey conducted by the Law Society during the Ministry of Justice's consultation on its proposals for judicial review reform) opposed the introduction of prospective-only remedies.
115. The most obvious effect of prospective quashing orders would be that a successful claimant who receives a prospective quashing order only receives a remedy to the extent that a change is made going forward. They do not receive any remedy for previous harm suffered. To demonstrate this issue by way of example: if a person who has been deemed ineligible for a welfare benefit successfully challenges the eligibility criteria on human rights grounds, but a prospective quashing order is applied, that person may not immediately be eligible and receive the entitlement in question. It is likely that the successful claimant (and any other benefit applicants rejected on the same grounds) would have to make a new application and wait for another decision to be made, during which time they may either receive no benefit entitlement or a lower rate. Furthermore, they would not receive back-payments of the benefit which they lawfully should have received, resulting in only a partial remedy.
116. There are important questions about the implications of this for the state's obligations under article 13 of the ECHR, the right to an effective remedy. In our view, if a challenge to a prospective order issued in a case concerning Convention rights was to be made to the ECtHR under article 13, it is far from clear that the government would be successful in defending that claim.
117. There is also the question of the impact on the availability of damages, which are provided for by section 8 of the HRA. If a prospective order is awarded, then the impugned act retains legal validity up to the date of the court judgment. This seemingly precludes the ability to award damages to compensate the individual because, in the logic of prospective orders, there would have been no legal harm before that date to compensate. This again deprives the individual of a remedy that they would currently be entitled to and would be entitled to if they took their case to the ECtHR. We would welcome the government clarifying whether a prospective order is intended to also preclude the awarding of damages in this way.
118. Even if a prospective quashing order is not used in a particular case, its mere availability would serve as a serious disincentive to claimants seeking to bring a case under the HRA. We therefore have significant concerns that they would have a chilling effect on justice. If a claimant cannot be sure that they will benefit from the claim even if it is successful, many will likely be deterred from pursuing perfectly meritorious claims, with the consequence that more unlawful actions by public bodies will go unchallenged, thus allowing human rights breaches to continue.
119. Moreover, prospective quashing orders would have a damaging effect on the accountability of government and therefore good governance. The threat of review on

grounds under the HRA is a powerful tool in encouraging public bodies to maintain focus on human rights considerations in their actions, therefore enhancing good decision-making and a healthy respect for individual rights. If public bodies are spared the risk of retrospective legal consequences this motivation will be weakened, and the quality of decision-making will likely drop.

Statutory presumption

120. We would also like to address the possibility of suspended and/or prospective quashing orders being introduced in a way that is subject to a statutory presumption in favour of their use, as has been the case in the Judicial Review and Courts Bill. We have clearly expressed our strong opposition to the statutory presumption in the Judicial Review and Courts Bill and would again reiterate that same strong opposition to it being introduced in the context of the BoR.
121. Suspended and prospective quashing orders both have a significant impact on the ability of individuals who have been subject to state wrongdoing to receive a full and timely remedy. They allow, to varying degrees, an act that has been found to be unlawful to remain valid. It is further not clear in what circumstances and which cases such remedies would be appropriate. A statutory presumption would hinder their ability to do this and could force the courts into using either type of order where they would not be appropriate, thereby undermining remedial flexibility and the ability of courts to ensure justice is done.
122. We would remind the government that the majority of respondents to its consultation preceding the Judicial Review and Courts Bill were opposed to the introduction of such a statutory presumption, as it acknowledged in its consultation response at the time. Significant continuing opposition has also been seen in both Houses of Parliament throughout the Bill's passage

Remedial orders

Question 17: Should the Bill of Rights contain a remedial order power? In particular, should it be:

- a. similar to that contained in section 10 of the Human Rights Act;**
- b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;**
- c. limited only to remedial orders made under the 'urgent' procedure; or**
- d. abolished altogether?**

Please provide reasons.

123. We are supportive of Option B, that a remedial order process similar to that already provided for in the HRA should be retained in the BoR, but with the slight

change that it should be made clear that the process cannot be used to amend the BoR itself.

Swift enactment of justice

124. The rationale behind devising the remedial order process in the HRA was to create a fast-track process for amending primary legislation following a declaration of incompatibility or an adverse judgment from the ECtHR. This is to ensure that clear violations can be quickly rectified without having to make the amendment through further primary legislation, which is dependent on there being parliamentary time available. We consider that this rationale still stands, as it allows the swift enactment of justice and remedying of a human rights violation.

125. Removing the remedial order process or limiting it in a significant way would create an increase in burdens on parliamentary time and therefore delays. Significant delays in remedial action being taken by the executive and legislature already exist, with it taking upwards of 2 years for a resolution to be achieved in many cases.⁵⁴ In urgent cases involving the life, liberty, safety or security of individuals, delays would have particularly damaging consequences. We therefore consider the maintenance of the remedial order process in a similar form to that in the HRA to be a necessity.

126. Ordinarily, it would not be desirable for an Act of parliament to be amended by ministerial order and we agree with the JCHR that “*as a matter of general constitutional principle*”⁵⁵ this should be done via primary legislation. In practice, this is the case and remedial orders are used in moderation. A search of legislation.gov.uk shows that seventeen remedial orders have been issued by the executive since the HRA came into force.⁵⁶ The Government tends to address incompatible primary legislation through the normal legislative process, reserving remedial orders for either urgent or minor technical amendments. Recent examples of orders made in response to the judgments in *Siobhan McLaughlin, Re Judicial Review (Northern Ireland)*⁵⁷ and *Jackson and Others v Secretary of State for Work and Pensions*⁵⁸ demonstrate how remedial orders are used to give effect to a judgment within its confines, where the amendment is not a question of overall policy direction but of eliminating an inconsistency or omission.

Removing the ability to amend the Bill of Rights through remedial order

127. As stated above and in our recommendations to the IHRAR, we support the proposal made here to remove the ability to amend the proposed BoR through remedial order. As the Government is no doubt aware, this issue arose as a result of

⁵⁴ J. King, ‘Parliament’s Role following Declarations of Incompatibility under the Human Rights Act’ (2015), p.5-8 Available at: <https://discovery.ucl.ac.uk/id/eprint/10072227/>

⁵⁵ Joint Committee on Human Rights, ‘*Making of Remedial Orders, Seventh Report of 2001-02*’ (2001), para. 32. Available at: <https://publications.parliament.uk/pa/jt200102/jtselect/jtrights/58/5803.htm#a3>

⁵⁶ See: <https://www.legislation.gov.uk/primary+secondary?title=remedial%20order> (accessed 13 February 2022).

⁵⁷ *Siobhan McLaughlin, Re Judicial Review (Northern Ireland)* [2018] UKSC 48

⁵⁸ *Jackson and Others v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin)

the response to the judgment in *Hammerton v UK*⁵⁹ through The Human Rights Act 1998 (Remedial Order) 2019. This order amended section 9(3) of the HRA, raising the question of whether the remedial order process could be used to amend the HRA itself.

128. Section 10 only refers to remedial orders being capable of amending “a provision of legislation”, leaving some ambiguity as to whether this includes the HRA itself. As the empowering statute, it would be unusual for Parliament to have intended that it be capable of being used in this way. Analysis from the Policy Exchange think tank, citing judicial precedent, has argued that where there is any doubt about the scope of an executive power, a restrictive approach must be applied.⁶⁰ On this point we agree.

129. We also agree with the discussion from Policy Exchange of the importance of the HRA as a constitutional measure.⁶¹ In confirming the rights and freedoms owed to all people in the UK, the HRA is legislation with significant constitutional importance and is often afforded the status of a constitutional statute. The BoR would be of similar constitutional importance. The ability then to amend it through executive order with reduced scrutiny would be somewhat problematic and we believe it should be clarified in the BoR that the remedial order process cannot be used in this way.

Statement of Compatibility – Section 19 of the Human Rights Act

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

130. The government has not provided sufficient detail on what it considers to be the problem in relation to section 19 to be able to fully answer this question.

131. Section 19 simply requires a minister to assess the proposed legislation and issue a statement to the effect that either they consider it to be compatible with Convention rights, or that it isn't but they wish for the legislation to proceed regardless. In practice, this operates by way of a short statement on the first page of a Bill, usually accompanied by a human rights memorandum of discussion of any human rights issues in the Explanatory Notes. It is hard to see how this requirement could have any impact on the constitutional balance between government and parliament or the government's ability to legislate.

132. It is appropriate that the government should be encouraged to consider the human rights implications of legislation it proposes to introduce, to promote compliance with its obligations under the ECHR. The provision of additional explanation of the

⁵⁹ *Hammerton v United Kingdom*, App. 6287/10 ECHR 2012

⁶⁰ Policy Exchange, *'Against Executive Amendment of the Human Rights Act 1998'* (2020), p.16-17. Available at: <https://policyexchange.org.uk/wp-content/uploads/Against-Executive-Amendment-of-the-Human-Rights-Act-1998.pdf>

⁶¹ *Ibid.*, p.18-19

human rights issues that arise within a Bill through a memorandum or Explanatory Notes is also beneficial to enabling parliament to perform its duties in scrutinising the legislation, and to understanding the intention of parliament later if the legislation is challenged in the courts. Detailed and realistic section 19 statements ensure that the final measure is compliant, avoiding subsequent litigation. This is therefore a useful practice which should be continued and encouraged.

Application to Wales, Scotland and Northern Ireland

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

133. Convention rights are hard-wired into the DNA of the devolution settlements in Wales, Scotland, and Northern Ireland.⁶² Unlike the Westminster Parliament, each devolved legislature is subject to a red-line restriction from legislating contrary to the Convention rights and Ministers in each devolved Government are prohibited from acting incompatibly with those rights.⁶³
134. Importantly, Convention rights or “the Convention” is explicitly given the same meaning as the HRA in devolution legislation. It follows that any change to the content or status of the HRA would shift the boundaries of the devolution settlements. Several of the proposals seek to redefine our obligations under the ECHR, or otherwise could result in differing standards and interpretations. This may therefore create uncertainty in a devolved context as to whether the standard to be applied should be that which is set in the BoR, or the ECHR. In particular, there are further specific concerns in relation to the proposal to remove the ability to quash secondary legislation, which are addressed in our answer to Question 15.
135. In accordance with the Sewel Convention, the UK Government should seek the devolved legislatures’ consent when inviting Parliament to alter devolved competence. We would expect the UK Government to honour that commitment, and not to proceed without consensus on an issue of such fundamental importance to devolved nations.
136. However, this could prove difficult. The subject matter of ‘human rights’ is not reserved to the Westminster Parliament in any of the devolution settlements. In relation to Wales, schedule 7A of the Government of Wales Act 2006 confirms the Senedd has competence to “observe and implement” international human rights in devolved areas, which gives scope to embed human rights through primary legislation. There are several examples of the devolved Parliaments legislating to increase protections beyond those afforded in UK law, such as the incorporation of the United Nations Convention on the Rights of the Child and the introduction of the socio-economic duty under section 1 of the Equality Act 2010 in Wales.

⁶² s.108A(2)(d) Government of Wales Act 2006; s.29(2)(d) Scotland Act 1998; s.6(2)(c) Northern Ireland Act 1998

⁶³ s.81 Government of Wales Act 2006; s.57(2) Scotland Act 1998; s.24(1)(a) Northern Ireland Act 1998

137. The devolved legislatures have strongly signalled their ongoing support and respect for the HRA and voiced profound alarm at the proposed reforms in this consultation. In a public statement, the Welsh Government has said:

“We do not agree with these proposed changes. There should be no dilution of human rights in Wales and it is essential that the United Kingdom remains a world leader in protecting and enabling people to exercise their human rights.”

“... 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.”⁶⁴

As the Law Society of England and Wales, our organisational remit does not extend to Scotland and Northern Ireland, but we note that there have been other similar statements from the other devolved legislatures.⁶⁵ An additional joint statement has been issued by the Welsh and Scottish governments.⁶⁶

138. We therefore have grave concerns that, if reforms to the HRA are pursued without the agreement of the devolved legislatures, there is a very real risk to ongoing relations between the devolved nations and to the maintenance of the current settlement. Even if a compromise is reached, there is the strong possibility of future variance in the extent to which human rights are embedded and protected in each constituent part of the United Kingdom.

Public authorities: section 6 of the Human Rights Act

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

139. Section 6 is one of the main success stories of the HRA. It has helped to create a culture of human rights throughout public bodies, instilling and embedding a greater respect for human rights resulting in rights considerations being habitually taken into account when making decisions or exercising their functions.

140. On the whole, we agree with the government’s assessment that the current approach to defining a public authority is “broadly right”⁶⁷ and do not believe any amendment to section 6 is needed.

⁶⁴ See: <https://gov.wales/written-statement-uk-government-proposal-reform-human-rights-act-1998>

⁶⁵ See: <https://www.gov.scot/publications/human-rights-act-letter-to-the-lord-chancellor/>

⁶⁶ See: <https://gov.wales/devolved-nations-criticise-unwelcome-and-unnecessary-uk-government-plans-drop-human-rights-act>

⁶⁷ Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (14 December 2021), p.75, para 266. Available at: <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights>

141. Section 6 does not provide a comprehensive definition of public authority. This was intentional, to provide flexibility to allow for the evolving nature of the state and state functions. What was clear from parliamentary debates at the time of the HRA's enactment, was that the test for liability under section 6 was to be based on the functions a body performs and the extent to which those functions are public in nature.⁶⁸ We believe that the wording provided in section 6 allows the flexibility needed to determine this in the wide and evolving factual circumstances in which it can arise.

142. We would further add that the definition of public authority under the HRA is also linked to that used elsewhere, such as in the Equality Act 2010. Amending the definition under the HRA would therefore impact other areas of law, risking uncertainty.

Question 21: The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons.

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

Option 2: retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

143. As stated above, section 6 is one of the main success stories of the HRA and has been instrumental in creating a pervasive culture of respect for human rights throughout public bodies. The Law Society is therefore very concerned by the proposal here to extend exemptions to public body liability. Option 1 in particular would shield public bodies from accountability and create more freedom to act incompatibly with human rights. Option 2 is dependent on the acceptance of proposals made to remove or amend section 3, to which we have set out our analysis above.

Option 1

144. We strongly oppose Option 1. Option 1 provides that wherever a public authority is giving effect to legislation, they will not be considered to be acting unlawfully. This removes the current obligation on public authorities that, where primary legislation is unclear or where they have a degree of discretion over how it is implemented, they must apply its requirements in a way that is compatible with Convention rights.

145. Removing this obligation would give more freedom to public authorities to act incompatibly with human rights. It means that, even where it is clear that an act would contravene human rights and an alternative rights-respecting course of action is available to them, public authorities are under no obligation to choose the course of action that would avoid breaching human rights. This is a wide dispensation which will

⁶⁸ Hansard, HC Debates, 17 June 1998, col 433

likely result in violations occurring with greater regularity and an overall lowering of human rights standards.

146. It would also undo the hard work public authorities have already undertaken to embed human rights considerations into their governance. Ultimately, this would have a negative impact on the quality of decision-making. The obligation on public bodies to perform their functions in a rights-compatible way has contributed immeasurably to creating a sharper focus within public decision-making on the possibility for adverse and unintended consequences. The proposal would undermine this, encouraging risk-taking without due regard for the impact on individuals who the public bodies are bound to serve.

147. Where violations, whether intentional or not, do result, this proposal would further shield the offending public authority from accountability. As public authorities hold primary responsibility for ensuring human rights, this is very concerning. It greatly reduces the ability of an individual to directly challenge the public authority, therefore undermining the rule of law. Wherever a person is no longer able to secure redress in domestic courts, they would be more likely to seek redress before the ECtHR.

Option 2

148. Option 2 is dependent on accepting the proposals made in Question 12 for either removing or amending section 3 of the HRA.

149. As stated in our answer to Question 12, we do not accept the removal of section 3. If this were to be progressed and the changes reflected in section 6, it is not clear what the effect of this would be. As stated in both our answers to Question 12 and above in relation to Option 1, we strongly oppose both outcomes and so similarly oppose it here.

150. As stated above in our answer to Question 12, we consider Option 2 for amending section 3 to be closer to the current position, therefore having less of an impact if reflected in section 6. As the government explains, the effect of this would be that only where there is ambiguity in primary legislation would a public authority have to choose how to give effect to it and be under an obligation to choose a rights-compliant approach. This is also close to the current position.

151. However, we state again our concern that the main change in section 3 is that this interpretive duty is in respect of the rights as contained in the future BoR, rather than the ECHR, and the risk of divergence being created between the two. Reflecting this in section 6 would therefore mean that public bodies are similarly under an obligation to act compatibly with the BoR, not Convention rights. The risk of divergence already discussed therefore creates a range of scenarios in which public authorities, while acting in compliance with the BoR, may be acting incompatibly with the ECHR. We therefore cannot support this proposal.

Provision of training

152. We acknowledge the government's concern that public bodies – such as local authorities, health and social care providers or police – can struggle to apply section 6 in order to determine what their obligations are. This is especially the case where primary legislation is vague or ambiguous. However, the feedback we have received from members who work within or with public bodies is that this is largely the result of a lack of understanding. The solution is therefore not to roll back on the human rights obligations of public bodies, but to provide effective training to support them to understand their obligations and apply them in practice.

153. We therefore recommend that government assess training needs of public bodies, including what is currently available and what additional training is needed. It should then consider how it can provide the necessary training or support others to do so. Training should be specific to the context of the public body, delivered by a legal professional with specific expertise and address the importance of human rights obligations and where they may arise in practice.

Extraterritorial jurisdiction

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

154. The Law Society has consistently held the current position towards extraterritorial application of human rights under the HRA and ECHR, including in situations of armed conflict, to be the correct one. We have repeated our concerns about attempts to reduce legal responsibilities and therefore the rule of law on the battlefield during the passage of the Overseas Operations (Service Personnel and Veterans) Act⁶⁹ and to the IHRAR.⁷⁰

155. In our response to the IHRAR call for evidence, we reviewed in detail the legal position on extraterritoriality and explained why the position arrived at through decades of case law is appropriate. Through decades of case law, the ECtHR has provided careful and principled analysis, arriving at a well-balanced position that accommodates the competing interests of upholding human rights protections without stretching the Convention beyond its limits. This can be summarised as below.

156. Firstly, the ECtHR has been clear that jurisdiction is primarily territorial.⁷¹ This fundamental principle remains intact today. Where exceptions exist, these are rightly restricted, and their limits have been clarified.

⁶⁹ See: <https://www.lawsociety.org.uk/topics/human-rights/overseas-operations-service-personnel-and-veterans-act>

⁷⁰ See: <https://www.lawsociety.org.uk/campaigns/consultation-responses/independent-human-rights-act-review-call-for-evidence-law-society-response>

⁷¹ Bankovic & Ors v Belgium & Ors, (admissibility) [GC] Application no. 52207/99 [2001] ECHR 890

157. These exceptions arise in essentially one of two ways: first of all, on the basis of the power or control that may be exercised by the member state over an individual person; and/or secondly, on the basis of the control exercised by the member state over a foreign territory. The exceptions to the territoriality principle were examined authoritatively in the case of *Al-Skeini v UK*.⁷²

Power and control over an individual

158. Jurisdiction over an individual arises where the state, through its agents, is exercising control and authority over that person. This most commonly arises in the context of detention. Other examples of where this jurisdiction has been established include capture and detention of an individual by security forces or officials,⁷³ detention in a prison controlled by a foreign state,⁷⁴ and seizure of a foreign vessel.⁷⁵ This jurisdiction is appropriate as it is the result of the state's control and authority over a person or property, thereby assuming responsibility for them.

159. Even where this jurisdiction is established, it is important to emphasise that ECHR rights in this situation can be "divided and tailored"⁷⁶ so that the member state is only obliged to secure those rights that are relevant, not the full panoply of rights that would apply were the person to be inside the territory of the member state. This is a practical, measured acceptance of the realities in which this type of jurisdiction can arise and avoids a situation whereby rights are applied in an 'all or nothing' manner. It is a proportionate and pragmatic approach.

Power and control over a territory

160. That Convention rights also apply to a member state's activities overseas when a member state exercises effective control of a geographical area outside of its national territory is not a recent invention.⁷⁷ However, more recent cases have tested the limits of this principle.

161. Whether a sufficient level of control over an area exists to amount to jurisdiction is a question of fact. Key indicators of this would be the strength of military presence in the area and/or the level of military, economic and political support for the local administration.⁷⁸ Where this jurisdiction is established, it entails the obligation to ensure the full range of Convention rights.⁷⁹

⁷² *Al-Skeini v. United Kingdom*, [GC] App. No. 55721/07 [2011]

⁷³ *Ocalan v Turkey*, App. 46221/99, ECHR 2005; *Issa and Others v Turkey*, App. 31821/96, ECHR 2004

⁷⁴ *Al-Saadoon and Mufdhi v the United Kingdom*, App. 61498/08, ECHR 2009

⁷⁵ *Medvedyev v France* App. 3394/03, ECHR 2010

⁷⁶ *Al-Skeini v. United Kingdom*, App. 55721/07 ECHR 2011, para. 137

⁷⁷ The principle of jurisdiction by virtue of exercising power and control over a territory was first established in *Loizidou v Turkey*, App. 15318/89, ECHR 1995

⁷⁸ *Al-Skeini v United Kingdom*, App. 55721/07, ECHR 2011 para. 139

⁷⁹ *Al-Skeini v United Kingdom*, App. 55721/07, ECHR 2011 para. 138

162. That the full range of Convention rights apply in this situation is appropriate, as it requires a substantial level of control to exist akin to what would be exercised by a sovereign government. The level of control required means that it is rarer that this will be established, with recent examples including the UK's intervention in Afghanistan and Iraq, where the UK had taken on responsibility for performing a significant amount of state functions.

163. The recent case of *Georgia v Russia (II)*⁸⁰ has further imposed additional limits to this jurisdiction. This made clear that the protections of the ECHR do not apply outside the territory of a State to military operations occurring during the “active phase of hostilities” in an international armed conflict. This was found by the ECtHR Grand Chamber in recognition that “*in a context of chaos*” there is neither “*State agent authority and control*” over individuals nor “*effective control*” over an area.⁸¹ The only exceptions made to this were where an individual is detained – with Russia being held responsible for several ECHR violations with respect to detainees⁸² - and in respect of the procedural obligation to investigate ECHR violations.

Interaction with international humanitarian law

164. It is sometimes argued that in the context of armed conflicts, only humanitarian law should apply. However, it is the consistent approach of international courts that in such contexts it is not an ‘either, or’ decision. Human rights law is interpreted through humanitarian law.

165. The compatibility of these two branches was confirmed in *Hassan v UK*, which concerned a suspected insurgent whose detention amounted to internment. While internment is not a specified ground for detention under article 5 ECHR, the ECtHR effectively read down article 5 to enable prisoner insurgents to be detained lawfully as long as they were detained in accordance with the Geneva Conventions. They held that detention that complied with the rules (including procedural safeguards) of international humanitarian law would not be arbitrary. This therefore provided a principled and pragmatic approach to reconciling human rights and humanitarian law, taking into account the realities of armed conflicts.

A measured approach

166. The restrictions placed on jurisdiction overall and to each of the exceptions demonstrates that the ECtHR is careful to show due deference to the need to ensure limited judicial encroachment on the battlefield. It is notable that, by comparison to other international courts and bodies, including those charged with the authoritative interpretation of treaty obligations binding on the UK (such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child),

⁸⁰ *Georgia v Russia (II)* [GC], No. 38263/08 (ECtHR, 21 January 2021)

⁸¹ *Ibid.*, at para 137

⁸² *Ibid.*, at paras 239 and 269-281

the ECtHR's jurisprudence offers a restrictive view of the extraterritorial applicability of human rights.⁸³

167. A similarly measured approach been shown in domestic courts. This is exemplified in the in the well-known case of *Smith & Ors v Ministry of Defence*.⁸⁴ Here, the question concerned the nature of the legal obligation owed by the Ministry of Defence (MoD) under the ECHR to soldiers that had been killed or injured as a consequence of what their families alleged had been the provision of ineffective tanks and/or military equipment.

168. The MoD argued that it did not have a positive obligation to protect the soldiers under article 2 of the ECHR, because they were outside the jurisdiction of the UK while on overseas operations. Applying *Al-Skeini*, the Supreme Court disagreed. The UK had exercised almost complete control over the soldiers and their activities and therefore the soldiers fell within the UK's jurisdiction as a consequence of the principle of state authority and control over the soldiers.

169. However, the Supreme Court was extremely careful to recognise the very wide margin of appreciation to be given to the state in such circumstances. They did not rule on whether there had in fact been a violation and simply ruled that the case could go to trial. The MoD subsequently settled the claims. The Court said:

*“The Court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the Convention”.*⁸⁵

Impact of limiting extraterritorial application

170. The Law Society does not believe that there is a convincing case for changing the current position. As *Smith & Ors* shows, the HRA not only provides protections for those local to the area but also for UK armed services personnel and other state agents who are deployed or stationed there. Limiting extraterritorial application of the HRA risks impacting on our own citizens and preventing them from accessing the protection of the court, should their rights be infringed. In our opinion, it is unlikely that such impact could be avoided, as even if an amendment was made that attempted to maintain protections only for state agents (excluding local inhabitants), this would likely be in breach of the prohibition of discrimination.

⁸³ For example: the UN Human Rights Committee's General Comment No. 36 on the right to life states jurisdiction is derived from the state's direct and foreseeable impact on the right; the African Commission on Human and Peoples' Rights' General Comment No. 3 on the right to life determines jurisdiction in broadly similar terms to the UN Human Rights Committee; the Inter-American Commission on Human Rights' has shown their focus for the purposes of jurisdiction to be on establishing a causal link.

⁸⁴ *Smith and Others v Ministry of Defence* [2013] UKSC 41

⁸⁵ *Ibid.*, para 72

171. Beyond this, attempting to limit responsibility for acts of public authorities taking place abroad undermines the object and purpose of the ECHR to promote respect and protection for human rights. The relevance of this as a significant consideration in questions of extraterritorial jurisdiction was first acknowledged by the ECtHR in *Cyprus v Turkey*, where the principle of extraterritorial application was established in part with reference to “*the terms used and the purpose of the Convention as a whole*”.⁸⁶ Reference to the object and purpose of the Convention has continued to be evident in successive ECtHR judgments and, as a signatory to the Convention, is one that the UK is committed to.

172. Amendment of the HRA to limit extraterritorial application would have further perverse consequences for the advancement of human rights and for the rule of law overall. It would create a situation whereby public authorities are bound by human rights obligations at home, but free to violate them elsewhere. In the words of Judge Bonello in his concurring opinion in *Al-Skeini*:

*“...[a]ny state that worships fundamental rights on its own territory but then feels free to make a mockery of them anywhere else does not [...] belong to the comity of nations for which the supremacy of human rights is both mission and clarion call.”*⁸⁷

Amendment would risk creating impunity for potentially serious human rights violations committed by UK state actors domestically, and therefore increase the likelihood of the UK being found to have breached the ECHR. Ultimately this will damage the international reputation of the UK as a champion of human rights and the rule of law and will undermine our ability to hold other states to account for human rights abuses.

Independent judicial oversight of detention decisions

173. As an alternative to restricting the application of the ECHR overseas, some commentators have proposed the creation of a system of independent judicial oversight of detention decisions of suspected insurgents. For example, in his written evidence to the Overseas Operations Bill Committee, former Command Legal Adviser for the Iraq War, Reverend Nicholas Mercer called for such a system:

*“[Make] provision [...] for a UK Judge to oversee detention and interrogation in future overseas operations. 80% of criminal cases submitted to the ICC related to detention and interrogation. The provision of a Judge alone could prevent the vast majority of future cases. The oversight by a civilian Judge was used by the AUS Army on the INTERFET deployment and resulted in a commendation from the UN.”*⁸⁸

⁸⁶ *Cyprus v. Turkey*, Apps. 6780/74 and 6950/75 ECHR 1975

⁸⁷ *Al-Skeini v United Kingdom*, App. 55721/07 ECHR 2011, Concurring opinion of Judge Bonello, para. 18

⁸⁸ Written evidence of former Command Legal Adviser for the Iraq War, Revd N. Mercer to the Overseas Operations Bill Committee. Available at:

<https://publications.parliament.uk/pa/cm5801/cmpublic/OverseasOperations/memo/OOB05.htm>

174. If such a system could be devised, this would protect both detainees and soldiers in future conflicts and would very significantly reduce the volume of civil claims being brought against the MoD in the aftermath.

Qualified and limited rights

Question 23: To what extent has the application of the principle of ‘proportionality’ given rise to problems, in practice, under the Human Rights Act? We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

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

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

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

175. We do not agree with either of the options put forward in these proposals, or that there is a need to address the way in which the courts apply the principle of proportionality.
176. The principle of proportionality is crucial to ensuring that the rights within the HRA are capable of being applied in an appropriately balanced way. It acknowledges that interferences with qualified or limited rights are sometimes necessary to balance individual rights against the needs and interests of the wider public and provides a pragmatic framework for weighing this. In doing so, it maintains an adequate level of protection for individual rights by requiring that, where an interference is unavoidable, it is nevertheless done in a way that goes no further than necessary, thereby limiting the impact.
177. We do not believe that the government has properly evidenced that there is a need for change. The courts are sensitive to the limits of their competencies. This includes acknowledging that parliament is better placed and has greater democratic legitimacy to assess what is necessary in a democratic society or in the public interest. They diligently avoid substituting their own view in this regard, even extending to refusing to review the merits of such a decision from parliament when necessary. For example, in the noted case of *A v Secretary of State for the Home Department*⁸⁹ the

⁸⁹ *A and Others v Secretary of State for the Home Department* [2004] UKHL 56

courts refused to be drawn on the issue of whether or not a public emergency existed for the purposes of section 15 HRA.

178. Furthermore, the recent Supreme Court decision in *R (SC) v Secretary of State for Work and Pensions*⁹⁰ deserves special attention for its reasoning in respect of the weight to be given to parliament's assessment when limiting rights. This case concerned the restriction of child tax credit to an amount calculated only on the basis of a maximum of two children. The judgment is notable for its extensive consideration of the reliance to be placed by the courts on parliamentary debates and other parliamentary material when considering whether primary legislation is compatible with Convention rights.

179. In this respect, it stated that "parliament's assessment that the difference in treatment is justified should be treated by the courts with the greatest respect"⁹¹ and that parliament was the best judge of "how far the welfare system should go to protect families against the vicissitudes of life".⁹² In considering the use of parliamentary materials as evidence of parliament's intent, it was concluded that "the courts should go no further than ascertaining whether matters relevant to compatibility were raised during the legislative process"⁹³ and "must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility".⁹⁴

180. Ultimately, it held that decisions concerning the extent of welfare provision, even where this leads to an interference with Convention rights, are to be left to parliament:

*"The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies [...] There is no basis, consistent with the separation of powers under our constitution, on which the courts could properly overturn Parliament's judgment that the measure was an appropriate means of achieving its aims."*⁹⁵

181. We therefore do not believe that the proposals are necessary or justified. Balancing rights – as our courts are experts in doing – is highly dependent on the facts and context of the case. A range of factors are taken into account, including the extent to which both rights are engaged, the harm that has resulted and wider public interests. It is therefore difficult, and in many cases undesirable and excessive, for Government

⁹⁰ [2021] UKSC 26

⁹¹ *Ibid.*, para 203

⁹² *Ibid.*, para 206

⁹³ *Ibid.*, para 183

⁹⁴ *Ibid.*, para 184

⁹⁵ *Ibid.*, paras 208-209

to seek to impose a generic framework that will be unlikely to allow the nuance required.

182. Furthermore, if the proposals were to be introduced, we would be concerned that it could result in reduced protections for minorities. Protection through the courts for individual rights is a crucial safeguard against the risk of majoritarian excesses which is present in all democratic systems. In times of public or political pressure, the individual rights of marginalised and vulnerable people must nevertheless be protected with appropriate legal frameworks in place for weighing competing considerations. We have seen examples of this in the context of the COVID-19 pandemic, with disabled people raising concerns that their health and safety must be considered even when responding to an overwhelming public health emergency. In the pandemic context, the HRA framework has proved an effective and pragmatic tool for analysing the appropriateness of emergency measures.

Deportations in the public interest

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

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

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

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.

183. We strongly oppose all three options put forward in this consultation. We are very concerned by these proposals and the direction towards removing human rights that they represent. The effect would be to strip individual rights on a blanket basis (Option 1 and 2) and they appear to prevent any appeal except in narrow circumstances (Option 3). Denying fundamental rights to a specific group of people or otherwise removing the ability to challenge decisions affecting their rights undermines core principles such as the universality of human rights, the provisions of article 14 of the ECHR, equality before the law in the common law and access to justice. No rights-respecting nation should be prepared to take forward these suggestions.

184. Such a drastic and discriminatory reduction in human rights protections would almost certainly result in a substantial number of cases being taken to the ECtHR and would very likely be incompatible with the ECHR.

185. We also do not consider such measures to be necessary, as foreign offenders can already be removed from the UK in the public interest even where there are arguments against this under qualified rights. Section 117C of the Nationality and Immigration Act 2002 creates a presumption that deportations of foreign national offenders are in the public interest, thereby creating a starting point in law that – absent any sufficiently strong reason to the contrary – the deportation should take place. This is a stringent presumption and Law Society members report that, in practice, it is difficult to displace.
186. The same provision sets out the test for rebutting the presumption. Most notably, this states that even where the person has a partner or child (thus creating a ground for a claim under the article 8 right to family life), they must prove that the effect of the removal would be “unduly harsh”. Therefore, simply being in a relationship or having a child is not enough for them to succeed. Again, the “unduly harsh” threshold is in practice a stringent one.
187. The courts are sensitive to the public interest and concern for the deportation of foreign criminals. They factor these considerations into a proportionality assessment and give them the appropriate weight, often resulting in the claimant being unsuccessful. For example, in *Hesham Ali (Iraq) v SSHD [2016]*, Lord Wilson commented that evidence of public concern for an area of law can add to an analysis of where the public interest lies, and that “*can strengthen the case for concluding that interference with a person’s rights under article 8 by reason of his deportation is justified by a pressing social need.*”⁹⁶ This comment was recently noted by the Supreme Court in *Sanambar v SSHD*⁹⁷ in a judgment which found that the interference with the appellant’s private and family life was outweighed by the public interest factor.
188. We note here that, where claims from foreign national offenders against being removed from the UK are successful, this is often the result of inactivity of the Home Office. Experienced solicitors have reported that there are common instances of foreign national offenders being released following their sentence rather than taken to immigration detention, only to then face deportation years later. In this interim, the individual is building a life, home, family and other relationships. The delay therefore means that their claims under the article 8 right to private and family life have solidified further, making removal more difficult. It is therefore likely that existing processes relating to removal of foreign national offenders can be improved in ways that would better serve the government’s aims.
189. Lastly, we are concerned by the rhetoric that surrounds these proposals and reject the allegation that deportations are “frustrated” by human rights claims. This denies the right of everyone to legal representation and access to justice, confuses lawyers’ interests with those of their clients and implies that solicitors are acting against the public interest when representing clients in removals cases. When representing

⁹⁶ *Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60*, para 70

⁹⁷ *Sanambar v Secretary of State for the Home Department [2021] UKSC 30*

claimants in these cases solicitors are bound, as in every case, by their professional duties to act in the best interests of their client. To insinuate that by doing so they are acting against the public interest is deeply damaging to the reputation of the legal profession and to the vital role they play in upholding the rule of law.

Illegal and irregular migration

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

190. We are concerned by the government's characterisation of Convention rights, either in the ECHR or HRA, as "impediments".

191. As seen within this consultation, the Nationality and Borders Bill and the Judicial Review and Courts Bill, there are several measures either being considered or progressed which would limit the ability of asylum seekers to access justice. This is particularly concerning where this is achieved through redefining our obligations under international law. This again has repercussions for the UK's international reputation as one that implements international agreements in good faith and a trusted partner which participates in global efforts.

Remedies and the wider public interest

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

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

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

192. The Law Society does not believe that the proposal to include a set of factors for consideration when awarding damages to be necessary. The domestic courts are already required by the HRA to consider a number of factors when considering whether damages should be awarded and, if so, how much. Case law clearly shows that the domestic courts already consider factors (a) to (c) set out in this question. Similarly, the HRA already provides protection for public authorities against awards of damages in circumstances where the public authority could not have acted differently because of primary legislation.

193. Unlike in common law claims, there is no absolute or automatic right to receive damages under the HRA.⁹⁸ There are also existing restrictions on awarding damages. Firstly, only a court that has the power to award damages in civil proceedings may do so for HRA claims.⁹⁹ They may also only award damages where it is necessary to afford just satisfaction. This means that they are a secondary consideration and only awarded where another remedy is unavailable or insufficient.¹⁰⁰

194. Although domestic courts are required to take into account the principles applied by the ECtHR in awarding compensation when deciding whether to award damages and the amount of such an award, they are not ultimately bound by these principles.¹⁰¹

195. The domestic courts may also take other relevant considerations into account.¹⁰² As stated above, the considerations that the court does take into account are already the same or similar to those outlined in the proposal and we see no benefit to including these in a BoR.

"The impact on the provision of public services"

196. Section 8(3)(b) of the HRA requires domestic courts to consider the consequences of any decision in relation to the unlawful act. The Court of Appeal noted in *Anufrijeva* that, in considering whether to award compensation, and, if so, how much, there is a balance to be struck between the interests of the victim and those of the public as a whole.¹⁰³ The Court of Appeal stated:

*"There are good reasons why, where the breach [of a positive obligation under Article 8 to provide support] arises from maladministration, in those cases where an award of damages is appropriate, the scale of such damages should be modest. The cost of supporting those in need falls on society as a whole. Resources are limited and payments of substantial damages will deplete the resources available for other needs of the public including primary care."*¹⁰⁴

197. Similarly, the Administrative Court has noted that:

"...the court must not ignore the consequences of awards under section 8(3) for public authorities generally and society as a whole. On a simplistic view of local authority accounting, the larger the award to the claimants under section 8 the less there will be for the London Borough of Enfield to spend on providing social service facilities for the many others in need of care within the borough. Even if the money does not come out

⁹⁸ *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, para 55

⁹⁹ Section 8(2) of the HRA

¹⁰⁰ Section 8(3) of the HRA

¹⁰¹ Section 8(4) of the HRA

¹⁰² *Alseran v Ministry of Defence* [2017] EWGC 3289 (QB), para 932

¹⁰³ *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, para 56

¹⁰⁴ *Ibid*, para 75

of the social services budget, it will have to come from some other service's budget and/or from Council taxpayers."¹⁰⁵

198. Additionally, the HRA protects against the possibility of double recovery through section 8(3)(a). If the claimant has already received damages or another remedy which affords them "just satisfaction" through another route (for example, damages for a private law wrong), no award of damages should be made.¹⁰⁶ This is similar to the approach of the ECtHR, which has often found that the award of compensation is unnecessary as just satisfaction has already been achieved by the finding of a violation of the Convention. This was observed by the House of Lords that "[T]he routine treatment of a finding of violation as, in itself, just satisfaction for the violation found reflects the point already made that the focus of the Convention is on the protection of human rights and not the award of compensation."¹⁰⁷

199. Similarly, the requirement under the HRA only to grant remedies which are "appropriate" has been interpreted by the domestic courts to mean that the remedy must effectively address the grievance - in many cases, this can mean that remedies other than damages are more appropriate.¹⁰⁸

"The extent to which the statutory obligation has been discharged"

200. We do not believe it is clear what is meant by this. To the extent that we understand this to mean that a public body has fulfilled its obligation under the HRA upon becoming aware of a violation, we believe this to also be covered by section 8(3).

201. Section 8(3) HRA requires domestic courts to take account of all the circumstances of the case. These circumstances can include whether or not the breaches of the Convention articles have been remedied and/or acknowledged. For example, the Administrative Court has noted that if a public body has become aware of a human rights violation but relatively promptly acknowledges this, provides an explanation, an apology and an assurance that steps have been taken to ensure that the same mistake will not happen again, it may well be the case that no damages are required to afford "just satisfaction".¹⁰⁹

"The extent of the breach"

202. The courts again already consider the extent of any breach as part of their consideration of all the circumstances of the case. This has been characterised in the courts as considering the "scale and manner of the violation"¹¹⁰ or the nature of the breach.¹¹¹ This means that a more serious violation will attract a higher award of damages, and a more minor one a lower or even no award of damages. For example,

¹⁰⁵ R (Bernard) v London Borough of Enfield [2002] EWHC (Admin) 2282, para 58

¹⁰⁶ See Dobson v Thames Water Utilities [2011] EWHC 3253 (TCC)

¹⁰⁷ R v Secretary of State for the Home Department, ex p Greenfield [2005] UKHL 14, para 9

¹⁰⁸ R (M) v Secretary of State for the Home Department [2011] EWHC 3667 (Admin)

¹⁰⁹ R (Bernard) v London Borough of Enfield [2002] EWHC (Admin) 2282, paras 39 - 40

¹¹⁰ Anufrijeva v Southwark LBC [2003] EWCA Civ 1406, para 67

¹¹¹ Re P [2007] EWCA Civ 2

in *Re P*, it was found that the relevant breach was a procedural failure that could not be labelled as significant. As a result, it was held to be unnecessary to award any remedy other than a declaration that there has been a violation of the applicant's rights.

203. It is also relevant here that exemplary damages are not awarded under the HRA,¹¹² and so the approach towards damages is about ensuring the affected person receives an effective remedy – no more and no less.

"Where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation"

204. Again, this is already covered, and protected against, in the HRA. An award of damages can only be made following the court's finding that a public body acted unlawfully, therefore contravening their obligations under section 6(1). However, section 6(2) provides an exception to public body liability where it is giving effect to primary legislation that either explicitly requires them to act in a way that contravenes human rights obligations or cannot be read or given effect to in a way that is compatible with Convention rights. In this situation, damages could not be awarded by virtue of the exception in section 6(2).

205. The only difference to the current approach reflected in the wording of this factor is in relation to the proposal made in this consultation to extend exemptions to public body liability to cover all instances where they are giving effect to primary legislation. This would therefore prevent the public body from being liable for an award of damages where they could have acted in a way that is compliant with human rights obligations when giving effect to primary legislation but did not. As stated above, we do not agree with that proposal and so similarly do not agree with the extension of an exemption from an award of damages in the same circumstances.

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

Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this?

Please provide reasons.

Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or

Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

206. We do not support either proposal outlined in this question. Both would be unnecessary and, in respect of Option 2, would have unintended practical

¹¹² *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, para 55

consequences that would increase burdens on the court and therefore costs to both parties, at the expense of access to justice.

Option 1

207. We consider this proposal to be unnecessary as damages may already be – and, in practice, are – reduced or removed by the domestic courts under the HRA on account of the applicant's conduct in the circumstances of the claim.
208. With reference to the points made above in Question 26, there is no right to damages under the HRA and the courts have both a broad discretion over which remedies they award and limitations placed on when damages, specifically, can be awarded. In particular, the courts are expressly required to take into account all of the circumstances of the case when deciding whether to award damages and, if so, how much.
209. In practice, this requirement has already led the courts to take into account the conduct of the claimant/applicant as part of the circumstances of the case when assessing damages. As is noted in the Government's proposals, the Court of Appeal has acknowledged that the complainant's own responsibility for what has occurred can be taken into account when assessing remedies including damages.¹¹³ In a separate case, the Court of Appeal has also considered the conduct of the applicant when deciding that damages were not payable at all.¹¹⁴ The Administrative Court has also declined to award damages when taking into account the claimant's "previous misbehaviour".¹¹⁵
210. This is further in keeping with the ECtHR's approach to awarding damages, which takes into account the conduct of the applicant when deciding an award of damages.¹¹⁶

Option 2

211. Option 2 is more concerning, going far beyond current practice and what is outlined in Option 1. It seemingly contains no limits to what conduct can be considered, which raises significant questions about the fairness of the proposal.
212. For example, it does not indicate whether conduct would have to be of a sufficiently serious nature or how this would be determined. It appears there are no time constraints, so could capture acts committed as an adolescent or a significant period before the circumstances of the claim. There are also no exceptions for 'bad' conduct committed as the result of a period of severe mental ill health or committed under duress. This latter point in particular carries specific concerns in the context of modern slavery, where victims are often subjected to criminal exploitation (49% according to data from the National Referral Mechanism).¹¹⁷ The lack of constraints

¹¹³Anufrijeva v Southwark LBC [2003] EWCA Civ 1406, para 65

¹¹⁴Re P [2007] EWCA Civ 2

¹¹⁵R (Richards) v Secretary of State for the Home Department [2004] EWHC (Admin) 93, para 139

¹¹⁶Johnson v UK Judgment of 24 October 1997 [1998] HRCd 41, para 77

¹¹⁷Home Office, *Modern Slavery: National Referral Mechanism and Duty to Notify Statistics* (18 March 2021), p.5. Available at:

further do not acknowledge the context of inequality of outcomes in relation to race and the criminal justice system.

213. The proposal therefore risks having a disproportionate impact on the most marginalised and vulnerable in society. It risks both an invasion of privacy and having a chilling effect on justice, as most people would be reluctant to have their private lives scrutinised and discussed in open court and may therefore be reluctant to bring even a claim with a high chance of success.
214. Even if limitations were put in place, the practical implications of a requirement to consider any and all conduct make the proposal both unworkable and costly. It potentially adds a further stage of detailed fact-finding where the considerations in deciding a process would be vast. Where would the burden of proof lie? If with the public authority, this would require them to compile evidence, therefore taking time and resources. At which stage would evidence be provided to the court? Would this be in writing or in an oral hearing, and would the claimant have a right of reply or even cross-examination? It would therefore be impossible to introduce this proposal without increasing burdens on the court and costs for both parties.
215. Lastly, if used too broadly, this proposal would exceed the approach to damages under the ECHR and used by the ECtHR. It could therefore possibly have implications for the article 13 right to an effective remedy, leading to claimants appealing to the ECtHR.

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

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

216. While we agree that the process outlined in the consultation document and draft clause for responding to adverse ECtHR judgments is appropriate and ensures parliamentary oversight, we do not believe its inclusion to be necessary or desirable.
217. We support those elements of the proposal that would see ministers required to lay notice to parliament of an adverse judgment and expressly give them the power to lay a motion in order to facilitate debate. The role of parliament in deciding how best to respond to an adverse judgment is an important one, especially where this requires the amendment of primary legislation, and their inclusion is to be encouraged.
218. However, these are powers that ministers already possess and there is nothing to prevent them taking the actions outlined. While formalising a process in statute could offer greater protection for parliament's role, it is not strictly necessary. We consider it

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970995/modern-slavery-national-referral-mechanism-statistics-end-year-summary-2020-hosb0821.pdf

appropriate within the bounds of the nature of the UK's uncodified constitution to refrain from putting such a process on a statutory footing and to instead establish consistent practice such that a constitutional convention emerges. This would be similar to the practice that has been established following a domestic courts' issuing of a declaration of incompatibility, where there is analysis of a convention becoming solidified of requiring parliament's response.¹¹⁸

219. The danger in formalising this process in statute lies in the proposed sections 1(a) and (b). This states that an adverse judgment from the ECtHR is not automatically a part of UK law and cannot affect the right of parliament to legislate or otherwise affect the constitutional principle of parliamentary sovereignty. While this is an accurate statement of UK constitutional law, we are concerned about how this would be received by other countries and particularly by other countries with weaker records of respecting rights. Firstly, it could be seen as demonstrating an intent to refuse to follow adverse rulings from the ECtHR, thereby damaging our reputation as a country that respects the international rule of law, and the rule of law in general. However, it could also encourage other countries keen to avoid international accountability to pass similar, but stronger, provisions. For example, Russia passed a law in 2015 which enables the Duma (Russia's lower house of parliament) to overrule judgements from the ECtHR. Establishing these principles in statute could then inspire other countries to pass defensive laws seeking to immunise themselves from decisions of international courts.

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.

220. We have highlighted throughout our response to this consultation where we consider there to be particular financial costs as a result of the proposals. In particular, we expect that a large number of the proposals would lead to increased costs for courts and both parties to a claim as a result of increasing the complexity of court procedures, the likelihood of a rise in litigation due to the creation of legal uncertainty and as a consequence of more cases proceeding to the ECtHR. Each of these impacts has a detrimental effect on the ability to access justice and could in many cases prove prohibitive to a person whose rights have been violated from being able to enforce their 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? Please give reasons and supply evidence as appropriate.

¹¹⁸ J. King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' (2015). Available at: <https://discovery.ucl.ac.uk/id/eprint/10072227/>

221. The proposed reforms contained in this consultation will have far-reaching impact for anyone seeking to enforce their rights and access human rights protections. Human rights violations are disproportionately experienced by those with protected characteristics or who are otherwise marginalised or vulnerable. There is a particular danger that some of the planned restrictions will impact on some groups rather than others and it is therefore imperative that proposed measures should be accompanied by a detailed Equality Impact Assessment that also includes an assessment in relation to article 14 of the ECHR itself.

222. We have outlined in our response at several points where proposals will have specific disproportionate effects on those with protected characteristics. We summarise and expand on these below; however, this is by no means an exhaustive list and the answers provided in response to this question are no substitute for a comprehensive Equality Impact Assessment.

223. Impacts of the proposals on those with protected characteristics include:

- **Permission stage** – as people with protected characteristics disproportionately experience human rights abuses, reducing the accessibility of the courts through the introduction of a permission stage will likewise have a disproportionate effect. It is acknowledged that people with protected characteristics already experience barriers in accessing justice and these will likely be exacerbated.
- **Limiting positive obligations** – this will have a particular impact on those who are reliant on or otherwise regularly use public services, such as disabled people, the elderly and children.
- **Introducing additional protections for freedom of expression** – these proposals could make it harder to take action against hate speech which may disproportionately affect those with protected characteristics.
- **Removing or amending section 3** – section 3 has been instrumental in recognising and protecting the rights of those with protected characteristics, such as on the grounds of sexual orientation and religion and belief.
- **Reducing the availability of rights to foreign national offenders** – these proposals directly affect people with protected characteristics, namely on the basis of race and ethnicity, removing protections on a blanket basis and undermining equality before the law.
- **Proportionality** – these proposals could impact those with protected characteristics by providing less protection against majoritarian excesses. This could specifically impact racial, ethnic and religious minorities, specifically in the context of asylum and migration or terrorism prevention.

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

224. We have outlined in our response where negative impacts can be mitigated. In many cases, we consider that the negative impacts cannot be avoided and as a result, where these are not justified by the government's aims or evidence, we believe the only course of action is to decline to take these proposals forward.

225. It is impossible comprehensively to cover all possible negative impacts in this response. We therefore again reiterate that it is imperative that full equalities and costs impact assessments are conducted before further steps are taken.