Government Consultation to Reform the Human Rights Act 1998

Call for Submissions - Response

March 2022
Table of Contents

Introduction ............................................................................................................................................... 4
Executive Summary ............................................................................................................................. 5

Full Report

I. Respecting our common law traditions and strengthening the role of the Supreme Court ................................................................................................................................................................................................. 32
   Interpretation of Convention rights: section 2 of the Human Rights Act ............................................. 32
      Question 1 ....................................................................................................................................... 32
   The position of the Supreme Court ..................................................................................................... 37
      Question 2 ....................................................................................................................................... 37
   Trial by Jury ......................................................................................................................................... 44
      Question 3 ....................................................................................................................................... 44

II. Restoring a sharper focus on protecting fundamental rights ................................................................. 71
   A permission stage for human rights claims .......................................................................................... 71
      Question 8 ....................................................................................................................................... 71
      Question 9 ....................................................................................................................................... 85
   Judicial Remedies: section 8 of the Human Rights Act ........................................................................ 90
      Question 10 ..................................................................................................................................... 90
   Positive obligations ............................................................................................................................... 91
      Question 11 ..................................................................................................................................... 91

III. Preventing the incremental expansion of rights without proper democratic oversight ....................... 99
   Respecting the will of Parliament: section 3 of the Human Rights Act .................................................. 99
      Question 12 ..................................................................................................................................... 99
      Question 13 ..................................................................................................................................... 108
      Question 14 ..................................................................................................................................... 109
   When legislation is incompatible with the Convention rights: sections 4 and 10 of the Human Rights Act ......................................................................................................................................................... 111
      Declarations of incompatibility .......................................................................................................... 111
      Question 15 ....................................................................................................................................... 111
      Question 16 ....................................................................................................................................... 115
   Remedial orders ..................................................................................................................................... 117
      Question 17 ....................................................................................................................................... 117
   Statement of Compatibility – Section 19 of the Human Rights Act .................................................... 118
      Question 18 ....................................................................................................................................... 118
      Question 19 ....................................................................................................................................... 121
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public authorities: section 6 of the Human Rights Act</td>
<td>126</td>
</tr>
<tr>
<td>Question 20</td>
<td>126</td>
</tr>
<tr>
<td>Question 21</td>
<td>137</td>
</tr>
<tr>
<td>Extraterritorial jurisdiction</td>
<td>144</td>
</tr>
<tr>
<td>Question 22</td>
<td>144</td>
</tr>
<tr>
<td>Qualified and limited rights</td>
<td>158</td>
</tr>
<tr>
<td>Question 23</td>
<td>158</td>
</tr>
<tr>
<td>Deportations in the public interest</td>
<td>168</td>
</tr>
<tr>
<td>Question 24</td>
<td>168</td>
</tr>
<tr>
<td>Illegal and irregular migration</td>
<td>194</td>
</tr>
<tr>
<td>Question 25</td>
<td>194</td>
</tr>
<tr>
<td>Remedies and the wider public interest</td>
<td>205</td>
</tr>
<tr>
<td>Question 26</td>
<td>205</td>
</tr>
<tr>
<td><strong>IV. Emphasising the role of responsibilities within the human rights framework</strong></td>
<td>212</td>
</tr>
<tr>
<td>Question 27</td>
<td>212</td>
</tr>
<tr>
<td><strong>V. Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role</strong></td>
<td>218</td>
</tr>
<tr>
<td>Question 28</td>
<td>218</td>
</tr>
</tbody>
</table>
Introduction

1. This evidence is provided by the Centre for Public Law (CPL) a research centre based in the Faculty of Law at the University of Cambridge.

2. The following members and associates have contributed to this response:
   Alexandra Allen-Franks, Guy Baldwin, Professor John Bell QC, FBA, FRSA, Tim Cochrane, Dr Dominic de Cogan, Autumn Ellis, Professor David Feldman QC, FBA, FRSA, Rebecca Freund, Matilda Gillis, Bethan Hall, Dr Kirsty Hughes, Nabil Khabirpour, Nick Kilford, Vandita Khanna, Dr Stevie Martin, Kate Ollerenshaw, Dr Stephanie Palmer, Elizabeth Paradis, Darren Peterson, Dr Edmund Robinson, Diego Romero-Rivero, Dr Andrew Sanger, Andreas Samartzis, Aradhya Sethia, Dr Stefan Theil and Dr Alex Williams.

3. This evidence draws on their knowledge of the Human Rights Act 1998 (HRA), the European Convention on Human Rights, Constitutional and Administrative law, International law, as well as their insights into comparative law. We have also consulted with, and benefitted from the expertise of Professor Nicky Padfield QC, Dr Jonathan Rogers and Dr Findlay Stark in respect of the proposal to introduce a qualified right to trial by jury.

4. Producing this response was a significant undertaking. CPL held six seminars at which we discussed our draft responses to the Consultation. We has previously held a series of seminars in Spring 2021 which culminated in our written response to the Independent Review of the Human Rights Act (March 2021). We also participated in the Independent Review of the Human Rights Act’s Roundtable in June 2021.

5. I am most grateful to the contributors who have worked tirelessly in producing this detailed response, the result of which is indicative of both their commitment to human rights and the grave concerns that we have about these proposals.

Dr Kirsty Hughes, Acting Director of CPL, 8th March 2022.
Executive Summary

1. In response to the atrocities committed during the Second World War, the European Convention on Human Rights emerged under the auspices of the Council of Europe. The war in Ukraine brings into stark focus this historical rationale and reinforces the continuing imperative of support for the values of democracy and the rule of law inherent in the European Convention on Human Rights.

2. The UK was one of the ‘founding fathers’ of the Council of Europe, with Winston Churchill at the forefront of its creation:

   The dangers threatening us are great but great too is our strength, and there is no reason why we should not succeed in achieving our aims and establishing the structure of this united Europe whose moral concepts will be able to win the respect and recognition of mankind, and whose physical strength will be such that no one will dare to hold up its peaceful journey towards the future.¹

3. The UK, represented by Sir David Maxwell-Fyfe, was also highly involved in the drafting of the European Convention on Human Rights, and when the Convention opened for signature in Rome on 1 November 1950 the UK was the first state to ratify the Convention.

4. As we see war again in Europe it is unthinkable that the Government would do anything that undermines the European Convention on Human Rights.

5. We are, of course, aware that the Government’s Consultation paper states that the UK will remain a member of the European Convention on Human Rights.² This is paramount. It is not, however, enough simply to remain a contracting

---

party to the Convention. Indeed if, as the Government states in its Consultation
document, it is truly committed to ‘the UK’s tradition of human rights leadership
abroad’, then it is fundamental to that role that the UK does not do anything that
undermines, reneges upon, or regresses from the highest standards of
protection for human rights. At this fragile moment we thus call upon the
Government to exercise great caution.

6. As matters stand there is no doubt that if the Government implements its
proposals, this will ultimately accord less protection to rights. It endangers a
return to the position prior to the introduction of the Human Rights Act 1998 in
which individuals seeking to enforce their Convention rights were obliged to
undertake lengthy and costly proceedings before the European Court of Human
Rights. The likely result will be an increase in findings of violations of human
rights by the Strasbourg Court. This prospect is impossible to square with full
commitment to the Convention.

7. In addition to the grave international implications of such a move we wish to
emphasise that the domestic case for such reform has not been established.

8. In 2020 the Government set up an expert Independent Human Rights Act
Review. That committee engaged in extensive consultation, responses to which
were overwhelmingly supportive of the Human Rights Act 1998. The Committee
reported in December 2021, highlighting the need for greater public ownership
of human rights and civic engagement. It recommended some amendments to
the Human Rights Act 1998 but did not propose reducing the level of protection
accorded to rights.

9. The Government has not, however, been deterred by the absence of a mandate
in the Independent Review. This latest Consultation was launched the same
day that the Independent Review report was published. The two reports were
described by Lord Carnwarth of Notting Hill as ‘almost like ships that pass in

---

3 Report of The Independent Human Rights Review, CP 586 (December 2021),
the night’, whilst Sir Peter Gross (Chair of the Independent Review) stated that the Consultation could not properly be called a ‘responsive document’ to the Independent Review report.  

10. Nor is the case for reform on this scale, and of this nature, established in the Government’s Consultation document. Indeed, we found the Consultation document to be inconsistent, incoherent, and at times misleading. It is important to emphasise that these deficiencies permeated both the rationale for the proposal, as well as the details of the proposal itself. When consulting on reform of this nature it is imperative that both the case for reform and the details of the proposed reform are clearly established. Yet in this Consultation both were sorely lacking. Consequently, one of the significant challenges that we encountered in responding to this Consultation was seeking to identify from the Consultation document how the Bill of Rights would be framed. In particular, how the Government envisages that the rights protected under the Bill of Rights will relate to the rights that are currently protected under the Human Right Act 1998 and the European Convention on Human Rights. In the absence of insight into the proposed framework for the Bill of Rights it was very difficult to fully assess the proposal.

11. Yet whilst the detail is missing it is evident that the direction of travel is deeply problematic. Underscoring our response is a concern about the adverse consequences that would flow from allowing a gulf to develop between the UK’s domestic law and the Convention scheme. These concerns fall broadly into two categories: (i) consequences for the UK’s international obligations, and (ii) the certainty and legitimacy of the resultant rights framework.

12. As to the first, the Government’s Consultation is clear that ‘[t]he Bill of Rights will continue to respect the UK’s international obligations as a party to the

---

Convention.\textsuperscript{5} It would, therefore, be antithetical to the ambitions of this reform if it undermined the UK’s ability to respect those international obligations. The Independent Review, for example, notes that ‘significant gaps between rights protection before UK Courts and the ECtHR are best avoided, while the development of a distinctively UK contribution to the Convention in accordance with the principle of subsidiarity is nevertheless desirable’.\textsuperscript{6} Even if the ambition of this Bill is the cultivation of a domestic rights framework, rather than ‘bringing rights home’, it would nevertheless frustrate the UK’s ability – and, in particular, the Bill of Rights’ stated intention – to comply with international legal obligations if section 2 HRA 1998 is significantly weakened. Our concerns are as follows:

a. Reducing the ability of UK courts to keep pace with Strasbourg is likely to increase the number of successful applications brought before the ECtHR against the UK.\textsuperscript{7} This is a concern shared by the Independent Review.\textsuperscript{8} Such litigation would be expensive and time-consuming for all parties involved.

b. The Independent Review notes that, under section 2 as currently drafted, ‘[i]n some situations, the UK courts could when departing from ECtHR case law put the UK in breach of its international law obligations to comply with the Convention.’\textsuperscript{9} Weakening the connection between domestic law and the Strasbourg scheme would adversely increase the likelihood of such a course.

\textsuperscript{5} Government Consultation (n 2) at [7].
\textsuperscript{6} Independent Review (n 3) at 24.
\textsuperscript{7} ibid, at 45 (‘prior to the enactment of the HRA, adverse findings against the UK were increasing before the ECtHR. Following the HRA coming into force, the number of adverse findings has been in decline, as have the number of ongoing cases against the UK before the ECtHR. One reason why the number of applications to, and adverse findings by, the ECtHR has decreased over the last twenty years would appear to be the UK Courts’ approach to section 2’).
\textsuperscript{8} ibid, at 78 (‘Should there be a strong case for recommending reform, care will be needed to limit the scope for the development of a significant gap between UK and ECtHR rights protection. Any such gap would undermine the HRA’s aims and lead to an increasing number of applications, including successful applications, brought against the UK before the ECtHR’).
c. Under Article 35 of the ECHR, ‘[t]he Court may only deal with the matter after all domestic remedies have been exhausted’. If parties’ capacity to raise their Convention rights domestically is undermined, it is more likely that this threshold will be met. This may in turn increase the likelihood of the ECtHR finding a violation of the right to an effective remedy (required under Article 13).

13. It would be deeply problematic if the UK were to find itself in breach of its obligations under international law, not least for ‘the UK’s tradition of human rights leadership abroad’.\(^{10}\) Indeed, it ought to be noted that the UK was the subject of only 5 adverse judgments by the European Court of Human Rights in 2021.\(^{11}\)

14. Turning then to our second concern - the certainty and legitimacy of the resultant rights framework - we accept that public ownership and confidence in the Bill of Rights is fundamental, both at a functional level and at the level of the substantive rights available. A core part of this confidence will no doubt stem from the certainty and legitimacy of the Bill of Rights scheme. We are, however, concerned that, if the relationship between domestic law and that of the ECtHR is too greatly weakened, such a course might undermine this ambition. This is so for the following reasons:

a. In enacting a Bill of Rights which ‘retain[s] all the substantive rights currently protected under the Convention and the Human Rights Act 1998’,\(^{12}\) Parliament will democratically (re-)endorse the substance of those Convention Rights. It is therefore counterintuitive to undermine the extent to which those rights can be vindicated domestically, or to otherwise raise questions about the meaning of those rights.

---

\(^{10}\) Government Consultation (n 2) at 3.
\(^{12}\) Government Consultation (n 2) at 6.
b. The Independent Review, in view of a previous response from this Centre, noted that the connection between Strasbourg and domestic case law allows domestic courts to contribute to the development of Convention case law. This is welcome and supports both the legitimacy of those rights, and their domestic resonance. In other words, if domestic courts can contribute to their development, the sense that these rights are ‘British’ in character should be strengthened. However, domestic contributions to Convention case law are rooted in domestic consideration of that case law and so would be weakened if opportunities for such consideration are reduced.

c. It is likely that domestic courts would still consider Strasbourg jurisprudence even if the direct link with Strasbourg is severed. This is because, where there is ambiguity in legislation, there operates ‘a presumption that Parliament has legislated in a manner consistent, rather than inconsistent, with the United Kingdom’s treaty obligations.’ However, this should operate as a fail-safe rather than a principal mechanism for giving effect to Convention rights. The demands of legal certainty are best served by legislation clarifying how, when and in what way these treaty obligations (in this case, under the Convention) are relevant. Weakening the relationship with Strasbourg’s case law would require courts to rely on this less certain test which lacks express legislative design. Such uncertainty would not be advantageous. The Independent Review consonantly notes that ‘if UK Courts were not to take account of ECtHR case law it would likely increase uncertainty in the law, to the detriment of public confidence in the judiciary.’

d. Domestic courts can already refer to a range of materials in interpreting rights, including from other common law jurisdictions. However, it is not clear

---

13 Independent Review (n 3) at 52; Cambridge University, Centre for Public Law, ‘Submission to the Independent Human Rights Act Review Panel’ (March 2021) at 5–6; see Animal Defenders v United Kingdom (App no 48876/08) [2013] ECHR 362; (2013) 57 EHRR 21; and Eiseman-Renyard v United Kingdom (App no 57884/17) [2019] ECHR 237.


15 Independent Review (n 3) at 80.
why reference to such alternative materials, which may lack parliamentary
approval, domestic judicial contribution or a deeper relationship with the
UK’s constitutional history, would be preferable to a strong connection to
Strasbourg’s case law. The Convention’s legitimacy benefits from the
contribution to its case law made by domestic courts and the symmetry
which now exists between the domestic and Convention systems, as well
as the Convention’s own rooting in UK constitutional traditions.

15. Therefore, we contend, in line with the Independent Review, that reform in this
area will be most effective if it is ‘beneficial domestically without disturbing the
existing equilibrium between UK Courts and the ECtHR, to the benefit of both.’\textsuperscript{16}
Any reform should be mindful to avoid undermining the UK’s international
obligations or imbuing the domestic rights framework with unwelcome degrees
of uncertainty or illegitimacy.

16. In this regard we are concerned that a number of the proposals indicate a desire
to reduce the level of protection accorded to specific rights in ways that are
likely to place the UK in breach of its international obligations, obligations that
include, but are certainly by no means limited to, those that stem from the
European Convention on Human Rights.\textsuperscript{17}

17. Indeed, we are deeply concerned that foreign nationals are specifically targeted
for this reduced level of protection, both those residing within the UK, as well
as those who fall within the extraterritorial jurisdiction of the UK. The attempt to
reduce the rights applicable to foreign nationals is one that cannot be squared
with our international obligations, nor with good conscience. Human rights are
universal.

\textsuperscript{16} ibid, at 24.
\textsuperscript{17} This is a shared concern. See, for example, Mark Elliot, ‘Do we need a British Bill of Rights?’
(Constitutional Law Matters, 2 February 2022) <https://constitutionallawmatters.org/2022/02/do-we-need-a-british-bill-of-rights/> accessed 7 March 2022; Colm O’Cinneide, ‘Having its (Strasbourg)
Cake, and Eating It: The UK Government’s Proposals for a New “Bill of Rights”’ (Völkerrechtsblog, 26
March 2022; Public Law Project, ‘HRA: 5 Concerns with new Consultation’ (16 December 2021)
6 March 2022.
18. By seeking to reduce the positive obligations imposed on public authorities the proposals will also reduce the level of protection accorded to people in hospitals and care homes, to victims of domestic violence, human trafficking, rape and murder.

19. We note in this regard that the Chair of the Independent Review of the Human Rights Act recently emphasised, to the House of Commons Justice Committee, the important role that the Human Rights Act has played in altering the decision making of public authorities for the better. In this regard he drew attention to the way in which the Human Rights Act framework has assisted those in care homes, noting that this was not high-profile litigation and that the ‘person in the care home could have been anyone’s relative’.¹⁸

20. For these reasons we have serious reservations about the tenor of the overall proposals, which is regressive on rights protection. We thus caution the Government to reconsider.

21. We conclude this executive summary with a brief outline of our response to each of the individual questions. Further details of our response can be found in the full report.

**Question 1**

22. This question proposes two draft clauses to replace s.2 HRA 1998.

Option 1 provides that the courts are not required to follow or apply any judgment or decision of the European Court of Human Rights and that the meaning of a right in the Bill of Rights is not necessarily the same as the meaning of a corresponding right in the European Convention on Human Rights.

Option 2 provides that the UK Supreme Court will have ultimate responsibility for interpreting the rights under the Bill of Rights. They may have regard to the development of any similar right under the common law in the UK, a judgment or decision from any common law jurisdiction or a judgment of the European Court of Human Rights. They are not however required to follow or apply any judgment of the European Court of Human Rights.

23. We believe that it would frustrate the UK’s ability – and, in particular, the Bill of Rights’ stated intention – to comply with international legal obligations if section 2 is replaced with a significantly weaker provision.

24. We acknowledge that the Independent Review of Human Rights suggested that s. 2 HRA be amended to clarify the priority of rights protection, it noted that UK statutes and the common law should be applied first before taking account of ECtHR case law. It did not, however, suggest that no account should be taken of it.

25. Whether interpreting ‘Bill of Rights’ rights or Convention rights themselves, the net result of not giving due attention to ECtHR case law may be an increase in cases before the Strasbourg courts, where ECtHR jurisprudence will be considered.

26. Consequently, we reiterate what we stated in our response to the Independent Review, namely that the courts should be able to take into account ECtHR jurisprudence when interpreting rights with a similar scope, along with other case law, in the usual way. Section 2 does not demand that the UK courts slavishly follow the jurisprudence of the European Court of Human Rights and there are many examples where the judgments of the domestic courts have diverged from the Strasbourg jurisprudence.

27. Furthermore, we suggest that as the two draft clauses are currently framed, they could have unintended consequences.
Question 2

28. The Government Consultation states that the Bill of Rights will make it clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights and asks how it can best achieve this with greater certainty and authority than the current position.

29. The UK Supreme Court is the ultimate judicial arbiter of our laws. The proposed, Bill of Rights, as domestic legislation (rather than the incorporation of an international treaty), would fall under this general rule. An express reference to the UK Supreme Court’s final judicial authority with regard to the Bill of Rights would leave no doubts on this position.

30. Nevertheless, the UK Supreme Court will typically still be liable to engage the UK’s international responsibility if it diverges from the case law of the ECtHR in cases which are identical to a case that has already been finally determined by the ECtHR and to which the UK was a party.

31. A weaker reliance of the UK Supreme Court on the case law of the ECtHR also enables the UK Supreme Court to adopt broader interpretations of the Bill of Rights than the ECtHR would. The UK Supreme Court is not constrained by the margin of appreciation doctrine and the principle of subsidiarity in the same way as the ECtHR. Although it does not presently appear likely that the UK Supreme Court will adopt broader interpretations than the ECtHR, this is a consideration to bear in mind for the long term.

Question 3

32. The Government Consultation proposes recognising a qualified right to ‘trial by jury’ in the Bill of Rights. We note that this is the only additional right that the Government proposes to add to the Bill of Rights.

33. The inclusion of a right to jury trial in the proposed Bill of Rights is not necessarily unwelcome, though the right may have little impact in practice, and the extent of its impact will depend on how it is drafted. Preferably, the right would be framed to apply at least above a certain threshold of potential criminal
punishment, such as one year’s imprisonment, while not altering the existing use of juries in some coronial inquests and civil trials. Given the different practices in the jurisdictions of the UK, the Government must consult with the devolved governments and legislatures in relation to this right. Further, there should be exceptions to the right, as there are some circumstances in which it is recognised that jury trial is not always appropriate. The Government may also wish to consider, when drafting, some interpretive issues that could potentially arise under a right to jury trial in relation to unanimity, jury size, waiver, and expulsions.

**Question 4**

34. Amendments to substantive rights such as freedom of expression and privacy did not form part of the terms of reference to the Independent Review of the Human Rights Act. Consequently, this part of the proposal has not been the subject of careful consideration by an independent body. This is of particular concern as the questions that it raises are highly complex ones with vast implications for a wide range of private actors. Moreover, as matters stand the Government’s position, as advanced in the consultation document, is opaque and inconsistent.

35. It is, perhaps, not surprising that a call for enhanced freedom of expression vis-à-vis the press has arisen at this juncture. It is entirely predictable that in seeking to pass any new Bill of Rights there will be a temptation to try and garner favour with the press by including enhanced ‘freedom of expression’ measures that promise to accord greater latitude to the press.

36. Section 12 of the Human Rights Act 1998 was itself a result of press lobbying during the drafting of the legislation. We do not believe that there is a need to amend s.12 of the Human Rights Act 1998 to limit interference with the press or other publishers. Certainly, such a case has not yet been established.
Question 5

37. We are concerned that the Government is proposing rebalancing the right to privacy and freedom of expression, recalling that prior to the Human Rights Act 1998 there was an unacceptable dearth of protection for privacy against the press in English law. This was most famously evident in Kaye v Robertson when the Court of Appeal determined that there was nothing that English law could do to prevent a tabloid newspaper from publishing photographs of an actor that they had obtained by infiltrating his hospital room. Bingham LJ declared at the time:

This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens.

...The defendants’ conduct towards the plaintiff here was “a monstrous invasion of his privacy”...If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff’s complaint. Yet it alone, however gross, does not entitle him to relief in English law.

38. Since the enactment of the Human Rights Act 1998, the courts have developed the tort of misuse of private information. This is shaped by both Articles 8 (private life) and 10 ECHR (freedom of expression). It is evident in the case law that neither right has priority over the other, and that ‘the contribution that publication will make to a debate of general interest is a factor of particular importance’. We believe that this is a positive development and that the law is operating effectively.

20 ibid, at [70] (per Bingham LJ).
39. We do not believe that there is a case for substantive reform of the balance that is struck between privacy and freedom of expression. Indeed, we note that the only case that the Government has advanced as indicative of the problem is a case concerning tabloid journalism in Slovakia. We find the suggestion that this case demonstrates the need for reform perplexing.

40. Consequently, we reject the proposal that the courts should be ‘given clearer guidance as to the utmost importance of freedom of expression’. The proposal to create a blanket presumption in favour of Article 10 ECHR over and above Article 8 ECHR would be incompatible with our Convention obligations.

41. The Consultation also notes at [210] that the ‘government is … clear that freedom of speech and academic freedom are fundamental principles, not least in the higher education sector.’ While this commitment is certainly laudable, it is rather inconsistent with the Government’s own PREVENT duty which compels universities (amongst other institutions) to monitor and, indeed, regulate the speech that occurs within these ‘centres of enquiry and intellectual debate.’ If the Government is truly committed to protecting intellectual curiosity and academic discussion, it does not need to improve the protection of Article 10 within a domestic Bill of Rights but, rather, should consider amending (or repealing) the PREVENT duty. Indeed, if Article 10 is, in fact, given the weight which the Government is suggesting, that will raise significant issues in terms of the legality of the PREVENT duty.

Question 6

42. We welcome steps to protect journalists’ sources whilst recognising that Article 10 ECHR already provides important protection for journalists’ sources. The importance of press freedom in a democratic society together with the chilling effect that an order for disclosure of a source has on the exercise of freedom of

---

22 Government Consultation (n 2), at [213] and Question 5.
23 European Court of Human Rights Factsheet – Protection of Journalistic Sources, December 2021
expression has been acknowledged by both domestic courts and the European Court of Human Rights.

43. The role of Article 10 ECHR in protecting journalists’ sources was evident when the Government detained journalist David Miranda using terrorism legislation. On that occasion, the Court of Appeal determined that the stop powers were incompatible with Article 10 ECHR.

**Question 7**

44. If the Government wishes to strengthen the protection accorded to freedom of expression, then it should not enact the provisions in the Police, Crime, Sentencing and the Courts Bill that will greatly restrict and inhibit freedom of expression and assembly.

45. If the Government is committed to a Bill of Rights that protects freedom of expression independently of Article 10 ECHR – a position which, for the reasons outlined with respect to Questions 4-6 above, we do not support – then we advise that full consideration is given to the impact that this could have on the existing domestic legal framework. We also suggest that any newly created right to freedom of expression would need to consider the need for protection of freedom of expression vis-a-vis private actors; a right that focused on public bodies would not be able to tackle modern threats to free expression arising from private actors.

**Question 8**

46. This question asks whether we think that it should be a condition at the permission stage that individuals must demonstrate that they have suffered a ‘significant disadvantage’ to bring a claim under the Bill of Rights and whether this would be an effective way of making sure that courts focus on genuine human rights matters.

---

47. We conclude that the case for the introduction of a ‘significant disadvantage’ threshold has not been made out, and that the intention of the Government in proposing such a threshold has not been well articulated in the Consultation document. If the intention is to rebalance litigation towards those cases that are most important for the public interest, then this is likely to require a broader reconsideration of the ‘victim’ test for HRA claims, with particular regard to those cases where a serious rights infringement is suspected but the immediate victims are unable or unwilling to act as claimants. We note that sections 3 and 4 of the HRA are not presently governed by the victim test and should therefore be unaffected by this proposal, but we recommend that this position is made explicit.

**Question 9**

48. In the event that a ‘significant disadvantage’ threshold is introduced at the permission stage, the Consultation document asks whether there should be an ‘overriding public importance’ exception for cases that fail to meet the ‘significant disadvantage’ threshold, but where there is a highly compelling reason for the case to be heard.

49. We conclude that, if a permission stage is introduced, an exception is essential. However, the threshold for the exception should not be as high as ‘highly compelling reason’ or ‘overriding public importance’. This is not consistent with other similar exceptions. The test should be that ‘some other compelling reason’ exists for granting permission.

**Question 10**

50. The Consultation asks what else can the Government do to ensure that the courts focus on genuine human rights abuses. Whilst we do not recommend any alteration to the victim test, if the Government does decide to reform the test, we suggest that consideration is given to widening standing to allow for some public interest challenges.

51. The victim test lends HRA litigation a strongly individualist character. Conversely, cases even of utmost seriousness and wider consequence cannot
be entertained where the claimant is not a victim of the infringement complained
of and is not otherwise given a statutory right to litigate. The most famous
example of such a case is the Northern Ireland Human Rights Commission
case where the majority of the Supreme Court rejected a claim relating to the
provision of abortion in Northern Ireland on the grounds that the NIHRC lacked
standing either as a ‘victim’ or on a statutory basis. Consideration might be
given to a wider reform of the ‘victim’ test in order to facilitate public interest
litigation where the immediate victims lack the resources and extreme courage
needed to act as claimants.

Question 11
52. The Bill of Rights should not amend the existing position regarding positive
obligations. Positive obligations give effect to human rights to be free from
domestic violence, online abuse, human trafficking, and rape and murder. As
such they ensure the broad relevance of human rights to all members of
society. The Bill of Rights should recognise and preserve their role. The
criticism in the Consultation paper of cases such as Osman v United Kingdom
and Rabone v Pennine Care NHS Trust is misplaced.

Question 12
53. We do not accept that there is a case for repeal or modification of section 3
HRA 1998. If, however, the provision is to be replaced then we believe that it
must be replaced by a provision which allows courts to interpret legislation in a
manner that is compatible with the rights contained in the new Bill of Rights.
Option 1 (repeal without replacement) should therefore be rejected.

54. We do not believe that courts’ powers of interpretation should be limited to
contexts in which the legislation is ambiguous. We thus reject the proposal to
replace section 3 HRA 1998 with a provision that would only apply when

25 Re Northern Ireland Human Rights Commission’s Application for Judicial Review [2018] UKSC 27,
[2019] 1 All Er 173, noted by Shona Wilson Stark, ‘In Re Northern Ireland Human Rights
Commission’s Application for Judicial Review [2018] UKSC 27: A Declaration in All but Name?’, UK
legislation ‘can be given more than one interpretation’ where both interpretations are an ordinary reading of the words and are consistent with the overall purposes of that legislation.

55. Consequently, a clause which would allow courts to interpret legislation compatibly when this is an ordinary meaning of the words in the legislation and is consistent with the overall purpose of the legislation is the only proposal that is viable. We emphasise, however, that whilst this option is the only palatable option it may give rise to problems of legal certainty.

Question 13
56. Parliament’s role could be enhanced by including section 3 judgments in the annual Ministry of Justice report on human rights judgments, ensuring that there is an annual parliamentary debate of this report, and empowering the JCHR to scrutinise section 3 decisions, propose motions on important judgments, and to liaise with their equivalent committees in the devolved legislatures. We note that legislation is not needed to bring in these changes.

Question 14
57. We would welcome a database of section 3 judgments whilst recognising that it may be difficult to discern which cases ‘rely on’ section 3. We would also like clarification regarding who would be responsible for maintaining this database and recommend that further legal certainty would be achieved were the legislation.gov website to be updated with notes on how legislation was to be interpreted following a section 3 judgment.

Question 15
58. The Consultation asks whether courts should be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament. We argue for no change to the current position, given the consequences of any change for legal certainty, parliamentary sovereignty, the separation of powers and devolution.
Question 16

59. This question asks whether the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill should be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights. We argue that there is a case for suspended and prospective only quashing orders, but that these should be considered as exceptional and not the norm and should be at the complete discretion of the courts.

Question 17

60. In response to the question of whether the Bill of Rights should contain a remedial order power our view on this point was articulated in our response to the Call for Evidence for the Independent Human Rights Act Review which we submitted in March 2021. We recommended a number of changes to the existing procedure including enhanced powers for the JCHR, a ‘stronger affirmative resolution procedure than is currently found in Schedule 2 of the HRA’ and the introduction of limits on the scope of remedial orders.

61. We note that this topic was reviewed comprehensively in the IHRAR report, which recommended that the remedial order power should be limited so that it cannot be used to amend the HRA, as well as a number of other methods of enhancing Parliamentary scrutiny of remedial orders. Some of our own suggestions were rejected, as was the option of abolishing remedial orders altogether.

62. Our view remains unchanged from our submission to this earlier consultation process.

Question 18

63. The section 19 procedure is operating well enough in practice to warrant it remaining as a tool to enhance scrutiny and accountability, and given its purpose, it is most appropriately made by a Minister. However, when there is more clarity about what the Bill of Rights will achieve vis-a-vis Convention
rights, the statement may need to be changed to encompass not only Convention rights but also ‘Bill of Rights’ rights.

**Question 19**

64. Clearly any British Bill of Rights must be truly British, and therefore must address the perspectives, concerns and needs of the devolved nations. In responding to this question, we recognise that the CPL’s contribution comes from Cambridge in the heart of England. Cambridge is therefore not best placed in this consultation to claim legitimacy in response to these aspects of the question.

65. In this regard, we note in responding to the Independent Review of the Human Rights Act 1998 that representatives from the devolved nations clearly, carefully and powerfully articulated the very real threat that repeal of the Human Rights Act 1998 poses to them. We urge the Government to listen.

66. In the light of these very real concerns, we make the following points. The first is that the system under the Human Rights Act in relation to devolved legislatures has worked well and not been a point of contention between the four nations. The second is that if the Westminster Parliament is to pass a Bill of Rights, it should do so in line with the Sewel Convention and secure a legislative consent motion from each devolved legislature. The third is that the recent Supreme Court decision in the Convention on the Rights of the Child (Incorporation) case presents a worrying development in regard to the power of devolved legislatures to give courts interpretive duties when deciding human rights matters. A British Bill of Rights would need to clarify that such powers are available to devolved legislatures. Finally, we recognise the inevitable tension between the universality of human rights and the nature of a devolved settlement. The European Convention on Human Rights provides a model that is able to recognise different ways of achieving protection of fundamental human rights through the margin of appreciation. A British Bill of Rights that

---

takes seriously the perspectives of the devolved legislatures both in the process of drafting the new Act, and in the framework that is ultimately adopted, would be in line with this model.

Question 20

67. This question asks whether the existing definition of public authorities should be maintained or whether it can be amended to provide greater certainty as to which bodies or functions are covered. In general, the courts have grappled well with the concept of a core public authority, which is relatively uncontroversial and straightforward to apply. In our view that aspect of the law does not need reform.

68. The notion of a public function has, however, proved much trickier. The case law is evolving but does not seem to become any clearer over time. It is notoriously difficult, arguably increasingly so, for prospective claimants and defendants to assess their positions. From the point of view of legal certainty this is unsatisfactory. We therefore recommend amending the legislation to provide for three distinct strands of public function under s 6(3)(b) HRA.

69. We recommend repealing s 6(5) HRA 1998.

70. We recommend making clear that a hybrid public authority performing public functions is a victim unless it would not be so regarded by the Strasbourg Court under Article 34 ECHR in the same circumstances.

Question 21

71. The Government has expressed a desire to ‘give public authorities greater confidence to perform their functions within the bounds of human rights law’ and, notably, ‘without the fear that this will expose them to costly human rights litigation’. Question 21 asks how this might be best achieved and offers two options.

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 that mirrors the changes to how legislation can be interpreted.

72. We reject both options. We suggest an alternative, namely that Section 6(2)(b) is expunged and that Section 6(2)(a) is amended to include both primary legislation and “provisions of, or made under, primary legislation”.

Question 22

73. We do not consider there to be any reason to restrict the extraterritorial application of the ECHR. The ECtHR has taken a cautious approach to extraterritorial jurisdiction. Its approach is in line with the nature of human rights, and with preventing a ‘human rights vacuum’ from arising in which neither the territorial state (because it is deprived of control), nor the extraterritorial state is responsible for protecting human rights. Such a situation would go against the spirit and intended application of the ECHR. The ECtHR’s approach is compatible with the general position in international law, but it is not as extensive as that of other international human rights law instruments. In this respect, the cautious approach of the ECtHR renders the ECHR an outlier.

74. We do not accept the assumption in Question 22 that there is a tension between the Law of Armed Conflict (LOAC) (also known as International Humanitarian Law, or IHL) and the ECHR for conflicts abroad. On the contrary, the two bodies of law are complementary and work together to achieve the same humanitarian objectives. The ECtHR has sensibly and carefully applied Convention Rights to conflict zones, taking account of LOAC to ensure that the rights are applied pragmatically and in a way that is appropriate to the relevant context.

75. As this Consultation concerns the Human Rights Act 1998 (that is, a domestic statute), it is important to keep in mind that whatever changes are made to this Act, they will not on their own change the reality that, in international law, the ECHR applies in certain circumstances to the UK’s extraterritorial conduct. Nor will any changes that limit the UK’s ability to protect rights extraterritorially
change the fact that the UK remains bound by other international human rights treaties and customary international law.

76. We consider that updating the UK’s Joint Service Manual on the Law of Armed Conflict would provide a valuable opportunity to provide clarity to members of armed forces on the extraterritorial application of the ECHR.

77. We recommend that the UK government consider discussing with other states the possibility of expanding further the extraterritorial reach of the ECHR to ensure that the ECHR is more closely aligned with other international human rights instruments and to ensure that human rights protection keeps up with an increasingly globalised and interconnected world.

Question 23

78. This question asks to what extent the application of the principle of proportionality has given rise to problems in practice. The Consultation then asks for feedback on the following two options.

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 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.

79. We do not believe that the application of the principle of the proportionality has given rise to problems in practice. When applying the principle of proportionality, the courts already give appropriate weight to the balance struck by Parliament. The courts are deferential to the decision-making of Parliament in cases involving controversial issues of social and economic policy and those with major implications for public expenditure. Indeed, the judgments of the UK
Supreme Court in recent cases such as *Elan-Cane*\(^{29}\) and *SC*\(^{30}\) are indicative of the fact that legislation purporting to compel the courts to give ‘great weight’ to Parliament’s decision-making is completely unnecessary. In any event, both proposed options run the risk of prompting litigation concerning the meaning of ‘great weight’.

**Question 24**

80. This question asks how the Government can ensure that deportations that are in the public interest are not frustrated by human rights claims. It offers three possible options.

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.

81. We reject the proposition that it is necessary to ‘ensure that deportations that are in the public interest are not frustrated by human rights claims’. We note that, as deportation did not form part of the terms of reference of the Independent Review of the Human Rights Act this proposal is not substantiated or supported by that report. We are also of the opinion that the Government Consultation document does not demonstrate the need for reform.

\(^{29}\) *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56.

\(^{30}\) *R (SC and others) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, [2021] 3 WLR 428.
82. We were reassured to note on pg. 7 of the Consultation document that the Government will ‘safeguard ... vital protection for the right to life and the absolute prohibition on torture, confirming that people should not be deported to face torture (or inhuman or degrading treatment or punishment) abroad’. We read this as meaning that the Government will not seek to amend the protection that is accorded by Articles 2 and 3 ECHR. Such an assurance is essential, and we would oppose any attempt to reduce the protection accorded by those rights. Indeed, any such move would be incompatible with the UK’s obligations under the European Convention on Human Rights and under international law.

83. Beyond this, whilst it is evident that Article 8 ECHR is a (if not the) target for this proposal it is not clear from the Consultation document whether the Government is also contemplating seeking to limit the scope and protection afforded by other rights such as Article 5 ECHR and Article 6 ECHR. We would reject any attempt to limit those rights.

84. In contemplating the options specified in the Consultation document we have therefore assumed that they are directed towards Article 8 ECHR and have evaluated these proposals in the light of that Convention right.

85. We reject options 1 and 3 as they are incompatible with our obligations under Article 8 ECHR.

86. We conclude that option 2 is the only model that could operate in a manner that is compatible with Article 8 ECHR. It is, however, essential to that compatibility that courts are able to balance Article 8 ECHR against the public interest in deportation in accordance with the criteria established in the Convention case law. If option 2 seeks to prohibit or restrict the courts in engaging with that balancing exercise, then it too would be incompatible with our Convention obligations. Consequently, we doubt that option 2 can require the courts to do anything other than what they currently do under the existing legal framework. Anything more restrictive than this is likely to lead to the European Court of Human Rights finding further violations of Article 8 ECHR in respect of the UK.
Question 25

87. The Government asks: ‘while respecting our international obligations, how can 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.’

88. International law affirms that states have the right to control entry to their borders. However, international law also provides that states have responsibilities towards migrants, including ‘illegal and irregular’ migrants. The Consultation does not detail ways that the UK envisions to ‘tackle the challenges posed by illegal and irregular migration’ whilst respecting the UK’s international obligations. In our opinion, in order to respect our international obligations, the UK cannot deal with ‘illegal and irregular’ migration through a practice of ‘pushbacks’, which are contrary to numerous obligations, not simply under the European Convention on Human Rights, but also within the law of the sea, refugee law, and international human rights law.

Question 26

89. The Consultation asks whether the Bill of Rights should set out a number of factors to consider when awarding damages such as:

   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.

90. We conclude that none of those considerations should be included in the Bill of Rights. Courts are already mindful of the factors proposed by the Government in their assessment of awards. The flexible and judicially influenced approach taken by the courts is preferrable to applying a list of statutory factors. We further note that the sums awarded are generally modest, and that courts are sensitive to public interest impacts in reaching their quantum.
Question 27

91. We do not agree 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.

92. Neither of the two options offered is satisfactory, as courts already have the ability to consider a claimant’s conduct as part of its reasoning on remedies. If, however, the Government insists on adopting one of these two models then Option 1 is preferable to Option 2.

Question 28

93. We reiterate the importance of recognising the primacy of the Strasbourg Court in international law as distinct from the constitutional role of Parliament and courts in the UK. We would support a move to require Parliament to be informed of adverse Strasbourg judgments to facilitate scrutiny and increase accountability. To achieve that though, the draft clause will need some amendment.
I. Respecting our common law traditions and strengthening the role of the Supreme Court

Interpretation of Convention Rights: Section 2 of the Human Rights Act

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

Summary
Our response to this Question depends on how Convention rights are to be enforced once the Bill of Rights is implemented.

We believe that it would frustrate the UK’s ability – and, in particular, the Bill of Rights’ stated intention – to comply with international legal obligations if section 2 is replaced with a significantly weaker provision.

We acknowledge that the Independent Review of Human Rights suggested that section 2 HRA be amended to clarify the priority of rights protection, it noted that UK statutes and the common law should be applied first before taking account of ECtHR case law. It did not, however, suggest that no account should be taken of it.

Whether interpreting ‘Bill of Rights’ rights or Convention rights themselves, the net result of not giving due attention to ECtHR case law may be an increase in cases before the Strasbourg courts, where ECtHR jurisprudence will be considered.

Consequently, the courts should be able to take into account ECtHR jurisprudence when interpreting rights with a similar scope, along with other case law, in the usual way. This is not unduly restrictive, as the courts’ approach in previous cases has shown.
We suggest that as the two draft clauses are currently framed, they could have unintended consequences.

1. The Independent Review of Human Rights suggested that section 2 HRA should be amended to clarify the priority of rights protection. It is, however, important to emphasise that section 2 HRA relates to the interpretation of ‘Convention’ rights. The clauses proposed by the Government relate to the interpretation of ‘Bill of Rights’ rights. The distinction between these is key and without further detail on the way in which Convention rights can be enforced nationally (if at all), our comments are restricted to broad principles. We have explored these issues in our [Executive Summary at [10]-[15]] and further in our response to Question 2. Our response to this question should therefore be read in the light of those responses.

2. To summarise comments pertinent to this Question that we have made elsewhere, we note that under the Government’s proposals the UK would remain a party to the Convention and that the Convention rights would sit at the heart of the Bill of Rights. However, precisely how Convention rights are incorporated domestically will impact on the approach the courts should be encouraged to take to their interpretation. Any change to section 2 HRA will need to be considered in light of the regime that is ultimately put in place under the Bill of Rights, and in particular whether a right to domestic enforcement of Convention rights (as distinct from ‘Bill of Rights’ rights) will remain. Whilst we note that the Government perceives problems in the way in which Convention rights have been applied in both Strasbourg and the UK courts, we think it is important to stress that any such problems may not be resolved by a clarification of the priority of sources to be applied by the UK courts when interpreting rights. Whether interpreting ‘Bill of Rights’ rights modelled on Convention rights or Convention rights themselves, the net result of not giving

---

31 Government Consultation (n 2) at [183].
32 ibid, at [184].
due attention to ECtHR case law may be an increase in cases before the Strasbourg courts, where ECtHR jurisprudence will be considered.

3. The question about the priority UK courts should give to ECtHR jurisprudence is therefore connected with how best to ensure Convention rights are upheld, and where decisions about their interpretation in a UK context are best taken. Cases such as Elan-Cane33 demonstrate the margin of appreciation afforded to states parties and how national courts can engage with ECtHR case law to produce a solution that takes national factors into account, including a recognition of the role of Parliament in developing legislation in areas that are not yet covered. The ECtHR is less able to do this. In addition, cases such as Elgizouli34 demonstrate how the UK courts are already able to explore the scope of common law rights, even if they conclude not to extend the law in the relevant circumstances. It seems therefore that restricting the Court’s ability to consider ECtHR jurisprudence is not necessary or desirable.

4. A related question is whether proven abuses of Convention rights are more effectively dealt with under the Article 46 ECHR process following an ECtHR ruling or via domestic procedures. Even if changes are made to require adverse ECtHR judgments to be notified to Parliament (see Question 28), if an ECHR case is brought in Strasbourg, the Article 46 process will still have to be followed once an adverse ECtHR judgment is obtained. In such circumstances, there may be a restricted ability to take into account national circumstances. Again, therefore, restricting the Court’s ability to consider ECtHR jurisprudence may not be necessary or desirable.

5. When the Independent Review of Human Rights suggested that section 2 HRA be amended to clarify the priority of rights protection, it noted that UK statutes and the common law should be applied first before taking account of ECtHR case law. However, it did not suggest no account should be taken of it. It put forward: ‘A court or tribunal determining a question which has arisen in

33 R (on the application of Elan-Cane) v. Secretary of State for the Home Department [2021] UKSC 56.

connection with a Convention right must first apply relevant UK statutory provisions, common law and UK case law generally and then, if proceeding to consider the interpretation of a Convention right, must take into account ... [as per the original text of section 2(1)]. It is notable that the suggestions were made in the context of the enforcement of Convention rights in UK courts, rather than ‘Bill of Rights’ rights. If Convention rights remain enforceable via UK courts, the UK courts should clearly retain the ability to consider ECtHR case law. It would clearly be sub-optimal to have parallel systems for Convention rights and ‘Bill of Rights’ rights in those circumstances, so it would seem preferable to allow the courts to continue to have regard for ECtHR case law for both. If, instead, the ‘Bill of Rights’ rights are standalone rights, albeit based on the ECHR, and there is no domestic ability to enforce Convention rights, we still believe it would be a retrograde step if no account were taken of ECtHR jurisprudence. If the rights are cast in similar terms, the Strasbourg case law may be helpful.

6. Therefore, if a need is felt to set out the priority the Court must give to various sources of law when interpreting ‘Bill of Rights’ rights, rather than leaving it to the Court, we would prefer Option 2. However, there are some infelicities in the drafting (of both options) that would need correcting if a statutory order of priority were to be implemented.

7. Looking at the detail of the draft clauses, if the Government is to proceed with either, we would make the following points:

- The Government should be cautious in constraining the ability of the Courts to depart from precedent in appropriate circumstances. The practice is more nuanced. See, for example, the House of Lords Practice Direction36 which states that the Court is permitted ‘while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so’.

---

35 Independent Review (n 3) at [199] (emphasis added).
36 [1966] 3 All ER 77 (HL).
• The Government should also ensure that the Court can have regard to dicta in UK cases that they are not obliged to follow by precedent, but which are nonetheless persuasive.

• Care should be taken not to limit the Court’s ability to adopt traditional interpretative techniques to construe the UK statute by limiting its review to the text of the relevant provision. In certain circumstances, there may be other principles of statutory interpretation that the Court would wish to apply.

• It would also be preferable not to muddy the textual interpretation with references to the preparatory work of the ECHR. That would be better as another matter to which the Court could have regard in subsection 5 of Option 2.

• It should also be noted that there may be similar rights to those contained in the Bill of Rights that derive from other statutes – the Human Rights Act 1998 is an obvious example but there are others, for example, the Police and Criminal Evidence Act 1985 – as well those arising under the common law. The Court’s ability to consider any case law related to the interpretation of the Bill of Rights should not be constrained by limiting it to case law developing common law rights.

• The Government may also want to consider combining subclauses 1 of both Options 1 and 2 to clarify that the Supreme Court is the ultimate judicial authority and that international treaties are not determinative of the interpretation of ‘Bill of Rights’ rights.

• Clarity also needs to be provided as to who would make any rules about the use of international and overseas precedent and what such rules would cover.
8. We have made further comments about the drafting of the clauses in our response to Question 2.

The Position of the Supreme Court

Question 2
The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights.

How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

Summary
The UK Supreme Court is the ultimate judicial arbiter of all laws. As domestic legislation (rather than the incorporation of an international treaty), the British Bill of Rights would fall under this general rule. An express reference to the UK Supreme Court’s final judicial authority with regard to this Bill of Rights would leave no doubts on this position. It could also encourage judicial dialogue. Nevertheless, the UK Supreme Court will be liable to engage the UK’s international responsibility if it diverges from the case law of the European Court of Human Rights in cases which are identical to a case that has already been finally determined by the ECtHR and to which the UK was a party. That being said, a weaker reliance of the UK Supreme Court on the case law of the ECtHR enables the UK Supreme Court to adopt broader interpretations of the Bill of Rights than the ECtHR would. The UK Supreme Court is not constrained by the margin of appreciation doctrine and the principle of subsidiarity in the same way as the ECtHR. Although it does not presently appear likely that the UK Supreme Court will adopt broader interpretations that the ECtHR, this is a consideration to bear in mind for the long term.

Introduction
9. The Bill of Rights can best achieve certainty with regard to the UK Supreme Court’s ultimate interpretive authority on human rights in two ways: firstly, by spelling out that the Bill of Rights is self-standing with regard to the European
Convention on Human Rights, rather than merely an incorporation of it into domestic law; and secondly, by emphasising the UK Supreme Court’s ultimate authority with regard to the interpretation and application of domestic law, including the Bill of Rights. Our view is that Option 2 of the proposed replacements for section 2 of the Human Rights Act best satisfies these aims. In the following sections, we provide comments and recommendations on (a) the relation between the Bill of Rights and the UK’s international law obligation under Article 46 ECHR; (b) the limits of this obligation; (c) the implications of enacting the Bill of Rights for the margin of appreciation doctrine; and (d) the wording of Option 2.

**The Bill of Rights and the UK’s international law obligations**

10. The final authority of the UK Supreme Court with regard to the Bill of Rights conforms with the UK’s international law obligations, provided that the Bill of Rights no longer merely incorporates the ECHR into domestic law, but instead establishes a domestic system of human rights protection. In this case, the UK Supreme Court would have final authority to interpret and apply human rights in the same way as with regard to ordinary legislation. An explicit reference to the UK Supreme Court’s final authority, as per Option 2, would emphasise and erase any doubt about this general position. It would also stress the responsibility of UK judges to take an active role in the development of UK fundamental rights and to engage critically with the case law of the European Court of Human Rights, rather than follow it without qualification. Explicitly referring to the UK Supreme Court’s final authority could thus enhance judicial dialogue between the UK Courts and the ECtHR, without undermining its organic development. In this connection, we endorse the analysis of the Independent Human Rights Act Review.

11. Nevertheless, the interpretation and application of the Bill of Rights by UK courts must be consistent with Article 46 ECHR. Article 46, section 1 requires that the Contracting States abide by the final judgment of the ECtHR in any case to which they are parties. Since the Government has not expressed an intention to withdraw from the ECHR, the UK will continue to be bound by this provision. Accordingly, acts of the UK which violate Article 46 ECHR will
engage the UK's international responsibility. Under international law, such acts include the conduct of any state organ that exercises judicial functions. Therefore, they include final judgments of the UK Supreme Court. A final judgment of the UK Supreme Court with regard to the Bill of Rights would violate Article 46 ECHR if it refused to abide by a final judgment of the ECtHR to which the UK is party. A narrow interpretation of this refusal would only refer to cases which have already been finally determined by the ECtHR and which a domestic court has jurisdiction to reconsider. The jurisdiction to reconsider a case after an adverse judgment by the ECtHR is provided in some legal systems. In UK law, adverse judgments of the ECtHR relating to domestic litigation do not automatically lead to the decision in the domestic litigation being reopened or reversed unless there is legislative intervention. Since the UK legal system does not grant such a jurisdiction to UK courts, the issue of how a UK court should rule on a case that has been reopened in domestic proceedings subsequent to an adverse judgment of the ECtHR is academic under this interpretation of Article 46 ECHR.

12. Nevertheless, the meaning of Article 46 ECHR could reasonably be extended to cases that are identical to the one finally determined by the ECtHR. In this case, diverging from a final judgment of the ECtHR with regard to them would risk activating the pilot judgment procedure against the UK. The pilot judgment procedure addresses what the ECtHR perceives as systemic problems of implementation of the ECHR that result in repetitive litigation before it. The ECtHR issued a pilot judgment with regard to the UK in Greens and MT v the United Kingdom. In this case, the ECtHR confirmed its finding that a blanket ban on voting for convicted prisoners in detention is incompatible with Article 3 of Protocol No 1 of the ECHR. The pilot judgment procedure is codified

38 See, for example, Strafprozeßordnung [German Code of Criminal Procedure], art 359; and Zivilprozeßordnung [German Code of Civil Procedure], art 580.
in Rule 61 of the ECtHR’s Rules of Court. In turn, the Rules of Court derive their validity with regard to the UK from Article 25 ECHR.

13. Finally, a radical divergence between the interpretation of Convention rights by the ECtHR and the interpretation of rights under the Bill of Rights by the UK Supreme Court could lead to the finding of a violation of the right to an effective remedy under Article 13 ECHR. Assuming that the rights and freedoms under the Bill of Rights will be at least equivalent in substance to Convention rights, the risk of such divergence is admittedly minimal but cannot be fully excluded.

14. None of this is meant to imply that, as a matter of domestic UK law, Parliament cannot preclude UK Courts, including the UK Supreme Court, from taking Article 46 ECHR into account when interpreting ordinary legislation, including the Bill of Rights. Unless consideration of Article 46 is explicitly excluded, however, UK Courts can be expected to interpret domestic legislation consistently with the international law obligations that the UK has undertaken, if possible.42

**Limits on the obligation under Article 46 ECHR**

15. Both in the UK and in the legal systems of other Contracting States, courts have placed limits on the scope of their obligation under Article 46. For example, the Federal Constitutional Court of Germany has ruled that German courts are required to abide by a final judgment of the ECtHR on matters that fall within their jurisdiction, unless the judgment in question is incompatible with constitutional law, is arbitrary, or based on a fundamentally incorrect view of the significance of a right or freedom.43 In interpreting domestic law, including fundamental rights and constitutional guarantees, the ECHR must be taken into account; nevertheless, fundamental rights remain hierarchically superior to it

---


43 BVerfGE, Order of the Second Senate, 2 BvR 1481/04 (14 October 2004) [Görgülü judgment], at [60].
as part of Basic Law.\textsuperscript{44} Abiding by a final judgment of the ECtHR does not imply a schematic enforcement; remedies provided in accordance with that judgment must still be adjusted to the domestic legal system and comply with its division of institutional competences and legal provisions.\textsuperscript{45}

16. In \textit{Manchester City Council v Pinnock}, the UK Supreme Court held that the requirement to take judgments of the ECtHR into account under section 2 of the Human Rights Act (HRA) implies that, as a matter of domestic law, UK courts are never legally bound to abide by a final judgment of the ECtHR.\textsuperscript{46} Although it is questionable that the latter interpretation of section 2 of the HRA is compatible with the UK’s international law obligation under Article 46 ECHR,\textsuperscript{47} it is reasonable to argue that an arbitrary judgment of the ECtHR, or one that fundamentally misunderstood how a right or freedom interacted with other norms within the UK legal system, would not have binding force with regard to the UK: in the first case, because an arbitrary decision does not fall within the meaning of a judgment given by a court of law, and in the second case, because the judgment of the ECtHR would be based on a deficient understanding of the relevant legal facts.

\textbf{The Bill of Rights and the margin of appreciation}

17. A new Bill of Rights may cause the UK Supreme Court to reconsider its position on the Government’s margin of appreciation. In \textit{R (Elan-Cane) v Secretary of State for the Home Department}, the UK Supreme Court rejected the view that the margin of appreciation enables domestic courts to decide a case in accordance with their own standards of rights protection.\textsuperscript{48} Instead, it established that, where a state enjoys a margin of appreciation, the judiciary should defer to the judgement of Parliament. If the Bill of Rights enacts fundamental rights and freedoms that are distinct from Convention rights, a possible implication is that UK Courts may adopt a higher standard of rights

\textsuperscript{44} Görgülü judgment, ibid, at [30].
\textsuperscript{45} Görgülü judgment, ibid, at [47].
\textsuperscript{46} Manchester City Council v Pinnock [2010] UKSC 45, at [48].
\textsuperscript{47} See para 13 above.
\textsuperscript{48} See especially R(Elan-Cane) v Secretary of State for the Home Department [2021] UKSC 56, at [81], [87], [89].
protection than the one afforded by the ECtHR, and a more intrusive approach on cases which the ECtHR would declare to fall within the UK’s margin of appreciation.

18. Admittedly, the current development of the case law of the UK Courts does not point in this direction. In *R (Elan-Cane) v Secretary of State for the Home Department*, the UK Supreme Court also stressed that, whilst Parliament is able to legislate for rights that go beyond the Convention, it would be a substantial expansion of the powers of the judiciary for judges to go further than the ECtHR in interpreting Convention rights.49 The UK Supreme Court has also been reluctant to develop common law rights in circumstances where the ECHR does not cover the ground.50 Nevertheless, a weaker reliance on the case law of the ECtHR and the distinct character of a British Bill of Rights may cause the UK Supreme Court to reconsider this position in the future.

**Comments on Option 2**

19. **Subsection 1**: We recommend that subsection 1 of Option 2 be either replaced or merged with subsection 1 of Option 1. Establishing the distinctive status of the Bill of Rights in relation to the ECHR would imply that the UK Supreme Court has ultimate responsibility for its interpretation, as is the case with all domestic law. Merging the two clauses would spell out this general position and further encourage judicial dialogue.

20. **Subsection 3**: The reference to a permission to have regard to the preparatory work of the ECHR in construing the Bill of Rights creates confusion on whether or not the Bill of Rights is a self-standing form of domestic human rights protection, rather than a statute incorporating the ECHR into domestic law. The difference is important because, in the latter case, the UK courts would be interpreting Convention rights, for whose interpretation the ultimate authority lies with the ECtHR under Article 46 ECHR. They would, therefore, have to follow the case law of the ECtHR more faithfully. If, on the other hand, the Bill

49 *ibid*, at [90].
50 *Elzigouli v Secretary of State for the Home Department* [2020] UKSC 10.
of Rights is a self-standing form of domestic human rights protection, the UK Courts would be interpreting UK fundamental rights and freedoms and would therefore be free to adopt interpretations which need not be consistent with the case law of the ECtHR beyond the confines of Article 46 ECHR. We recommend that the reference to preparatory work of the ECHR be moved to subsection 5 of Option 2.

21. **Subsection 4**: It is not clear what will be the binding force of judgments given in relation to the Human Rights Act. We recommend that the Government clarify whether judgments given in relation to the Human Rights Act will be a precedent in relation to the interpretation of rights or freedoms in the Bill of Rights that are equivalent to the rights or freedoms protected under the Human Rights Act.

22. **Subsection 6**: A possible interpretation of this subsection is that the UK Courts may not apply any judgment or decision of the ECtHR, even if they have jurisdiction as a matter of domestic law. This would risk engaging the international responsibility of the UK for final judgments of domestic courts which contravene international law, specifically Article 46 ECHR. We recommend that UK courts be required to apply final judgments of the ECtHR that fall within their jurisdiction (including applying them to identical cases), unless the judgment in question is arbitrary or based on a fundamentally incorrect view of the significance of a right or freedom in the Bill of Rights.\(^{51}\)

\(^{51}\) See sections (a) and (b) above.
Trial by Jury

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

Summary
The inclusion of a right to jury trial in the proposed bill of rights is not necessarily unwelcome, though the right may have little impact in practice, and the extent of its impact will depend on how it is drafted. Preferably, the right would be framed to apply at least above a certain threshold of potential criminal punishment, such as one year’s imprisonment, while not altering the existing use of juries in some coronial inquests and civil trials. Given the different practices in the jurisdictions of the UK, the government must consult with the devolved governments and legislatures in relation to this right. Further, there should be exceptions to the right, as there are some circumstances in which it is recognised that jury trial is not always appropriate. The government may also wish to consider, when drafting, some interpretive issues that could potentially arise under a right to jury trial in relation to unanimity, jury size, waiver, and expulsions.

23. Juries are an established part of the criminal process in the UK’s jurisdictions. The merits of juries are debated, given their cost, but there are good arguments in favour of juries, including that juries serve as an important protection for the accused, and that lay involvement builds public confidence in the criminal justice system. The ECtHR has accepted that, with sufficient procedural safeguards, jury trial is compatible with Article 6 of the ECHR. In view of these considerations, the inclusion of a right to jury trial in the proposed bill of rights is not necessarily unwelcome, though the right may have little impact in practice, and the extent of its impact will depend on how it is drafted.

24. Perhaps the most critical issue in drafting a protection for jury trial is its application: in what circumstances would the right to jury trial apply? Currently, in respect of criminal trials, in England and Wales, indictable only offences are tried with a jury while summary offences are tried without a jury. Some offences are triable either way.\textsuperscript{54} Jury trials are also used in coronial inquests in certain circumstances: for example, if the senior coroner has reason to suspect that the deceased died while in custody or otherwise in state detention, and that either the death was a violent or unnatural one, or the cause of death is unknown; or that the death resulted from an act or omission of a police officer or a member of a service police force in the purported execution of the officer’s or member’s duty as such.\textsuperscript{55}

25. In addition, jury trial may be used in some civil trials. Jury trial is available in the Queen’s Bench Division or the county court on the application of a party if the court is satisfied that there is a charge of fraud against that party or a claim in respect of malicious prosecution or false imprisonment.\textsuperscript{56} Because jury trial may play an important role in coronial inquests and civil trials where there are concerns about the possible misconduct of public authorities, we consider that the availability of jury trials in coronial inquests and civil trials, as currently provided for, should not be altered by the right to jury trial in the proposed Bill of Rights.

26. The different practices in the jurisdictions of the UK also need to be taken into account in framing a right to jury trial. For example, in Scotland, juries may return a verdict of ‘not proven’, as well as ‘guilty’ and ‘not guilty’. Although whether to reform jury trial in Scotland is under consideration,\textsuperscript{57} this is a matter for the Scottish government, and the right to jury trial in the proposed Bill of Rights should not disturb existing practices. In Northern Ireland, the Director of

\textsuperscript{54} See Magistrates’ Courts Act 1980, ss 17-27.
\textsuperscript{55} Coroners and Justice Act 2009, s 7(2).
\textsuperscript{56} Senior Courts Act 1981 s 69; County Courts Act 1984, s 66.
Public Prosecutions for Northern Ireland may certify a non-jury trial for an indicable offence if he is satisfied that, for example, the defendant is a member of a proscribed organisation or the offence was committed as a result of religious or political hostility, and in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. The UK government must consult with the devolved governments and legislatures in relation to the right to jury trial.

27. In other countries, differing approaches have been taken to the application of a right to jury trial in criminal trials. Section 80 of the Australian Constitution provides that the ‘trial on indictment of any offence against any law of the Commonwealth shall be by jury’, but it has been held by the High Court of Australia that it is for Commonwealth law to define whether an offence is to be tried on indictment or summarily. In practice, this means that the Commonwealth Parliament can avoid the application of s 80 by defining an offence as triable summarily, irrespective of the punishment that may be imposed for commission of that offence. That approach contrasts with that of the US, where, in respect of the constitutional right to trial by jury in criminal trials, if an offence is punishable by imprisonment for more than six months, there is a constitutional right to trial by jury.

28. The approach in Canada and New Zealand more closely resembles that of the US than Australia, in that there is a threshold of punishment beyond which the right to jury trial applies. Under the Canadian Charter there is a constitutional right to a jury trial for all crimes punishable by five years of imprisonment or more, while in New Zealand the right applies where the penalty for the offence is or includes imprisonment for two years or more. In New Zealand the provision was revised to its present form in 2011, with the threshold having

---

59 See response to Question 19.
60 See R v Federal Court of Bankruptcy; Ex parte Lowenstein (1938) 59 CLR 556; Li Chia Hsing v Rankin (1978) 141 CLR 182; Kingswell v The Queen (1985) 159 CLR 264.
61 US Constitution, Sixth Amendment; see also Article III.
63 Canadian Charter of Rights and Freedoms, s 11(f).
64 New Zealand Bill of Rights Act 1990 (NZ), s 24(e).
originally been set at imprisonment for three months. The motivation for the change in threshold was the resource intensiveness of jury trials, as balanced against the defendant’s rights.

29. If the Australian approach is followed, the right may be limited in effect because lawmakers will be able to avoid its application by defining an offence as triable summarily. Accordingly, we consider that the approach that a right to jury trial applies at least above a certain severity of criminal punishment is more principled and therefore preferable. In England and Wales, the Judicial Review and Courts Bill (if passed) will increase the maximum sentence imposable by magistrates on summary conviction for an either way offence from six months’ imprisonment to one year’s imprisonment. In order to ensure consistency with this, it may be desirable for the right to jury trial in the proposed bill of rights to be defined as available in a criminal trial where the punishment in that trial may exceed one year’s imprisonment.

30. The right to jury trial is said in the consultation paper to be ‘qualified’. There should be exceptions to the right to jury trial, because there are circumstances in which it is currently recognised that jury trial is not always appropriate, such as where there is a danger of jury tampering, or where non-jury trial is permitted in Northern Ireland. Further, the right may not be intended by the government to apply to offences under military law tried before military courts-martial. If so, this would mirror the right to jury trial in section 11(f) of the Canadian Charter of Rights and Freedoms and section 24(e) of the New Zealand Bill of Rights Act 1990, each of which contains an exception for offences under military law tried before a military tribunal.

65 See New Zealand Bill of Rights Amendment Act 2011 (NZ), s 4.
67 Judicial Review and Courts Bill 2021, s 13(1).
68 See Criminal Justice Act 2003, ss 44-46. But see Protection of Freedoms Act 2012, s 113 for an example of where a limitation on jury trial was reconsidered.
31. The government may also wish to consider, when drafting, some interpretive issues that could potentially arise under a right to jury trial. One such issue is whether jury unanimity is implied. In Australia and the US, the requirement of jury unanimity has been held to be an aspect of the constitutional guarantee of jury trial, though majority jury verdicts are common at the state and territory level in Australia (as the guarantee is only at the federal level). The unanimity requirement in those jurisdictions stems from historical considerations. In *Cheatle*, the High Court of Australia observed that ‘in 1900 [that is, at the time of enactment of the Australian Constitution], it was *an essential feature of the institution* that an accused person could not be convicted otherwise than by agreement or consensus of all the jurors’. Similarly, in *Ramos*, Justice Gorsuch, delivering the opinion of the US Supreme Court, wrote that ‘[w]herever we might look to determine what the term “trial by an impartial jury trial” meant at the time of the Sixth Amendment’s adoption … the answer is unmistakable. A jury must reach a unanimous verdict in order to convict’.

32. In contrast, in Scotland juries decide on a simple majority basis. In England and Wales, a verdict in proceedings in the Crown Court or High Court need not be unanimous if, in a case where there are not less than 11 jurors, 10 of them agree on the verdict, and in a case where there are 10 jurors nine of them agree on the verdict. The verdict of a jury of eight in proceedings in the county court need not be unanimous if seven of them agree on the verdict. However, no court shall accept such a verdict unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case. A similar position applies in Northern Ireland. Given this practice, the right to jury trial in the proposed bill of rights should not imply any requirement of jury unanimity.

---

70 See *Cheatle v The Queen* (1993) 177 CLR 541; *Ramos v Louisiana* 590 US (2020).
71 See eg, *Jury Act 1977* (NSW), s 55F; *Jury Act 1995* (Qld) s 59A; *Juries Act 2000* (Vic), s 46. Majority verdicts are also available in New Zealand: see *Juries Act 1981* (NZ), s 29C.
72 *Cheatle v R* (1993) 177 CLR 541, at 552.
74 *Juries Act 1974*, s 17(1).
75 *Juries Act 1974*, s 17(2).
76 *Juries Act 1974*, s 17(4).
77 *Criminal Procedure (Majority Verdicts) Act (Northern Ireland)* 1971, s 1.
33. A further issue that may arise is the minimum size of juries. In the case of Brownlee, the High Court of Australia accepted that a jury trial with 10 jurors, after two were discharged during the course of the trial, was compatible with s 80 of the Australian Constitution, though obiter from the plurality questioned whether it would be consistent with s 80 of the Australian Constitution to reduce the number of jury members below 10.78 In the US, the Sixth Amendment has been found not to require a jury to have 12 members because that number of jurors was a historical accident.79 Currently, in England and Wales, the number of jurors can be fewer than 12, with the Juries Act referring to juries of as few as 10 in the Crown Court or High Court, and as few as eight in the county court.80 In Scotland, juries comprise 15 jurors in criminal proceedings (12 in civil proceedings). To preserve the current system, it may be best for the size of juries not to be stipulated in the right to jury trial.

34. The government might also consider whether the right to jury trial in the proposed bill of rights should be waivable at the election of the accused (resulting in a trial before a judge alone instead). In the Auld report in 2001, it was recommended that ‘defendants, with the consent of the court after hearing representations from both sides, should be able to opt for trial by judge alone in all cases now tried on indictment’ because this had the ‘potential for providing a simpler, more efficient, fairer and more open form of procedure than is now available in many jury trials’.81 The Criminal Justice Bill 2003 included provisions to give effect to this recommendation,82 but the final Act as passed did not include these.

35. Varying approaches to this issue have been taken in other jurisdictions. The High Court of Australia has held that it is not possible for an accused to waive a right to jury trial under s 80 for a trial on indictment.83 In the US, waiver of the

---

78 Brownlee v The Queen (2001) 207 CLR 278, 304, at [73].
80 See Juries Act 1974, s 17.
right to jury trial by the accused is possible,\textsuperscript{84} though under the Federal Rules of Criminal Procedure this has to take place with the agreement of the prosecution and court\textsuperscript{85} – there is no absolute right on the part of the accused to waive.\textsuperscript{86} In Canada, waiver of the right to jury trial by the accused is possible on the basis that the accused is the one that the right is designed to protect.\textsuperscript{87} Similarly, in New Zealand, the defendant can elect whether to be tried by jury.\textsuperscript{88} The government may wish to consider whether or not it intends that the right to trial by jury in the proposed bill of rights should be waivable at the election of the accused.

36. Lastly, we note that the ECtHR has found limitations on the ability of states to extradite or deport persons to states where there are substantial grounds to believe that they face a real risk of violation of articles of the ECHR,\textsuperscript{89} including a real risk of a flagrant denial of justice under Article 6.\textsuperscript{90} Such an approach would not be suitable in relation to a right to jury trial because it is not the case that jury trial is the only possible form of fair trial. Accordingly, the unavailability of jury trial in foreign jurisdictions should not serve as a basis for resisting extradition or deportation, and it may be helpful to clarify, out of an abundance of caution, that the right to jury trial does not imply a right not to be removed to a country that does not have jury trial.

\textsuperscript{84} Patton v United States (1930) 281 US 276.
\textsuperscript{85} Federal Rule of Criminal Procedure, Rule 23(a).
\textsuperscript{86} Singer v United States (1965) 380 US 24.
\textsuperscript{87} See R v Turpin [1989] 1 SCR 1296.
\textsuperscript{88} See S v R [2019] 1 NZLR 408.
\textsuperscript{89} Soering v United Kingdom (1989) 11 EHRR 439.
\textsuperscript{90} Othman v United Kingdom (2012) 55 EHRR 1.
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?

Summary

Amendments to substantive rights such as freedom of expression and privacy did not form part of the terms of reference to the Independent Review of the Human Rights Act. Consequently, this part of the proposal has not been the subject of careful consideration by an independent body. This is of particular concern as the questions that it raises are highly complex ones with vast implications for a wide range of private actors. Moreover, as matters stand the Government’s position, as advanced in the consultation document, is opaque and inconsistent.

It is, perhaps, not surprising that a call for enhanced freedom of expression vis-à-vis the press has arisen at this juncture. It is entirely predictable that in seeking to pass any new Bill of Rights there will be a temptation to try and garner favour with the press by including enhanced ‘freedom of expression’ measures that promise to accord greater latitude to the press.

Section 12 of the Human Rights Act 1998 was itself a result of press lobbying during the drafting of the legislation. We do not believe that there is a need to amend s.12 of the Human Rights Act 1998 to limit interference with the press or other publishers. Certainly, such a case has not yet been established.

37. Amendments to substantive rights such as freedom of expression and privacy did not form part of the terms of reference to the Independent Review of the Human Rights Act. Consequently, this part of the proposal has not been the subject of careful consideration by an independent body. This is of particular concern because the questions that it raises are highly complex ones with vast implications for a wide range of private actors. Moreover, as matters stand the
Government's position as advanced in the consultation document is opaque and inconsistent.

38. It is, perhaps, not surprising that a call for enhanced freedom of expression vis-à-vis the press has arisen at this juncture. It is entirely predictable that in seeking to pass any new Bill of Rights that there will be a temptation to try and garner favour with press by including enhanced ‘freedom of expression’ measures that promise to accord greater latitude to the press.

39. Section 12 of the Human Rights Act 1998 was itself a result of press lobbying during the drafting of the legislation. We do not believe that there is a need to amend section 12 HRA to limit interference with the press or other publishers. Certainly, such a case has not yet been established.

40. Moreover, an attempt to amend the section as proposed so that ‘the courts should only grant relief [which interferes with freedom of expression] when there are exceptional reasons’\(^\text{91}\) is contrary to the very clear position in Strasbourg jurisprudence that neither Article 8 nor Article 10 of the European Convention on Human Rights takes precedence over the other.\(^\text{92}\) Likewise, there is no need for a provision in the Bill of Rights to provide ‘more general guidance on how to balance the right to freedom of expression with competing rights (such as the right to privacy) or wider public interest considerations.’\(^\text{93}\)

41. While the Government may not think that ‘it should be merely left to the courts to develop’ and that there should be a ‘presumption in favour of upholding the right to freedom of expression’,\(^\text{94}\) not only would such an approach fall foul of the long line of Strasbourg and domestic case law referred to above, it is also unnecessary. Both the European Court of Human Rights and the domestic courts have clearly articulated how the courts are to balance Articles 8 and 10 when the rights protected by those provisions come into conflict and in each

\(^{91}\) Government Consultation (n 2) at [213].
\(^{92}\) Couderc and Hachette Filipacchi Associés v France (App no 40454/07), 10 November 2015 (Grand Chamber), at [91].
\(^{93}\) Government Consultation (n 2) at [215].
\(^{94}\) ibid, at [215].
case, the courts are required to apply ‘an intense focus on the comparative important of the specific rights being claimed in the individual case’ and ‘the justifications for interfering with or restricting each right must be taken into account’.95 It is also unclear how a statutory weighting in favour of Article 10 would affect the common law cause of action of misuse of private information, which is based on the principle that neither Article 10 nor Article 8 takes precedence over the other. Should Article 10 be granted precedence by the Bill of Rights, this would surely undermine well-established case law from the UK’s highest court and would lead to expensive, and unnecessary, litigation to clarify the elements of the cause of action and the utility of previous case law.

42. The Government’s proposals are also unnecessary in light of the significant emphasis the courts place on freedom of expression. As Lord Nicholls observed in Attorney General v Punch Ltd: ‘restraints on the freedom of expression are acceptable only to the extent they are necessary and justified by compelling reasons. The need for the restraint must be convincingly established. Restraints on the freedom of the press call for particularly rigorous scrutiny.’96

43. It is also difficult to reconcile the Government’s stated commitment to ensuring that ‘the biggest social media companies protect users from abuse and harm’ with its desire to introduce a presumption in favour of freedom of expression. It would be compounding the ‘abuse and harm’ suffered by victims of online abuse to introduce a threshold of ‘exceptional circumstances’ in order to secure relief. Requiring that there be ‘exceptional reasons’ before such relief can be granted would also create significant confusion within defamation law. Given the ‘significant harm’ threshold that was confirmed via the Defamation Act 2013, it is unclear how a further requirement of ‘exceptional reasons’ would interact with that standard. For instance, if a successful applicant in defamation proceedings has demonstrated significant harm (as they must in order to succeed in a claim for defamation), would that be sufficient to meet the

95 Re S(FC) (a child) [2004] UKHL 47, at [17].
96 [2002] UKHL 50, at [27].
‘exceptional reasons’ threshold in section 12? Or does the ‘exceptional reasons’ proposal only apply to interim relief and, if so, how does that fit with the existing case law which makes clear that restraints on freedom of expression must be ‘justified by compelling reasons’?

44. The Government also takes issue with section 12(3), which provides that no relief interfering with freedom of expression may be granted ‘so as to restrain publication before trial unless the court is satisfied that the applicant is *likely* to establish that publication should not be allowed’ (emphasis added). According to the Report, ‘a higher threshold’ is required. However, the courts have considered the meaning of ‘likely’ in detail on a number of occasions and have emphasised that *it is* a higher threshold than is applicable at common law in interim injunction cases in other circumstances. In *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, Lord Nicholls concluded that Parliament’s purpose in enacting section 12(3) was to set a *higher* threshold for the grant of interlocutory injunctions against the media than is the standard at common law in other civil settings, which requires that a ‘serious question [is] to be tried’ or a ‘real prospect of success’ at trial. Indeed, the Supreme Court has expressly recognised the high threshold for granting pre-publication injunctions which, it has described, as ‘extremely rare, because of the well-established constraints on judicial remedies which restrict freedom of expression in advance of publication.’

45. Lord Nicholls in *Banerjee* also emphasised the importance of flexibility in cases involving pre-trial injunctions:

Cases may arise where the adverse consequences of disclosure of information would be extremely serious, such as a grave risk of personal injury to a particular person. Threats may have been made against a person accused or convicted of a crime or a person who gave evidence at a trial. Disclosure of his current whereabouts might have extremely serious consequences. Despite the potential seriousness of the adverse

---

97 *Lachaux v Independent Print Ltd and another* [2019] UKSC 27, at [14].
consequences of disclosure, the applicant’s claim to confidentiality may be weak. The applicant’s case may depend, for instance, on a disputed question of fact on which the applicant has an arguable but distinctly poor case. It would be extraordinary if in such a case the court were compelled to apply a [higher threshold] and therefore, regardless of the seriousness of the possible adverse consequences, refuse to restrain publication until the disputed issue of fact can be resolved at the trial.  

46. For the same reasons, replacing ‘likely’ with a ‘higher threshold’ as proposed at [214] of the Report would be very problematic.

47. It should also be noted that the Government contends at [213] of the Consultation Document that section 12(4) ‘has not had any real effect on the way such issues [namely, whether relief should be granted which interferes with freedom of expression] have been determined by the courts.’ Yet the UK Supreme Court in the recent decision of Bloomberg LP v ZXC [2022] UKSC 5 made repeated reference to section 12(4) in the context of publication of information relating to the fact that a person is under criminal investigation (i.e. prior to the individual being charged). Significantly, the Supreme Court reiterated Lord Nicholls’s observation in Reynolds v Times Newspapers Ltd that:

…the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion.  

The Supreme Court in *Bloomberg LP v ZXC* went on to hold that:

The extent to which publication is in the public interest is of central importance. This is reflected in section 12(4) of the HRA under which, in relation to journalistic, literary or artistic material, the court is required to have particular regard to the extent to which “it is, or would be, in the public interest for the material to be published”.

49. Thus section 12(4) has had a real effect on how issues are determined.

**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?

**Summary**

We are concerned that the Government is proposing rebalancing the right to privacy and freedom of expression, recalling that prior to the Human Rights Act 1998 there was an unacceptable dearth of protection for privacy against the press in English law.

Since the enactment of the Human Rights Act 1998 the courts have developed the tort of misuse of private information. This is shaped by both Articles 8 (private life) and 10 ECHR (freedom of expression). It is evident in the case law that neither right has priority over the other, and that ‘the contribution that publication will make to a debate of general interest is a factor of particular importance’. We believe that this is a positive development and that the law is operating effectively.

---

100 [2022] UKSC 5, at [61].
We do not believe that there is a case for substantive reform of the balance that is struck between privacy and freedom of expression. Consequently, we reject the proposal that the courts should be directed to the ‘utmost importance attached to Article 10’. Indeed, the proposal to create a blanket presumption in favour of Article 10 ECHR over and above Article 8 ECHR would be incompatible with our Convention obligations.

The Consultation also notes that the ‘government is … clear that freedom of speech and academic freedom are fundamental principles, not least in the higher education sector.’ While this commitment is certainly laudable, it is rather inconsistent with the Government’s own PREVENT duty which compels universities (amongst other institutions) to monitor and, indeed, regulate the speech that occurs within these ‘centres of enquiry and intellectual debate.’ If the Government is truly committed to protecting intellectual curiosity and academic discussion, it does not need to improve the protection of Article 10 within a domestic Bill of Rights but, rather, should consider amending (or repealing) the PREVENT duty. Indeed, if Article 10 is, in fact, given the weight which the Government is suggesting, that will raise significant issues in terms of the legality of the PREVENT duty.

50. We are concerned that the Government is proposing rebalancing the right to privacy and freedom of expression. It is worth recalling that prior to the Human Rights Act 1998 there was an unacceptable dearth of protection for privacy against the press in English law. Indeed, the deficiencies of the law in this regard were most famously evident in the case of *Kaye v Robertson* in which the Court of Appeal held that there was nothing that English law could do prevent a tabloid newspaper from publishing photographs of an actor in a state of semi-consciousness after brain surgery that they had obtained by infiltrating his hospital room. Bingham LJ declared at the time:

> This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens.
…The defendants’ conduct towards the plaintiff here was “a monstrous invasion of his privacy” … If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff’s complaint. Yet it alone, however gross, does not entitle him to relief in English law.101

51. Since the enactment of the Human Rights Act 1998 the courts have developed the cause of action known as misuse of private information. This is shaped by the values underpinning both Articles 8 and 10 ECHR. Stage 1 of that tort requires the courts to determine whether the claimant had a reasonable expectation of privacy. If such an expectation is established the court will then consider stage 2. Stage 2 involves a balancing of the claimant’s article 8 right to privacy and the publisher’s article 10 right to freedom of expression in order to determine which should prevail in the particular circumstances of the case – the so-called ‘balancing exercise’.102 We believe that this is a positive development and that the law is operating effectively. It is evident in the case law that neither right has priority over the other, but that ‘the contribution that publication will make to a debate of general interest is a factor of particular importance’.103 We do not believe that guidance should be given to the courts directing them, as the Government suggests, to the ‘utmost importance attached to Article 10’.104

52. In any event we believe that it would be incompatible with our Convention obligations to create a blanket presumption in favour of Article 10 ECHR over and above Article 8 ECHR. This is contrary to the long line of case law from the European Court of Human Rights which has clearly and consistently set out the test to be applied when Article 10 conflicts with other rights, especially Article

102 Bloomberg v ZXC [2022] UKSC 5, at [56].
103 ibid, at [62].
104 Government Consultation (n 2) at 64.
8. As that test makes clear – and as the domestic courts have repeatedly affirmed – Article 10 is not presumed to carry greater weight.

53. We note that the Government has suggested that the ‘case law of the Strasbourg Court has shown a willingness to give priority to personal privacy’.105 This is an inaccurate representation of the case law.

54. The Convention protects both Articles 8 and 10 ECHR and these rights are non-hierarchical. Indeed, the Grand Chamber has expressly stated that ‘as a matter of principle these rights deserve equal respect’.106 All that the Court requires states to do is to strike a balance between the competing rights by considering the factors identified in Von Hannover (No.2). This includes the ‘contribution made by photos or articles in the press to a debate of general interest’.107 Moreover, the European Court of Human Rights offers a wide margin of appreciation to states in striking a balance between those two competing rights, provided that the balancing criteria are applied. Indeed, it will only intervene where there are strong reasons:

Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.108

55. Consequently, it is incompatible with the UK’s Convention obligations to create a blanket presumption in favour of Article 10 ECHR over and above Article 8 ECHR.

---

105 ibid, at [206].
106 von Hannover v Germany (No.2) (2012) 55 EHRR 15, at [106].
107 ibid, at [109].
108 ibid, at [107].
56. Nor is there a need to adopt this approach. There are no cases in which the European Court of Human Rights has determined that the UK has violated Article 8 ECHR in respect of press intrusion into privacy.

57. Indeed, we note that the only case that the Government has identified as evidence of the problem that it perceives within the Strasbourg case law is a case concerning tabloid journalism in Slovakia,109 a case that, of course, does not even bind the UK.

58. In ML v Slovakia the Court found that there had been a violation of Article 8 ECHR when the domestic courts failed to apply the balancing criteria when faced with a case in which the tabloid press in Slovakia had published unverified tawdry statements on, and pictures of, the applicant’s son, a priest convicted of sexual offences, years after his death. We find the Government’s presentation of the case slightly misleading as the Court did not determine that any reportage about the convictions would violate the Convention, but rather that on the facts that publication of unverified material ‘presented in a sensational and gossip-like manner, with flashy headlines … placed on the front pages, along with – photographs of the applicant’s late son’ had not been the subject of sufficient scrutiny by the domestic courts. Consequently, the domestic courts had ‘failed to carry out a balancing exercise between the applicant’s right to private life and the newspaper publishers’ freedom of expression in conformity with the criteria laid down in the Court’s case-law’.110

59. The importance of Article 10 and freedom of expression, especially a free press, is plainly reflected in both the case law of the ECtHR and the domestic courts and there is, then, no need for ‘clearer guidance’ than that which the jurisprudence – as reaffirmed by s 12 – provides. Further, any such attempt to attach greater weight to Article 10 would raise the possibility of violations of the ECHR and significant issues in terms of existing causes of action within domestic law, in particular misuse of private information.

109 ML v Slovakia [2021] ECHR 821 referenced in Government Consultation (n 2) at [206].
110 ML v Slovakia [2021] ECHR 821, at [56].
60. It also bears noting that within defamation law, there is a clear appreciation of the importance of Article 10 and freedom of expression. Defences such as the *Reynolds* public interest defence which now find reflection in the Defamation Act 2013, clearly recognise the importance of responsible journalism and enable the courts to attach sufficient weight to freedom of expression, while also protecting the reputational interests of individuals, including victims of online abuse who, according to the Report, the government is committed to protecting.

61. The Report also notes that the ‘government is … clear that freedom of speech and academic freedom are fundamental principles, not least in the higher education sector.’\(^{111}\) While this commitment is certainly laudable, it is rather inconsistent with the Government’s own PREVENT duty which compels universities (amongst other institutions) to monitor and, indeed, regulate the speech that occurs within these ‘centres of enquiry and intellectual debate.’\(^{112}\) If the Government is truly committed to protecting intellectual curiosity and academic discussion, it does not need to improve the protection of Article 10 within a domestic Bill of Rights but, rather, should consider amending (or repealing) the PREVENT duty. Indeed, if Article 10 is, in fact, given the weight which the Government is suggesting, that will raise significant issues in terms of the legality of the PREVENT duty.

62. In terms of other international models, the Report references the United States and South Africa. It is highly problematic to rely on the United States as a potential model as its constitutional framework is distinctly different to that of the UK and any approach that seeks to adopt a First Amendment-like predominance of freedom of speech will encounter significant difficulties within the framework of the European Convention on Human Rights given that Article 10 ECHR is not similarly pre-weighted. Similarly, while the South African Constitution and, in particular, section 16 of the Bill of Rights, is cast in broader

---

\(^{111}\) Government Consultation (n 2) at [210].

\(^{112}\) ibid.
terms than Article 10 ECHR, the right to freedom of expression protected by the South African Bill of Rights is subject to section 36 which permits limitations in terms that are strikingly similar to Article 10(2) ECHR. It is also worth noting that the South African Bill of Rights protects the right to privacy.

63. In sum, given the approach adopted by the ECtHR and the domestic courts which ensures that adequate weight is attributed to the right to freedom of expression and recognises the importance of a free press, there is no need for amendments which would see Article 10 being presumed to have preeminent weight over other, conflicting, rights. Indeed, for so long as the UK is a member of the Council of Europe and, thus, bound by the ECHR, such an approach would be extremely problematic.

Question 6

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

Summary

Whilst in general we welcome steps to protect journalists’ sources, we note that Article 10 ECHR has provided important protection for journalists’ sources.

64. We welcome steps to protect journalists’ sources whilst recognising that Article 10 ECHR already provides important protection for journalists’ sources. The importance of press freedom in a democratic society together with the chilling effect that an order for disclosure of a source has on the exercise of freedom of expression has been acknowledged by both domestic courts and the European Court of Human Rights. Helpful guidance on the handling of journalists’ sources was provided by the European Court of Human Rights in Goodwin v UK (1996) 22 EHRR 123 and has been followed by the domestic courts. Any measures inhibiting the exercise of free speech cannot be compatible with Article 10 unless it can be justified by an overriding requirement

113 European Court of Human Rights Factsheet – Protection of Journalistic Sources, December 2021
in the public interest and subject to the test of necessity in a democratic society pursuant to Article 10(2). The Strasbourg jurisprudence has provided helpful guidance on what is and what is not permitted.

65. The role of Article 10 ECHR in protecting journalists’ sources was evident when the Government detained journalist David Miranda using terrorism legislation. On that occasion the Court of Appeal determined that the stop powers were incompatible with Article 10 ECHR.

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

Summary
If the Government is committed to a Bill of Rights that protects freedom of expression independently of the Convention right – a position which, for the reasons outlined with respect to Questions 4-6 above, we do not support – then we advise that full consideration is given to the impact that this could have on the existing domestic legal framework. We also suggest that any newly created right to freedom of expression would need to consider the need for protection of freedom of expression vis-a-vis private actors; a right that focused on public bodies would not be able to tackle modern threats to free expression arising from private actors.

66. Freedom of expression is crucial to individual autonomy and protecting the expression of controversial ideas and information, as well as structurally important to a well-functioning democracy because it permits individuals to criticise and hold those in power to account.

67. Protest is one of the most important forms of freedom of expression.

For many people, participation in public meetings or less formal forms of protest – marches or other demonstrations on the streets, picketing, and

sit-ins - is not just the best, but the only effective means of communicating their views. Leader-writers, journalists and other writers, politicians and celebrities can use the mass media, but these opportunities are regularly available only to a small minority. Taking part in public protest, particularly if the demonstration itself is covered on television and widely reported, enable people without media access to contribute to public debate. A right of peaceful assembly is an important freedom, even though individuals can always write letters to newspapers, participate in radio phone-in programmes, and engage in discussion on the Internet.115

68. Consequently, if the Government wishes to strengthen protection for freedom of expression, then it should not enact the proposed provisions in the Police, Crime, Sentencing and Courts Bill, which are intended to greatly restrict and inhibit freedom of expression and freedom of assembly.

69. Looking to the proposed Bill of Rights we suggest that any attempt to untether freedom of expression within the Bill of Rights from Article 10 ECHR is prone to be fraught with difficulties. We suggest that the following issues would require detailed and careful consideration, which is clearly lacking in the current Consultation:

- Clarity is needed as to the intended relationship between the common law right to freedom of expression, Article 10 ECHR and the right to freedom of expression under the Bill of Rights;

- Clarity is needed as to the balance that should be struck between freedom of expression and other competing rights and interests under the Bill of Rights and the ramifications of this for existing legal provisions – including criminal law;

Clarity is needed as to the scope of the obligations under the right to freedom of expression and in particular the extent to which the right will apply in the context of threats to freedom of expression that arise from private actors.

Relationship between Common Law, Article 10 ECHR and Right to Freedom of Expression within the Bill of Rights

70. Although freedom of expression has long been recognised as a common law right and ‘its historical foundation is more precarious than sometimes acknowledged and its content less than certain’.\(^{116}\) Indeed, Rowbottom’s careful study of the common law right to freedom of expression revealed the limitations of the common law right and the role of Article 10 ECHR in plugging the gap. He commented that

So far, the reliance on the ECHR has allowed some of the uncertainties to continue without posing practical problems. However, if greater reliance is placed on common law rights in future, these are the questions that will need to be addressed.\(^{117}\)

71. It is therefore evident that we could not rely upon the common law without requiring courts to significantly develop it, and such a move seems at odds with the direction of travel against judicial creativity.

72. Consequently, it is imperative that in absence of an Article 10 ECHR right within the Bill of Rights that a ‘Bill of Rights’ right to freedom of expression would be needed. This would, however, raise questions as to the scope and nature of that right and its interface with both the common law right and Article 10 ECHR (which we would still be bound by under the European Convention on Human Rights).


\(^{117}\) ibid, at 139.
Balance that is Struck with other Competing Rights and Interests

73. It seems that the Government's aim in untethering freedom of expression from Article 10 ECHR is to enhance the protection that is accorded to freedom of expression. Although in general the idea of greater protection for freedom of expression may seem desirable freedom of expression is not, nor should it be, an absolute right and the extent to which it should be protected thus depends upon the other rights at stake.

74. The Article 10 ECHR model that we have at present allows for a careful balance to be struck which evaluates these other competing rights and interests, which includes not only privacy, but also reputation, the protection of minority groups from expression that incites violence and hatred, as well as national security. If the Bill of Rights wishes to strike a different balance from that struck under Article 10 ECHR then this is likely to have major ramifications across a vast array of different areas of law.

75. Indeed, in this regard it is helpful to note that the Law Commission has recently completed two major reports which have considered freedom of expression in the context of hate crime and communications offences.\(^{118}\) The scale and detail of those reports is indicative of the complexity of the issues that arise when seeking to refine any laws relating to freedom of expression. It is thus imperative that any reform that purports to introduce a newly calibrated right to freedom of expression is very carefully considered as it may have unintended consequences when it interacts with other aspects of our legal framework, including criminal law.

Application of the Right to Private Actors

76. In the event that the Bill of Rights is premised upon a right to freedom of expression that is independent of Article 10 ECHR, then an important issue that needs to be considered is how it should be framed in order to best address the threats posed to freedom of expression that arise from structurally dominant

private actors (as opposed to the state). Government regulation of speech is rightly seen with scepticism, given examples of repression and censorship, particularly of minority and dissenting views, but a focus on state power is unsatisfactory in the context of modern threats that also arise from structurally dominant private actors.

77. Private social media companies are the paradigmatic example of the power that some private actors now wield through shaping the conditions under which individuals may express themselves on their platforms. User content is routinely removed, and individuals are excluded (temporarily or indefinitely) based on loosely defined (and often arbitrarily enforced) contractual terms and conditions of use (also known as community standards). Structural dominance can be determined in several ways, but one measure is market share. Reliable figures are difficult to obtain, but according to one report the UK had around 45 million active social media users in 2020, and out of the top five social media platforms all but one are owned by Facebook Inc. (recently renamed to Meta).\textsuperscript{119}

78. These platforms have also attained great significance for political campaigning. Data from the Electoral Commission in the UK analysed by Katharine Dommett and Sam Power suggest that in the 2017 General Election parties spent 42.8% of their overall advertising budget on online advertising, the vast majority on Facebook.\textsuperscript{120} Excluding certain political parties from access but not others, may therefore represent a particularly grave interference in the democratic process. Therefore, there appears to be a good case to require dominant platforms to take freedom of expression into account in their dealings with users and thus prevent them from relying on unilaterally imposed and arbitrarily enforced contractual terms to stifle free speech.

79. Consequently, if the Bill of Rights is to contain a freestanding right to freedom of expression, there are two issues that would need to be considered in respect of private actors.

- How to draft the right to freedom of expression in such a way as to allow for the direct regulation of powerful private actors through other legislation, in a manner that gives practical effect to free speech commitments,
- Whether the legislation should recognise and make provision for an indirect horizontal effect of freedom of expression rights between private actors, primarily by requiring courts to take free speech into account when interpreting, developing, and applying private law in certain circumstances.

**Regulation**

80. The right to freedom of expression under the Bill of Rights should not preclude Parliament in setting up regulatory regimes in legislation, nor hamstring public authorities in taking effective enforcement measures. This could be accomplished through provisions in the right to freedom of expression in the Bill of Rights that expressly recognise combatting private threats to free speech as a legitimate aim that can justify an interference with freedom of expression.

81. Such provisions would ensure legal certainty for instance for the regulatory regime envisioned by the Online Safety Bill. Clause 12 of the Bill currently promises to protect freedom of expression by requiring service providers to ‘have regard to the importance of protecting users’ right to freedom of expression within the law (…) when deciding on, and implementing, safety policies and procedures.’ However, as noted in a Joint Committee Report by the House of Commons and House of Lords, this protection appears inadequate in its current form because its requirements are comparatively weak when contrasted with the extensive safety duties envisioned.\(^{121}\) Moreover, the

\(^{121}\) *Draft Online Safety Bill, Report of Session 2021-22* (Joint Committee on the Draft Online Safety Bill, 2021) at [282]–[283].
Bill does not currently address the distinct possibility that social media platforms might invoke their own rights to free expression when seeking to challenge any regulatory requirements imposed by Ofcom.

**Indirect Horizontal Effect**

82. A further issue to consider is whether the rights protected under the Bill of Rights, including freedom of expression, will have indirect horizontal effect. The concept has some conceptual links but should not be confused with positive obligations. Positive obligations are addressed exclusively at the state and oblige it to promote the meaningful enjoyment of rights under certain circumstances, for instance by regulating the conduct of private actors.\(^\text{122}\) Indirect horizontal effect, by contrast, ensures that courts take freedom of expression into account when interpreting, developing and applying private law in disputes exclusively between private actors. This would for instance cover disputes between a social media platform and a user, and in some cases may preclude a service provider from relying on otherwise enforceable contractual provisions to remove content or terminate an account. The effect is indirect because while rights thus influence private law, they crucially do not become an independent cause of action or a separate source of enforceable legal obligations, and their effect remains horizontal (as opposed to vertical), because it applies exclusively to disputes between private actors.\(^\text{123}\)

83. The Bill of Rights would therefore limit and influence private actors in their conduct with others through private law, but not generally obligate any private entity to act in accordance with fundamental rights. What specific indirect horizontal implications a right has in a given dispute would depend on the balance of competing interests and fundamental rights of the parties.

84. In this regard it is worth noting that when the HRA 1998 was drafted there was considerable attention paid to the question of whether the Convention rights


would have any direct or indirect horizontal effect.\textsuperscript{124} At the time this was of particular interest in the context of the right to privacy and a considerable body of literature was produced on this complex issue.\textsuperscript{125} The Bill of Rights may therefore entail revisiting some of those issues, bearing in mind that horizontal effect may arise not only in relation to freedom of expression, but also the other rights protected by that legislation. This issue would therefore need to be given careful consideration in the light of the vast ramifications that it could have for private law.

85. In the context of freedom of expression indirect horizontal effect has been implemented with some success in Germany, where the Constitutional Court, has amongst other things, required Facebook to reinstate the account of a political party in the run-up to European Parliament elections.\textsuperscript{126}

86. It is therefore possible that some form of direct regulation and indirect horizontal effect could be employed to work in tandem to ensure that structurally dominant platforms: (1) cannot remove content indefinitely over violations of terms and conditions of use, especially in the case of public officials and political parties, provided that the content is not otherwise unlawful, (2) afford their users a right to be heard and that they are given sufficient reasons based on predictable, publicly available rules for any adverse decision,


\textsuperscript{126} German Federal Constitutional Court, 1 BvQ 42/19, 22 May 2019, unpublished; German Federal Constitutional Court, 1 BvR 3080/09, 11 April 2018, BVerfGE 148, 267; for a more detailed overview, see Stefan Theill, ‘Private Censorship and Structural Dominance – Why Social Media Platforms Should have Obligations to their Users under Freedom of Expression’ (2022).
and (3) cannot arbitrarily exclude individual users (or groups) from participation, with a general presumption against indefinite (as opposed to temporary) exclusion from the platform.

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.

Summary
We conclude that the case for the introduction of a ‘significant disadvantage’ test has not been made out, and that the intention of the government in proposing such a test has not been well articulated in the consultation document. If the intention is to rebalance litigation towards those cases that are most important for the public interest, then this is likely to require a broader reconsideration of the ‘victim’ test for HRA claims, with particular regard to those cases where a serious rights infringement is suspected but the immediate victims are unable or unwilling to act as claimants. We note that sections 3 and 4 of the HRA are not presently governed by the victim test and should therefore be unaffected by this proposal, but we recommend that this position be made explicit.

87. The suggestion that a permission stage should be implemented for claims under a Bill of Rights with a requirement that individual claimants must have suffered a ‘significant disadvantage’ is far-reaching and would represent a substantial change from the existing standing rules under the HRA. This suggestion was not considered in the IHRAR report and was not included in the call for evidence for the IHRAR.
88. It is not clear from the consultation document what the proposed reform is intended to achieve. The obvious possibilities are as follows.

- First, a requirement of ‘significant disadvantage’ might be expected to reduce the volume of unmeritorious claims that proceed to a full hearing.

- Second, the aim might be to focus the attention of the courts on those victims who have suffered the very most serious detriment from alleged human rights infringements.

- Third, the idea might be to focus the attention of the courts on the most serious infringements in view of the public interest in ensuring that human rights principles are upheld.

89. The implications of a ‘significant disadvantage’ test depend fundamentally on which of these objectives is engaged, but there is no clear guidance on this question in the consultation document. Nonetheless, we have commented on each possibility below.

(1) Weeding out unmeritorious claims

90. There is some evidence from the Consultation document that a ‘significant disadvantage’ test is intended to weed out unmeritorious claims. It is stated that the government’s aim is to ‘ensure that spurious cases do not undermine public confidence in human rights’ and that ‘people lose trust in the system’ ‘when frivolous or spurious cases come before the courts’. An example is given of an applicant who is said to have ‘brought a series of spurious claims relying on breaches of his human rights’. However, it is also acknowledged that these claims were struck out and the government was able to apply for a Civil Restraint Order in relation to this applicant. As the Consultation document itself

---

127 Government Consultation (n 2) at [9], [219].
128 ibid, at [129].
acknowledges, then, the courts already have powers enabling the screening out of unmeritorious proceedings. The overriding objective of the Civil Procedure Rules (CPR)\(^{129}\) is to ‘deal with cases justly and at proportionate cost’.\(^{130}\) Consistently with this, courts have strike out powers, the ability to grant summary judgment, and are able to make civil restraint orders. It is important to note that these powers are exercised against a background context which requires any party seeking to rely on a right arising under the HRA or seeking a remedy available under the HRA to include specific details of their claim in their statement of case.\(^{131}\) The consultation document does not make a strong case that these existing methods for weeding out unmeritorious cases are insufficient.

\textbf{a. Strike out}

91. Consistently with the overriding objective of the CPR,\(^{132}\) a statement of case may be struck out if it appears to the court:\(^{133}\)

‘(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;\(^{134}\)

(b) that the statement of case is an abuse of the court’s processes or is otherwise likely to obstruct the just disposal of the proceedings;\(^{135}\)

…’

\(^{129}\) The Civil Procedure Rules apply to all proceedings in the County Court, High Court and Civil Division of the Court of Appeal: CPR 2.1.

\(^{130}\) CPR 1.1.

\(^{131}\) CPR Practice Direction 16, paragraph 15.1.

\(^{132}\) CPR 1.4.

\(^{133}\) CPR 3.4

\(^{134}\) Practice Direction 3A gives examples of claims that ‘set out not facts indicating what the claim is about’, ‘are incoherent and make no sense’, ‘contain a coherent set of facts but those facts, even if true, do not disclose any legally recognizable claim against the defendant.’

\(^{135}\) Practice Direction 3A states that a claim may be struck out under this rule ‘where it is vexatious, scurrilous or obviously ill founded’. Peter Coulson (ed), \textit{Civil Procedure 2021}, vol 1 (Thomson Reuters 2021) gives examples of statements of case offending against the doctrine of res judicata (3.4.5), collateral attacks upon earlier judicial decisions (3.4.9), and pointless and wasteful litigation where the costs are out of all proportion to the benefit to be achieved (3.4.14).
An entire claim may be struck out, or part of a claim.\textsuperscript{136}

92. The consultation document states, ‘we believe it is wrong that the burden is on public bodies to apply to courts to strike out frivolous or spurious human rights claims.’\textsuperscript{137} However, this overstates the position. While defendants may initiate strike out applications, the power may also be exercised by the court acting on its own initiative (therefore sparing the defendant any costs).\textsuperscript{138} Although such an approach may be rare, it will be open to the court to do so in a plain and obvious case.\textsuperscript{139} To the extent that a court has not struck out a given human rights related claim on its own initiative, this is an indication that said claims are not frivolous or spurious. Even where it is a defendant public body initiating the strike out process, an application will usually be made at the pre-trial stage of proceedings, resulting in significant cost and time savings if granted.\textsuperscript{140} To the extent that a defendant public body is late in filing its application for strike out, and therefore incurs costs in relation to preparation for a substantive hearing which are then wasted if the claim is struck out, the defendant public body must take some responsibility for this. If they are unable to make use of the mechanisms which are made available to them in a cost-effective way, it may be that the particular public bodies in question are under-resourced and those resources should be increased. It is unclear why human rights claims are seen as requiring a different approach from any other type of claim – public authorities will be familiar with using the strike out mechanism in relation to allegations of negligence, for example.\textsuperscript{141}

\textsuperscript{136} CPR 3.4(1).
\textsuperscript{137} Government Consultation (n 2), at [221].
\textsuperscript{138} CPR 3.3. See also Practice Direction 3A 2.1 which empowers a court officer to consult a judge when a claim form is filed so that a judge may ‘may on his own initiative make an immediate order designed to ensure that the claim is disposed of…’ and PD 3A 4.1.
\textsuperscript{139} Jay Benning Peltz (A Firm) v Deutsch [2000] 2 WLUK 299.
\textsuperscript{140} It should also be noted that where a defendant public body succeeds in applying for strike out of a claim (or for summary judgment), the court may order that the claimant pay the defendant's costs under CPR 44.2 (the general rule being that the unsuccessful party will be ordered to pay the costs of the successful party).
\textsuperscript{141} CT Walton (ed), Charlesworth & Percy on Negligence (14th edn, Sweet & Maxwell 2018) calls a strike out application ‘the ultimate weapon in the armoury of the defendant who considers the claimant has no arguable case in negligence’ (4-329).
93. We acknowledge that the test for strike out (‘discloses no reasonable grounds for bringing a claim’) is a high one and whether any given case will merit strike out is fact specific. However, at a general level, the high threshold for strike out is essential in order to balance a litigant’s access to the courts and right to a fair trial, and the aim of saving costs. In this regard, the existence of a strike out power has been tested against article 6 of the Convention. The European Court of Human Rights has commented on the strike out power contained in the CPR, acknowledging that the article 6 right is not absolute.\textsuperscript{142} It has considered that ‘there is no reason to consider the strike out procedure which rules on the existence of sustainable causes of action as per se offending the principle of access to court. In such a procedure, the plaintiff is generally able to submit to the court the arguments supporting his or her claims on the law and the court will rule on those issues at the conclusion of an adversarial procedure.’\textsuperscript{143}

94. In sum, if a strike out application is not sought or is not granted in a human rights case, this is itself an indication that the claim is not unmeritorious, spurious or frivolous.

\textit{b. Summary Judgment}

95. In addition to the courts’ powers to strike out claims, CPR 24.2 empowers the court to give summary judgment against a party if it considers that the party ‘has no real prospect of succeeding on the claim or issue’ and ‘there is no other compelling reason’ for the matter to proceed to trial. This provides a further mechanism for dealing with unmeritorious cases in a cost-effective manner. As

\begin{footnotes}
\item[142] Z v United Kingdom (2002) 34 EHRR 3 (ECtHR), at [93].
\item[143] ibid, at [97]. See also Kent v Griffiths (No 3) [2001] QB 36 (CA), at [38] (‘it would be wrong for the Osman decision to be taken as a signal that, even when the legal position is clear and an investigation of the facts would provide no assistance, the courts should be reluctant to dismiss cases which have no real prospect of success. Courts are now encouraged, where an issue or issues can be identified which will resolve or help resolve the litigation, to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. There is no question of any contravention of article 6 … Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible. Although a strike out may appear to be a summary remedy, it is in fact indistinguishable from deciding a case on a preliminary point of law’).
\end{footnotes}
with strike out, the court can act on its own initiative or on the application of a defendant public body.

c. Powers to restrain litigants from bringing claims

96. Where a claim has been struck out and the claim is considered to have been ‘totally without merit’,\(^{144}\) CPR 3.4(6) requires the court to record this in its order, and requires the court to consider whether it is appropriate to make a civil restraint order.\(^{145}\) Practice Direction 3C governs the making of civil restraint orders.\(^{146}\) A **limited civil restraint order** may be made ‘where a party has made 2 or more applications which are totally without merit’. The effect of a limited civil restraint order is to prevent the party from making any further applications in the proceedings in which the order is made, *without first obtaining permission*. If permission is not obtained, the application will automatically be dismissed. The effect of an **extended civil restraint order** depends on the identity of the judge who made the order, but also imposes onerous permission requirements.

---

\(^{144}\) A claim will be “totally without merit” if it is “bound to fail”, “hopeless” or has “no rational basis”: *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82, [2016] 1 WLR 2793, at [17].

\(^{145}\) See also CPR 3.11 and 23.12.

\(^{146}\) The courts also have the power to make similar orders in the exercise of their inherent jurisdiction: John O’Hare and Kevin Browne, *Civil Litigation* (19th edn, Thomson Reuters 2019) 33-028; Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2021) 3.41, 3.42.
<table>
<thead>
<tr>
<th>Judge</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Of the Court of Appeal</td>
<td>Party cannot issue a claim or make applications in any court concerning the proceedings which are the subject of the order without permission of a judge identified in the order. Such claims are automatically struck out or dismissed. Applications for permission must be made in writing, and determined without hearings.</td>
</tr>
<tr>
<td>Of the High Court</td>
<td>Party cannot issue a claim or make applications in the High Court or the County Court concerning the proceedings which are the subject of the order without permission of a judge identified in the order. Such claims are automatically struck out or dismissed. Applications for permission must be made in writing, and determined without hearings.</td>
</tr>
</tbody>
</table>

97. An extended civil restraint order will be made for a period not exceeding 2 years, with the ability for the court to extend this as long as the duration is not extended for a period greater than 2 years on any given occasion.

98. If it is considered that an extended civil restraint order would not be sufficient or appropriate, a judge may make a **general civil restraint order**. The effect of a general civil restraint order is wider than an extended civil restraint order. With an extended civil restraint order, the claims and applications which are restrained are those relating to the proceedings in which the order was originally made. With a general civil restraint order, the person who is the subject of the order is restrained from making any applications or filing any claims without permission, related to any subject matter in the named court.

99. As discussed above, the court is obliged to consider the making of civil restraint orders in appropriate cases. However, if this has not happened, a party faced

---

147 Practice Direction 3C 3.2(1)(a).
148 Practice Direction 3C 3.3.
149 Practice Direction 3C 3.2(1)(v).
150 Practice Direction 3C 3.3.
151 Practice Direction 3C 3.9.
152 Practice Direction 3C 4.1.
with vexatious or unmeritorious claims may apply itself for a civil restraint order against another party.\textsuperscript{153} The consultation document states that in 2020 ‘government litigators were forced to apply for a Civil Restraint Order’ in relation to a particular applicant,\textsuperscript{154} showing that the government is already aware of, and using, this method of limiting unmeritorious claims. However, the consultation document goes on to say ‘relying on the government seeking Civil Restraint Orders is not the appropriate way to deal with this issue.’\textsuperscript{155} This obscures the fact that the court itself is obliged to consider whether a Civil Restraint Order should be made, as discussed above. It also obscures the tension between reducing costs and restricting a litigant’s right to access the court.

100. Further, section 42 of the Senior Courts Act 1981 provides that the High Court may, on an application made by the Attorney General, make ‘a civil proceedings order, a criminal proceedings order or an all proceedings order’ if satisfied that any person ‘has habitually and persistently and without any reasonable ground’ instituted vexatious proceedings or made vexatious applications.\textsuperscript{156} The effect of a civil proceedings order will be to prevent the person against whom the order is made from bringing any civil proceedings in any court unless leave is given by the High Court.\textsuperscript{157} Leave will not be given unless the High Court ‘is satisfied that the proceedings or application are not an abuse of process of the court in question and that there are reasonable grounds for the proceedings or application.’\textsuperscript{158} Unless otherwise specified, such an order remains in force indefinitely. It is unclear why this power, which has been described as draconian,\textsuperscript{159} is insufficient to meet the government’s needs if it is genuinely faced with persistent unmeritorious claims.

101. We consider that the mechanisms already available are sufficient for screening out unmeritorious claims. That this is not the main aim of the

\textsuperscript{153} Practice Direction 3C 5.1.
\textsuperscript{154} Government Consultation (n 2) at [128].
\textsuperscript{155} Ibid, at [129].
\textsuperscript{156} Senior Courts Act 1981, s 42(1).
\textsuperscript{157} Senior Courts Act 1981, s 42(1A).
\textsuperscript{158} Senior Courts Act 1981, s 42(3).
\textsuperscript{159} Michael Burton (ed), Civil Appeals (2nd edn, Sweet & Maxwell 2013) 2-1515.
government, however, is apparent from the emphasis in this part of the consultation on reducing the number of compensation claims under the HRA. Given that compensation can only be awarded when necessary to provide ‘just satisfaction’ (HRA s 8), this demonstrates that the intention is for the ‘significant disadvantage’ test to bar claims where compensation is necessary. In other words, the government seems to be seeking a method to bar some meritorious claims, rather than a method to prevent unmeritorious claims.

102. If a permission stage is to be implemented, a sensible option might be to implement the same threshold as that applied to claims for judicial review. The relevant test for judicial review is whether the claim is ‘arguable’ or has a ‘realistic prospect of success’.

103. We conclude that the existing mechanisms for dealing with unmeritorious cases are sufficient and a permission stage is not needed to achieve this aim. If a permission stage is nonetheless contemplated, the judicial review test of arguability would be preferable to a ‘significant disadvantage’ test.

(2) Prioritising victims who have suffered the most serious harm

104. The second possibility, that the ‘significant disadvantage’ test is intended to focus the attention of the courts on those victims who have suffered the most serious harm, also gains some support from the consultation document. It is said that ‘claims aiming to vindicate rights are serious matters’ and that ‘the system needs to focus on cases where genuine harm or loss has been caused’. Once again, however, this interpretation is contradicted by the repeated criticism of the use of the HRA to obtain compensation. Given that the courts have developed a principle of refusing compensation where ‘just

---

160 See also R(Greenfield) v Home Secretary [2005] UKHL 14.
161 Government Consultation (n 2) at [220].
satisfaction’ can be achieved by a simple recognition that a human rights infringement has taken place, it is likely that a ‘significant disadvantage’ test would tend to preserve the types of claims where compensation is presently awarded and bar those where it is not.

105. One of the justifications given in the consultation document for the proposed test is that 'similar case management conditions exist in other jurisdictions, such as the European Court of Human Rights'. There is indeed a threshold of ‘significant disadvantage’ in Article 35(3)(b) ECHR, but this assumes that the claimant has already exhausted national remedies and does not provide any support for the view that those national remedies ought to be similarly restricted. In any case, Jacobs, White and Ovey report that the criterion in Article 35(3)(b) ‘has been used as the primary reason for inadmissibility in only a small number of cases’.

106. In light of this, there is an additional risk that raising the threshold for victimhood might lead to a divergence between UK law and the jurisprudence of the European Court of Human Rights, which would make it easier for claimants to apply directly to Strasbourg on the basis that they had exhausted their remedies under domestic law (Article 35(1)).

107. **We conclude that a significant disadvantage test might succeed in barring claims from victims who have only suffered moderate disadvantage but that this is unlikely to achieve any significant reduction in awards of compensation against public authorities under the HRA. Depending on how it is interpreted, it might also encourage claimants to apply directly to Strasbourg rather than seeking remedies in UK courts.**

---

162 ibid, at [222].
(3) Prioritising the public interest

108. The third possibility is that a ‘significant disadvantage’ test is intended to rebalance litigation towards the most serious infringements in view of the broader public interest in upholding human rights principles. The consultation document provides substantial support for this view, for example, in the proposal that cases of ‘overriding public importance’ should be allowed to proceed even if the claimant has not suffered a significant disadvantage (Question 9) and in the repeated references to ‘public confidence’ in human rights law and the possibility that it could be brought into ‘disrepute’. It is also supported by the suggestion that claimants ought to exhaust private law remedies before making a human rights claim, which suggests that human rights law is a residual method of dealing with misconduct that might otherwise remain unredressed. This public interest interpretation of the ‘significant disadvantage’ test, however, sits uneasily with a close focus on the individual nature of human rights elsewhere in the consultation, for example in the statements that ‘human rights provide fundamental individual guarantees in our society’, and that it is ‘crucial that our justice system protects people who have genuinely suffered’.

109. If the government’s priority is to underline the public interest in upholding human rights, it seems that a ‘significant disadvantage’ test is unsuited to this task. This is because there is no necessary correlation between the level of disadvantage suffered by any given claimant and the public interest in judicial recognition of a human rights infringement. An example might be a course of conduct that infringes the rights of a large number of people, but in circumstances where it is difficult to find a suitable and willing claimant. A new requirement of ‘significant disadvantage’ is not only unsuited to furthering the public interest in bringing this type of conduct to the attention of the courts, but might make it more difficult unless the claim can be brought within the

164 Government Consultation (n 2) at [226].
165 ibid, at [219].
166 ibid.
‘overriding public importance’ test that we discuss in our response to Question 9.

110. We conclude that a ‘significant disadvantage’ test is unsuited to prioritising cases of the highest importance and to this extent is difficult to justify by reference to the public interest.

Mixed objectives

111. The lack of clarity in the consultation document as to the intention behind the proposed standing test makes it very difficult to assess whether the reform is likely to achieve the government’s aims.

112. One further possibility is that the proposed test is not intended to achieve any of the objectives previously discussed in a pure sense but is instead aimed at a more general rebalancing of litigation so that the courts are encouraged to hear those cases that are most significant either for the public interest or for the vindication of private rights. The ‘significant disadvantage’ test, on this view, would make space for this rebalancing by allowing courts to refuse permission in cases that involve lesser infringements of private rights that do not raise wider public interest considerations.

113. This is a coherent reading of the government’s intentions, but it is in tension with the policy of restricting claims under the HRA to ‘victims’ and not allowing public interest standing in the same manner as judicial review. The victim test lends HRA litigation a strongly individualist character and has the natural consequence that individuals can vindicate their rights even if there is no public interest involved (beyond the public interest that we all have in vindication of rights). Conversely cases even of the utmost seriousness and wider consequence cannot be entertained where the claimant is not a victim of the infringement complained of and is not otherwise given a statutory right to litigate. The most famous example of such a case is the Northern Ireland Human Rights Commission case where the majority of the Supreme Court rejected a claim relating to the provision of abortion in Northern Ireland on the
grounds that the NIHRC lacked standing either as a ‘victim’ or on a statutory basis.\(^{167}\)

114. If the government’s aim is indeed to rebalance litigation in favour of the public interest, one possibility would be to abolish the ‘victim’ requirement altogether and to align the standing requirement in HRA cases with the ‘sufficient interest’ test for judicial review. That test already allows the courts to relax the standing requirements in cases that raise important public interest considerations and conversely to tighten standing in cases where the consequences are more closely confined to the parties.\(^{168}\)

115. The sufficient interest test for judicial review allows some claims to proceed even where the individual interests of the claimant are not engaged at all. The advantages of allowing claims by public-spirited individuals,\(^{169}\) representative bodies and public interest groups are well-rehearsed but include providing courts with access to detailed expertise;\(^{170}\) improving the quality of argument in cases involving the public interest; reducing the volume of litigation in relation to public interest issues that affect or concern large numbers of people; providing an additional route by which the interests of the most vulnerable can be aired in litigation;\(^{171}\) and helping individual victims who are likely to be traumatised by bringing a case themselves.\(^{172}\) Nevertheless, the provision of standing to such claimants is not automatic and can be refused in appropriate cases.\(^{173}\)


\(^{168}\) A famous example of standing being refused on these grounds is R(Bulger) v Home Secretary [2001] EWHC (Admin) 119, [2001] 3 All ER 449; cf R (McCourt) v Parole Board [2020] EWHC 2320 (Admin), [2020] All ER (D) 07 (Sep); R (Islam) v Home Secretary [2019] EWHC 2169 (Admin); and R (Dolan) v Health Secretary [2020] EWCA Civ 1605, [2021] 1 All ER 780.

\(^{169}\) See eg R v Foreign Secretary, ex parte Rees-Mogg [1994] QB 552.

\(^{170}\) See eg R v Inspectorate of Pollution, ex parte Greenpeace (No.2) [1994] 4 All ER 329; R v Foreign Secretary, ex parte World Development Movement [1995] 1 WLR 386.

\(^{171}\) See eg R v Social Security Secretary, ex parte Child Poverty Action Group [1990] 2 QB 540.


\(^{173}\) See eg R (Good Law Project) v Prime Minister [2022] EWHC 298 (Admin).
116. We recognise that widening the standing of interest groups in human rights litigation is likely to raise wider policy considerations. We are, however, concerned that the lack of a clear rationale behind the proposed reform risks creating a confusing patchwork of rules. A claimant concerned about the public interest will be able to proceed under the proposed rules if she has suffered a significant disadvantage; or if she is a victim who has suffered a non-significant disadvantage but there is an overriding public interest in allowing the claim to proceed; but not if she is claiming in the public interest but is not a victim, though in that case if a victim can be found, she might be able to support the victim or even intervene in the case. If there is an overriding public interest in the case being heard but no victim can be found or is prepared to come forward, then the case would fail. This is a difficult set of distinctions that is likely to cause confusion to claimants and courts in the future, and the clarification of which may well prompt rather than discourage costly litigation.

117. **We recommend that the government clarify the intention behind the ‘significant disadvantage’ test. If the aim is to rebalance litigation in favour of the public interest, consideration might be given to a wider reform of the ‘victim’ test in order to facilitate public interest litigation where the immediate victims lack the resources and extreme courage needed to act as claimants.**

*Sections 3 and 4*

118. The victim test does not apply to sections 3 and 4 of the HRA and there is no indication that the new test of ‘significant disadvantage’ is intended to alter this position. This is sensible, given that it is already recognised in the existing law that questions relating to sections 3 and 4 of the HRA can arise for the decision of courts outside the context of a claim by the victim of a rights infringement.

119. **We recommend clarification that the new ‘significant disadvantage’ test does not apply to sections 3 and 4 of the HRA.**
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.

Summary
We conclude that, if a permission stage is introduced, an exception is essential. However, the threshold for the exception should not be as high as ‘highly compelling reason’ or ‘overriding public importance’. This is not consistent with other similar exceptions. The test should be ‘some other compelling reason’ exists for granting permission.

120. The consultation document states that if a permission stage is implemented, this could include ‘a second “overriding public importance” limb available in exceptional circumstances where claims fail to meet a “significant disadvantage” threshold but for some other reason merit consideration by the courts. … [T]he additional limb would give courts discretion to allow claims to proceed to a full hearing if there is a highly compelling reason on the grounds of public importance.’

121. As discussed above, we consider that a case for the introduction of a ‘significant disadvantage’ test has not been made out. It is not necessary for weeding out unmeritorious claims and is unlikely to achieve any significant reduction in awards of compensation against public authorities under the HRA. Further, inclusion of a permission stage may in reality increase costs, as is recognised in the consultation document. Specifically, the consultation acknowledges that ‘there would likely be non-monetised costs to courts and tribunals from the permission stage proposals’, and ‘there could be extra litigation costs for individuals … such as where a permission stage is introduced’.

174 Government Consultation (n 2) at [223].
175 ibid, at 103.
176 ibid, at 104.
122. If the ‘significant disadvantage’ test (or similar) is implemented, it is essential that this includes a second limb to capture exceptional cases that fail to meet the threshold test. This is because:

- as discussed below, a similar exception is built into other procedural rules, so an exception will ensure consistency and its existence is supported by the same reasons that justify those other exceptions;
- the role of the courts goes beyond dispute resolution in an individual case, and unless the ‘victim’ test for domestic human rights cases is widened significantly, an exception will be required to reflect this; and
- to safeguard against the risk of the European Court of Human Rights being faced with applications concerning the UK which have not been considered by domestic courts because of a strict permission stage.

123. We do not agree that the test should be ‘overriding public importance’ or ‘a highly compelling reason on the grounds of public importance’, as suggested in the consultation document. If the decision is taken to proceed with a ‘significant disadvantage’ test subject to an exception, we consider that the text of the exception should read as follows:

**Permission may be granted where there is some other compelling reason for the proceeding to be heard.**

Our reasons for this form of wording are given below.

**a. Similar exceptions already in place**

124. Inclusion of an exception to allow cases that do not meet the test to be heard where a compelling reason exists is consistent with the approach to permission for first and second appeals.
125. When a party wishes to appeal a judgment for the first time, they must seek permission and permission may only be given where the court considers that: (a) the appeal would have ‘a real prospect of success’ or (b) ‘there is some other compelling reason for the appeal to be heard’.

It is therefore contemplated that an appeal might not have a real prospect of success, but nonetheless there may be some other compelling reason for the appeal to be heard. If a party wishes to bring a second appeal (after the first appeal), permission will not be given unless the Court of Appeal considers that the appeal would: (a) have ‘a real prospect of success’ and ‘raises an important point of principle or practice’ or (b) ‘there is some other compelling reason for the Court of Appeal to hear it’.

For a second appeal, it is contemplated that a case might not have a real prospect of success but nonetheless it may raise an important point of principle or practice. Permission for such appeals can be given with reference to the ‘some other compelling reason’ exception.

126. In the context of appeals, the ‘some other compelling reason’ exception is justified by the public purpose of the appeal system. This is to serve ‘the social need for authoritative interpretation of the law, for an effective machinery to respond to socio-economic changes, for maintaining high standards of adjudication and promoting public confidence in the administration of justice’.

The test for permission to bring a second appeal is understandably more stringent than the test for bringing a first appeal. Second appeals are restricted because the primary responsibility for correcting error lies with the first tier tribunal, and secondly to ensure a proportionate use of court resources.

Zuckerman summarises the approach: ‘to obtain leave for a second appeal it is not enough to point to a private interest in the correction of error in order.

177 CPR 52.6.
178 Shared Network Services Ltd v Nextiraone UK Ltd [2012] EWCA Civ 1171 is an example. Permission to appeal to the Court of Appeal was granted despite the appeal not having a real prospect of success, because there was a conflict of authority in the High Court which could, and should, be resolved by the Court of Appeal. There was therefore a compelling reason to hear the appeal, and permission was granted ‘in the interests of an authoritative clarification of English contract law’, it being ‘in the public interest for the Court of Appeal to rule on this point of law.’
179 CPR 52.7; Access to Justice Act 1998, s 55.
181 Zuckerman, ibid, at [25.114]–[25.115].
Permission would only be given where there is an element of wider public importance which justifies using the Court of Appeal's scarce resources'.

127. The ‘some other compelling reason’ wording for permission to appeal tells us two things:

a. First, the suggestion in the consultation document of an ‘overriding public importance’ second limb for cases where there is ‘a highly compelling reason’ for the case to be heard sets the bar far too high. There can be no justification for a more stringent test for bringing a claim in the first place than exists for bringing an appeal (where the affected party has already had one attempt at arguing their case). Even accepting that the government’s intention may be to interfere with access to justice in cases considered to be ‘trivial’, imposing such a high threshold for the exception would go too far.

b. Secondly, and related to the first point, access to justice concerns mean that discretionary exceptions to tests for leave or permission are essential and unavoidable. There are always going to be rare circumstances where a permission stage risks real injustice if flexibility is not built in. This is further emphasised by the fact that the Court of Appeal has recognised an exceptional power to reopen a concluded appeal if considered necessary to ‘avoid real injustice’ in circumstances where there was no alternative effective remedy. Similarly, the High Court has recognised a power to reopen a finally determined application for judicial review if this is necessary to avoid a real injustice, the circumstances are exceptional and there is no alternative effective remedy.

---

182 Zuckerman, ibid, at [25.119].
184 R (Harkins) v Secretary of State for the Home Department (No 2) [2014] EWHC 3609 (Admin), [2015] 1 WLR 2975.
b. The role of the court goes beyond dispute resolution in an individual case

128. We have already identified above that parts of the consultation document seem to favour a public interest focus to human rights litigation and have suggested that consideration might be given to a wider reform of the ‘victim’ test in relation to this. Consistently with the points raised above and short of such a wider reform, we consider that the existence of these public interest aspects of litigation mean that a ‘some other compelling reason’ exception must be included if a permission stage is to be introduced.

129. While litigation is valuable for the individuals concerned (who are seeking to vindicate their rights), it is also valuable to society at large by promotion of a public good through securing the rule of law. In relation to this, Jolowicz uses the fact that appeals may now be pursued on hypothetical or academic bases to argue that the idea that the purpose of the civil litigation is only to resolve disputes ‘has long ceased to be tenable’, and that ‘litigation plays many roles other than dispute resolution, one of the most important of which … is to enable the clarification of the law and the authoritative interpretation of statute.’ This being so, a ‘some other compelling reason’ exception is essential to prevent society from being deprived of the benefits of adjudication in appropriate cases, which extend beyond the litigants of a particular case (and may support widening the ‘victim’ test, as we have argued above).

---

185 John Sorabji, English Civil Justice after the Woolf and Jackson Reforms A Critical Analysis (Cambridge University Press 2015) 1, 10; Dominic De Saulles, Reforming Civil Procedure: The Hardest Path (1st edn, Hart Publishing 2019) 14; Adrian Zuckerman, Zuckerman on Civil Procedure: Principles of Practice (3rd edn, Sweet & Maxwell 2013) [1.7]; Chief Justice Helen Winkelmann, ‘Access to Justice - Who Needs Lawyers?’ (Ethel Benjamin Commemorative Address, Dunedin, New Zealand, 7 November 2014), arguing that the availability of civil action, and resultant court decisions, are ‘essential to social order’ because ‘the courts’ decisions articulate clearly how the law applies to the citizen, and thereby allow others to order their conduct and affairs so as to comply with the law. Through the independent operation of the courts, society also orders itself in the certain knowledge and belief that all can have a remedy for a wrong, and that no one is above the law.’


187 ibid.
c. The risk of claimants bringing applications to the European Court of Human Rights that have not been determined by domestic courts

130. Pursuant to article 35 of the Convention, the European Court of Human Rights will only hear an application after an applicant has exhausted all of their domestic remedies. If a permission stage is implemented for bringing claims domestically, a claimant who has been refused permission may bring their application to the European Court. Such a claimant will have exhausted their domestic remedies without the domestic courts being able to consider their claim, precisely because of the stringent permission stage. Their claim may be found to be admissible, with the European Court considering its merits without the benefit of any input from the domestic courts. The risk of this happening is significantly reduced if a ‘some other compelling reason’ exception is incorporated into any permission stage.

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?

131. Although we do not recommend any alteration to the victim test, if the Government does decide to reform the test, we suggest that consideration is given to widening standing to allow for some public interest challenges, for the reasons provided in our response to Question 8.
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.

Summary
The Bill of Rights should not amend the existing position regarding positive obligations. Positive obligations give effect to human rights to be free from domestic violence, online abuse, human trafficking, and rape and murder. As such, they ensure the broad relevance of human rights to all members of society. The Bill of Rights should recognise and preserve their role. The criticism in the consultation paper of Osman v United Kingdom is misplaced, as to give meaningful content to the right to life, it is not enough for the state to refrain from the wrongful taking of life – it is also necessary for the state to take appropriate steps to protect its people from the taking of life by others.

132. The Bill of Rights should not amend the existing position regarding positive obligations, which are an essential element of the ‘substantive rights’ which the government plans to retain and to which it has expressed commitment. The Article 3 ECHR right to freedom from torture, and from inhuman and degrading treatment or punishment, for example, was not drafted in terms which limited it to treatment inflicted by the state. Where private actors inflict intimate partner violence, child abuse, or rape, the UK courts and the ECtHR have recognised

---

188 Government Consultation (n 2) at [9].
that such treatment clearly amounts to (at least) inhuman or degrading treatment, and so falls within the terms of Article 3 ECHR. If a right to be free from such abuse exists and if it is to have any meaningful effect, it must encompass an obligation on the state to take positive protective measures; if the authorities are free to ignore apprehended or future violations of Article 3 ECHR rights by private actors then, in reality, the right has no content.

If a right to be free from such abuse exists and if it is to have any meaningful effect, it must encompass an obligation on the state to take positive protective measures; if the authorities are free to ignore apprehended or future violations of Article 3 ECHR rights by private actors then, in reality, the right has no content.

133. Similarly, the explicit requirement under Article 2 ECHR that the right to life be protected by law, and prohibition of intentional deprivation of life, are not framed such as to exclude murder at the hands of terrorists, or an individual’s own partner. Because such killings violate human rights, an obligation on the state to offer some level of protection is the vehicle by which those rights are given effect. The same is true of the right under Article 4 ECHR to freedom from slavery, servitude and forced and compulsory labour, in the context of non-state abuses such as human trafficking. Without positive obligations on the State to protect against such abuses in specific and limited circumstances, such rights have little value for the most vulnerable members of society.

While the need for positive obligations is perhaps most striking in respect of those ‘absolute’ rights such as Articles 3 and 4 ECHR, and we note with some surprise the Consultation Paper’s focus on the right to life as an area of concern, the position regarding other rights should not be overlooked. As the Consultation Paper observes, enjoyment of the right to freedom of expression

---

190 See for example Opuz v Turkey (App no 33401/02), 9 June 2009; MC v Bulgaria (App no 39272/98), 4 December 2003; E and others v the United Kingdom (App no 33218/96), 26 November 2002; Commissioner of Police of the Metropolis v DSD & Anor (Rev 1) [2018] UKSC 11.

191 Although the Government Consultation’s discussion of positive obligations primarily emphasises those which require the state to take measures to avoid harm by other actors, an important and well-established role is also played by positive obligations relating to the behaviour of officials. To ensure that rights are not rendered ineffective by public authorities ‘turning a blind eye’ to, for example, allegations of torture or killing by state officials, there is a positive obligation on states to investigate credible allegations of such behaviour (see for example McCann and others v the United Kingdom (App no 18984/91), 27 September 1995, at [161]; and Assenov and others v Bulgaria (App no 24760/94), 28 October 1998, at [102]). We assume no change in intended in respect of that and other positive obligations which simply serve to reinforce and ensure the practical effectiveness of the state’s obligations not to directly perpetrate serious human rights violations itself.

192 See for example Osman v the United Kingdom (App no 23452/94), 28 October 1998; Tagayeva and others v Russia (App no 26562/07), 13 April 2017.

193 See for example Siliadin v France (App no 73316/01), 26 October 2005; Rantsev v Cyprus and Russia (App no 25965/04), 10 October 2010.

194 See further the discussion at paragraph 139 below.
requires governments to ensure ‘the biggest social media companies protect users from abuse and harm’. Accordingly, a positive obligation on states to impose appropriate regulation on such companies is an essential corollary to the right.

135. It follows from the discussion of rights set out above that positive obligations offer essential guarantees of accountability for public bodies and empowerment for individuals. While it is important that the authorities retain flexibility in the performance of positive obligations, without some enforceable minimum requirements of their response to criminal threats, for example, fundamental rights to protection can effectively be removed at the discretion of state officials. In 2012 the government-appointed independent review of the authorities’ conduct in respect of the murder of Northern Irish lawyer Pat Finucane identified serious failings in the authorities’ responses to threat intelligence. By ‘subjectively’ assessing which individuals should be warned of threats to their lives, they risked persons ‘deemed to be subjectively “untrustworthy” not receiving any protection from the State’, with results in that case ‘wholly incompatible with the obligations of Article 2’. The admitted ‘significant errors’ in the Metropolitan Police Service’s investigation of John Worboys, the taxi driver who ‘committed a legion of sexual offences on women’ before his extremely belated arrest and conviction, which ‘could and should have been done years earlier’, provide another example. Positive obligations empower victims of crime to hold officials accountable for serious failures in the performance of basic governmental functions, instead of leaving the recognition of such shortcomings entirely to the discretion of the government machinery itself. Indeed, in the recent decision of the UK Investigatory Powers Tribunal in respect of Kate Wilson, the authorities were held accountable for the deplorable – described as ‘unprecedented’ – conduct of an undercover police officer. It is

---

195 Government Consultation (n 2) at 62.
197 As the ECtHR has repeatedly recognised (see paragraph 142 below).
199 Commissioner of Police of the Metropolis v DSD & Anor (Rev 1) [2018] UKSC 11, at [1], [4] (per Lord Kerr); [102] (per Lord Hughes).
significant that the Government ‘admitted very significant breaches of Arts 3, 8 and 10’ including the positive obligation to protect against violations of Article 3 ECHR. 200

136. A focus of criticism in the Consultation paper is the ECtHR’s judgment in *Osman v United Kingdom*. 201 The case concerned a child who was wounded in a shooting incident that also resulted in the death of his father. 202 The applicants argued that the United Kingdom had failed to protect the lives of the child and his father. 203 The European Court held that authorities are required to do ‘all that could be reasonably expected of them to avoid a real and immediate risk to life which they have or ought to have knowledge’. 204 This duty is also known as the operational obligation under Article 2 ECHR. 205

137. *Osman* recognised that the first sentence of Article 2(1) ECHR – ‘Everyone’s right to life shall be protected by law’ – ‘enjoins the State not only to refrain from the intentional unlawful taking of life, but to take appropriate steps to safeguard the lives of those within its jurisdiction’. 206 The Consultation paper concedes that ‘the principle articulated by the *Osman* judgment seems reasonable at first sight’. 207 This is entirely correct. To give meaningful content to the right to life, it is not enough for the state to refrain from the wrongful taking of life. It is also necessary for the state to take appropriate steps to protect its people from the taking of life by others. This is a basic function of the state, and the suggestion that the police should be able to eschew it is troubling.

138. The Consultation paper contends that the *Osman* principle creates uncertainty, 208 and places an ‘onerous burden on police forces’ because of the trouble of notifying people when their lives are in danger, with 770 notifications

---

201 (2000) 29 EHRR 245.
202 ibid, at [10].
203 ibid.
204 ibid, at [116].
205 See eg, Kurt v Austria (2022) 74 EHRR 6, at [159].
207 Government Consultation (n 2) at [144].
208 ibid, at [142].
issued in 2019, some recipients of which may be criminals. However, if it is genuinely too onerous for the police to try to protect people whose lives are in danger, then it may be that the police are under-resourced to perform their essential functions and those resources should be increased. Further, if there is confusion or uncertainty around the scope of the police’s obligations in this regard, Parliament may wish to legislate to clarify the issue. Neither of these considerations offers a justification for legislating to remove the operational obligation. In fact, doing so while remaining a member of the Council of Europe and, thus, bound by the ECHR, will inevitably lead to an increase in successful cases being brought before the ECtHR for breaches of Article 2 ECHR.

139. Moreover, as the paper acknowledges in passing, the claim in Osman was rejected by the ECtHR because of the restrictive nature of the real and immediate risk to life standard, which was not met in the circumstances of the case. Because of this high threshold, the ECtHR has shown restraint in this area, including recently in Kurt v Austria in which an applicant was unsuccessful before the ECtHR despite what may be thought to have been a rather clear danger to the applicant's children by an abusive partner (one of whom was killed). The ECtHR has repeatedly emphasised that the obligation ‘must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities’, and that ‘[i]t is not the Court’s role to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to ensure compliance with their positive obligations’. It has also observed that ‘the police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated and the police, who have access to information and intelligence not available to the general public, will usually be in the best

209 Ibid, at [144]–[146].
210 Ibid, at [148].
211 Ibid, at [143].
212 As Lord Carswell noted in his (unanimously endorsed) opinion in a case concerning the ‘real and immediate risk’ test before the House of Lords, ‘the threshold is high’ (Re Officer L (Northern Ireland) [2007] UKHL 36, at [20]).
213 (2022) 74 EHRR 6.
214 See for example Osman v the United Kingdom (2000) 29 EHRR 245, at [116].
215 TM and CM v The Republic of Moldova (App no 26608/11), 28 January 2014, at [37].
position to make them.’ In view of the cautiousness of the ECtHR, the concerns expressed in the Consultation paper seem overstated, and may be addressed without undermining the important protections afforded by the operational obligation.

140. The Consultation paper also criticises the case of Rabone v Pennine Care NHS Trust as creating ‘operational difficulties’. In that case, the UK Supreme Court unanimously found a violation of the operational obligation under Article 2 ECHR in circumstances where a patient, who was admitted voluntarily to a hospital following a suicide attempt and was assessed as high risk of suicide, was granted leave despite protestations from the patient’s parents on the basis of her mental health. The patient subsequently hanged herself. Far from creating ‘operational difficulties’, this unanimous decision reflects common sense in the context of a very grave medical error. The decision shows the importance of positive obligations in giving meaningful content to the right to life, content which this consultation paper seeks to erode. It is notable that while the Consultation document laments the fact that in Rabone, the Supreme Court went further than Strasbourg in finding liability, the ECtHR was at the time hearing a case involving the UK that concerned a similar argument about which the Supreme Court was aware. Indeed, the ECtHR went on to confirm the finding in Rabone in its subsequent decision. Some may argue, then, that Rabone epitomises the type of dialogue the government is propounding between the domestic courts and Strasbourg.

141. In their ongoing development, through the jurisprudence of the UK courts and the ECtHR, positive obligations offer valuable guidance to public authorities as to the protection of the relevant human rights. In the recent Kurt decision, for example, the ECtHR’s discussion of the positive obligation to assess risks of

---

216 PF and EF v the United Kingdom (Admissibility Decision, 2010), at [41].
217 In particular, the asserted ‘straitjacket approach required by human rights case law’ (Government Consultation (n 2) at 43).
219 Government Consultation (n 2) at [134].
220 Rabone v Pennine Care NHS Trust [2012] 2 AC 72, at [2]–[6].
221 Ibid, at [6].
222 Government Consultation (n 2) at [134].
recurrent domestic violence indicates various key elements which should inform consideration of the adequacy of risk assessment processes.\textsuperscript{224} Such guidance is invaluable in terms of authorities appreciating what is required in order for them to comply with the obligations under the ECHR. It also provides considerable clarity for the UK courts when applying the relevant obligations with sensitivity to the UK’s particular legal order and governmental structures.\textsuperscript{225} It would be surprising if such guidance were to conflict with the expectations of UK government officials or legislators, concentrating as it generally does on the need for reasonable diligence, such as proper risk assessment and appropriate co-ordination between different arms of central and local government.\textsuperscript{226}

142. In that respect, the ‘Osman’ or ‘Threat to Life’ notices, about which the Consultation Paper expresses concern,\textsuperscript{227} play a vitally important role in many situations beyond those criticised by the Government. In particular, such notices are a key component of the response of authorities to domestic abuse which, it must be noted, disproportionately effects women and children.\textsuperscript{228} Indeed, in a recent Family Division case concerning a final care order regarding a child, an Osman warning issued by the police to the mother of the child, in respect of the threat posed to her by the father, was central to the determination by the court that the relevant local authority should be precluded from providing information about the child to the father.\textsuperscript{229} Police performance of the positive obligation thus allowed the court to ensure that a local authority did not expose both mother and child to a serious risk of violence.

\textsuperscript{224} Kurt v Austria (App no 62903/15), 15 June 2021, at [167]–[174].
\textsuperscript{225} See for example the detailed consideration of police procedures and communications, consciously avoiding the benefit of hindsight and the risk of identifying areas where there was room for improvement as amounting to a violation of the positive obligation, by the High Court in Griffiths v Chief Constable of Suffolk [2018] EWHC 2538, at [577]–[620].
\textsuperscript{227} Government Consultation (n 2) at 42–43.
\textsuperscript{229} A City Council v Mother [2021] EWHC 3375 (Fam), [36]–[41].
143. The Report of the Independent Human Rights Act Review identified the need for ‘the development of a perception, reflecting the reality, that human rights issues concern, apply to and protect everyone in society’.

Positive obligations give effect to human rights to be free from domestic violence, online abuse, human trafficking and indeed rape and murder. As such they ensure the broad relevance of human rights to all members of society, and the Bill of Rights should recognise and preserve their role.

230 Independent Review (n 3) at 17.
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.

Summary
We argue that there is no evidence to support a modification to section 3 HRA and agree that with the Consultation Paper that Option 1 should be rejected. Although we would not propose any change, nevertheless, we prefer Option 2B over Option 2A given the consequences for legal certainty and for the protection of human rights that would arise were courts only able to interpret ambiguous provisions of legislation in a manner compatible with human rights. Nevertheless, problems still arise with Option 2B, particularly as concerns legal certainty.

144. The IHRAR’s report provided a thorough and detailed analysis of this issue. It concluded that ‘there is no substantive case for its repeal or amendment other than by way of clarification’. It would require strong evidence to overturn their conclusion. We do not think that there is such evidence.

231 Independent Review (n 3), at [7].
145. In particular, we contend that the judicial approach to section 3 is tempered by deference and restraint. We accept, as the Consultation itself notes, that \( R v A \)\(^{232} \) represents a high watermark in terms of the courts’ approach to section 3 and suggests that their subsequent retreat from that position does not justify reform. In common with the conclusions of the Independent Human Rights Act Review, we argue that later case law demonstrates greater restraint.

146. The Consultation Paper expresses concerns about the bounds of ‘possible’ in this provision. However, far from being unbounded, what is ‘possible’ within the meaning of section 3 is properly limited by the wording of legislation\(^{234} \) in addition to any ‘cardinal principle’ or ‘underlying thrust’ of the legislation in question\(^{235} \). Such limitations mean that, in addition to following an express instruction in the HRA itself, courts cannot be said to ‘displace the role of Parliament in determining difficult questions of public policy’\(^{236} \).

147. Further, far from undertaking an exercise that is absent ‘any direct or meaningful Parliamentary oversight’\(^{237} \), the courts have recognised that section 3 does not permit them to make policy choices ‘calling for legislative deliberation’\(^{238} \). Such choices remain under this framework the exclusive remit of Parliament. Indeed, the courts have accepted that section 3 does not ‘require courts to make decisions for which they are not equipped’\(^{239} \), contrary to the suggestion in the Consultation that ‘[s]ection 3 compels the court to expand the scope of its interpretive duty beyond what is appropriate for an unelected body’\(^{240} \).

148. Of course, Parliament nonetheless retains the power to expressly legislate to reverse any judgment that makes use of section 3 or to legislate in response to

---

\(^{232}\) Government Consultation (n 2) at [118].
\(^{234}\) See, for example, Michael O’Donnell v Department for Communities [2020] NICA 36, at [77] where interpretations must not ‘go against the grain’ of legislation.
\(^{236}\) Government Consultation (n 2) at [117].
\(^{237}\) Ibid, at [116].
\(^{239}\) Ibid.
\(^{240}\) Government Consultation (n 2) at [235].
a judgment of the court.\textsuperscript{241} For example, Part 3 of The Police, Crime, Sentencing and Courts Bill, although not reversing the conclusion in \textit{Ziegler},\textsuperscript{242} can be interpreted as a response to this judgment through introducing new provisions regulating public protests.

149. We therefore support the conclusion of the IHRAR that there is no case to repeal section 3 of the Human Rights Act, nor to amend it in the manner suggested by the Government proposals.\textsuperscript{243} Nevertheless, we offer comments below as regards the two options proposed. Although we do not believe there is a case for a reform, if reform were to take place, then we argue that courts should not be limited to interpreting legislation in line with the provisions of the new Bill of Rights only when that legislation is ambiguous.

\textit{Option 1 - Repeal section 3 and do not replace it.}

150. \textbf{We agree with the recommendation of the Independent Human Rights Act Review (IHRAR) that section 3 should not be repealed with no replacement.}

151. To repeal section 3 without a replacement is likely to mean that courts can only read legislative provisions in line with Convention rights when faced with ambiguous legislation and, in such cases, choosing an interpretation which was in line with Convention rights over an interpretation that was not in line with Convention rights.\textsuperscript{244} Other legislative provisions will remain incompatible with Convention rights. This may result in additional situations in which the UK is found in breach of its obligations under the ECHR, with more cases going to the European Court of Human Rights in Strasbourg. This outcome is in tension

\textsuperscript{241} We previously noted this in Cambridge University, Centre for Public Law, ‘Submission to the Independent Human Rights Act Review Panel’ (March 2021), at [56].
\textsuperscript{242} \textit{Director of Public Prosecutions v Ziegler [2021] UKSC 23, [2021] 3 WLR 179.}
\textsuperscript{243} Independent Review (n 3) ch 5. See Lady Hale, \textit{Transcript of Oral Evidence to the JCHR (3 February 2021)} at Q27 <https://committees.parliament.uk/oralevidence/1661/html/> accessed 6 March 2022 (where Lady Hale notes that ‘[u]sually the Government argues first for compatibility, but if we decide that it is incompatible, there is then a choice between the interpretive obligation, if we can, to try to cure it or simply to make a declaration of incompatibility. I cannot remember a case that I was involved in where we did not do whichever of those two the Government asked us to do’).
\textsuperscript{244} \textit{R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696.}
with the stated intention of the Government that it wishes the UK to remain a
signatory to the ECHR, as well as its commitment to ‘the UK’s tradition of
human rights leadership abroad’.245

152. Furthermore, this option may give rise to legal uncertainty. The UK courts
have over 20 years of experience of interpreting section 3. The case law is now
relatively settled, with the main guidance as to the interpretation of this clause
being found in Ghaidan v Godin-Mendoza.246 To remove this test will give rise
to litigation as courts determine the extent to which they are able to interpret
legislation in line with the rights found in the proposed Bill of Rights. Whilst this
may place courts in a position similar to that which existed prior to the
enactment of the Human Rights Act 1998, the courts will also have to determine
how to interpret the requirements of a new Bill of Rights, without an equivalent
of section 3.

153. Courts will interpret any legislative replacement of the Human Rights Act in
line with the intention of Parliament, as expressed in the wording of legislation,
in addition to the aims and purposes of that legislation.247 This will include the
express aim that the UK remains a signatory state of the ECHR, whilst also
reinforcing the ability of the UK courts to determine the scope of the rights found
in the proposed Bill, including those whose content replicates Convention
rights. Consequently, following a repeal of section 3, with no replacement, the
principle of statutory construction would apply that Parliament would not wish
to legislate contrary to its international law obligations. When faced with
ambiguous legislation, courts would prefer an interpretation which upheld, as
opposed to contradicted, Convention rights. This would appear to have the
purpose of minimising judicial activism. However, it is not clear that this
objective would be achieved. For example, in Rantzen v Mirror Group
Newspapers Ltd248 the courts applied this principle of statutory construction to

245 Government Consultation (n 2) at 3.
247 R (O) v Secretary of State for the Home Department; R (The Project for the Registration of
Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3, [2022] 2
WLR 343.
section 8(2) of the Courts and Legal Services Act 1990 to empower courts to interfere more readily with the award of damages made by civil juries in defamation actions in order to protect Article 10 ECHR (the right to freedom of expression).\footnote{See, generally, John Bell and George Engel, \textit{Cross on Statutory Interpretation} (3rd edn, OUP 1995) 184.5.}

154. The proposed reforms to the current section 2 HRA suggest that courts should refer to domestic law, including the common law, before looking to the ECHR to determine the content of human rights. Fundamental common law rights, to which the principle of legality applies, form a significant element of the common law to which the courts would refer. The principle of legality applies when courts are faced with general as opposed to ambiguous legislation.\footnote{R v Secretary of State for the Home Department, \textit{ex parte Pierson} [1998] AC 539; R v Lord Chancellor, \textit{ex parte Witham} [1998] QB 575; R v Secretary of State for the Home Department, \textit{ex parte Simms} [2000] 2 AC 115; \textit{R (UNISON) v Lord Chancellor} [2017] UKSC 51, [2020] AC 868.} When interpreting such legislation, courts apply the principle of legality to read down general provisions where this will uphold fundamental common law rights. This obligation differs from section 3 of the Human Rights Act 1998, which applies to all legislation and not just general provisions of legislation, and where courts can read words into legislation in order to protect Convention rights, as well as reading words down.

155. The combination of the repeal of section 3 of the Human Rights Act 1998 and the principle of legality may place courts in a difficult position when determining how to proceed in interpreting legislation under such a framework. On the one hand they are pushed towards a more restrictive approach to interpreting legislation, when considering Convention rights. Courts will presume that Parliament did not wish to legislate contrary to international law obligations, choosing Convention-compatible interpretations of ambiguous legislation. At the same time the courts are pulled towards a broader interpretative principle, due to the emphasis upon common law rights, which stems from the principle of legality. This would require them to read down general legislative provisions to uphold fundamental common law rights. This would mean that different rights – or sometimes the same rights – might have different interpretive
consequences for legislation with which they interact depending on where they have their source. This would be a disjointed approach and, consequently, a repeal of section 3 without further guidance may give rise to considerable legal uncertainty.

**Option 2 - Repeal section 3 and replace it with a new provision**

156. The Consultation Paper proposes two possible options for reform. Option 2A would only apply when legislation ‘can be given more than one interpretation’ where both interpretations are an ordinary reading of the words and are consistent with the overall purposes of that legislation. For ease of reference, we will refer to this as ambiguous legislation. Option 2A then instructs courts to prefer the interpretation which is compatible with the rights included in the proposed Bill of Rights. Option 2B applies more generally and not just when courts are faced with ambiguous legislation. Courts must, under this option, interpret legislation in a manner compatible with the rights contained in the new Bill of Rights, but only when this is an ordinary meaning of the words in the legislation and is consistent with the overall purpose of the legislation. Whilst we would argue that there is no need to change section 3, we would nevertheless argue that, were section 3 to be replaced, option 2B is preferable to option 2A.

157. Ambiguity should not be the trigger for a replacement to section 3. As outlined above, to only allow courts to read legislation to comply with human rights protected in the proposed Bill of Rights would be a retrograde step, placing the UK in a position similar to that prior to the enactment of the Human Rights Act 1998. This has the potential to harm the UK’s standard-setting record for the protection of human rights.

158. Options 2A and 2B require that legislation is interpreted consistently with the rights found in the new Bill of Rights as opposed to Convention rights. These rights would have been recently endorsed by Parliament in legislation. The intention of the new Bill of Rights is to provide a statement of essential rights that reflects the UK’s constitutional traditions. This aim, alongside the
parliamentary endorsement of rights provides a strong justification for courts to
ensure legislation is interpreted in a manner compatible with these rights. This
would not be achieved were courts only able to interpret legislation in line with
these rights when faced with ambiguous legislative provisions. The ambiguity
trigger, therefore, runs the risk of undermining the aim of a modern Bill of
Rights.

159. Second, ‘ambiguity’ as a trigger is itself ambiguous and therefore open to
interpretation. It can refer to a situation where words in a legal text are capable
of having more than one meaning, as well as referring to ambiguity as to the
purpose or aim of that legislation. Both of these remain possible when applying
the wording of option 2A. It is possible for legislation to have multiple meanings
that are compatible with the ordinary meaning of the words used. Moreover, it
is possible for legislative provisions to have more than one purpose. It is not
clear whether Option 2A is only meant to apply when legislative provisions are
capable of more than one ordinary meaning, but there is no ambiguity regarding
the purpose of the legislative provision; or where the ordinary meaning of
legislation is capable of having more than one purpose; or both. This gives rise
to legal uncertainty.

160. Third, even when faced with ambiguity, courts may have a discretion. There
may be more than one interpretation of the legislative provision/s that would be
compatible with the human rights found in the Bill or with Convention rights. It
is not clear whether, in this situation, courts should prioritise interpretations in
line with Convention rights, in line with the presumption that Parliament would
not wish to legislate contrary to international law, or to adopt a meaning in line
with the rights found in the Bill of Rights. This potential uncertainty is
exacerbated by the proposed replacement for section 2 of the Human Rights
Act. In particular, this may give rise to issues where the common law and the
principle of legality would apply, but the replacement for section 3 of the Human
Rights Act, as discussed above, would not.

161. Fourth, rather than redress the perceived imbalance between courts and the
legislature, the requirement that courts can only interpret ambiguous legislation
in line with human rights may tip the balance of power too far in favour of the courts. Courts play an important role in protecting rights in situations where legislation is generally in line with human rights, but where its specific application undermines human rights. Courts are well-suited to providing remedies in such situations. Moreover, to provide a remedy rarely contradicts the policy objectives of the legislature. Indeed, courts are furthering those objectives, ensuring that they are fully achieved even in unforeseen situations where legislation may inadvertently undermine rights. This function may be weakened if courts could only interpret ambiguous legislation in line with human rights. Such legislative provisions are rarely ambiguous. Rather, through inadvertent omission, they may fail to fully achieve their objective.

162. Although we would prefer Option 2B to Option 2A, problems nevertheless arise with Option 2B. This option would require courts to read legislation to protect human rights contained in the new Bill, provided that this was consistent with the ‘ordinary meaning’ of the words and ‘the overall purpose of legislation’. This modifies the current test found in Ghaidan v Godin-Mendoza in two ways.\(^\text{251}\) First, the current test refers to linguistic limits and the ‘fundamental features’ of legislation. Second, the current test provides that language and fundamental features provide a brake to Convention-compatible interpretations. Courts interpret legislation to comply with Convention rights provided that this does not linguistically strain the language, contradict legislative provisions, or undermine fundamental features of the legislation. The proposed modification only enables courts to provide legislative interpretations that protect human rights when these are consistent with the ordinary meaning of legislation and with the purpose of legislation.

163. First, it is not clear how far this proposed modification to section 3 is designed to provide a principle of interpretation different from that currently generally adopted by the courts when interpreting legislation – where courts interpret

legislation in line with its wording, aims, and purposes.\(^{252}\) Yet, it would also be clear that the section provides an additional interpretive obligation, given that this wording was chosen over and above the mere repeal of section 3 without a replacement. This may give rise to uncertainty. Should courts focus first on applying normal principles of statutory interpretation, using Option 2B when such an interpretation does not protect human rights? If so, it is hard to know what the replacement for section 3 will add. There may be few, if any, situations in which an interpretation in line with wording, aims, and purposes of legislation that does not protect a right will then be able to protect that right, given that this further interpretation must also be compatible with the ordinary meaning of words and consistent with the overall purpose of legislation.

164. Second, further uncertainty may arise as it may be difficult to discern the overall purpose of legislation. The current test requires courts to discern a fundamental feature of legislation as opposed to its purpose. A fundamental feature of legislation may be more easily determined from an examination of the wording of legislation than it may be to discern the overall purpose of legislation. In addition, it is not clear whether courts would be able to refer to other material to determine the overall purpose of legislation. For example, courts may refer to Hansard when applying section 3 of the Human Rights Act 1998.\(^{253}\) Should they also be able to refer to Hansard to determine the overall purpose of legislation? Lady Arden recently referred to the possibility of courts referring to explanatory memorandums which are attached to Bills.\(^{254}\) Should courts also be able to refer to explanatory memorandums to determine the overriding purpose of legislation?

165. Third, courts prefer to make a declaration of incompatibility under section 4, even when it may be possible to read legislation in line with a Convention right,


\(^{254}\) R (O) v Secretary of State for the Home Department; R (The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3, [2022] 2 WLR 343.
when faced with a range of Convention-compatible interpretations of legislation,255 or where a Convention-compatible interpretation would require the creation of legislative or administrative schemes which would be beyond the scope of the courts.256 It is not clear from Option 2B whether courts should still issue a declaration of incompatibility in these situations or whether courts would be required to choose between potential interpretations that would be compatible with the human rights in the new Bill, provided that both were within the range of ordinary meanings of the legislation and consistent with the overall purpose of legislation.

Question 13

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

Summary

We argue that Parliament’s role could be scrutinised by including section 3 judgments in the annual MoJ report on human rights judgments and ensuring there is an annual parliamentary debate of this report, through empowering the JCHR to scrutinise section 3 decisions and to propose a motion on important judgments and for the JCHR to liaise with their equivalent committees in the devolved legislatures.

We note that legislation is not needed to bring in these changes.

166. There are a number of ways in which it may be possible for Parliament’s role in engaging with, and scrutinising, section 3 judgments to be enhanced. First, it may be possible for section 3 judgments to be included in the annual report of the Ministry of Justice which currently reports on declarations of incompatibility and on adverse decisions of the European Court of Human Rights against the UK. This could be supplemented by an annual debate in the House of Commons on this report. It may also be possible for this debate to be

256 ibid.
supplemented by a report of the JCHR in response to the annual report of the MoJ.

167. Second, if the proposal for a database of section 3 judgments were to be adopted, it would also be possible for this to be used to help facilitate further debate. For example, the JCHR could be invited to report on the database. It could also be possible to grant the JCHR the power to initiate a motion in Parliament to debate specific section 3 judgments, or for reports of the JCHR to be required to be debated in Parliament. The JCHR could perform an important role in sifting through section 3 interpretations that did and did not merit further parliamentary debate.

168. Third, it would also be possible for the JCHR to work more closely with committees performing a similar role in the Scottish Parliament, the Senedd Cymru and the Northern Ireland Assembly.

169. It is important to recognise, however, that legislation would not be needed to bring about these changes. These could be achieved either through modifications to the Standing Orders of the House of Commons, or through current parliamentary Committees in the Westminster Parliament reaching out to their equivalent committees in the devolved legislatures.

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

Summary
We welcome a database, but recognise that it may be difficult to discern which cases ‘rely on’ section 3. We would also like clarification regarding who would be responsible for maintaining this database and recommend that further legal certainty would be achieved were the legislation.gov website to be updated with notes on how legislation was to be interpreted following a section 3 judgment.
170. We would welcome the creation of a new database to record all judgments that rely on section 3, or its replacement, when interpreting legislation. We also have the following further remarks that are designed to further this objective.

171. First, it would be important to clarify what it means for a judgment to ‘rely on’ section 3, or its replacement. As discussed above, the proposed modifications to section 3, particularly when applied to the proposed modifications to section 2, may make it difficult to discern when a court has relied on section 3 and when courts have applied the ordinary principles of interpretation, or when courts have relied on the principle of legality, or when courts have applied the statutory presumption of interpretation that Parliament would not wish to legislate contrary to its obligations in international law.

172. Second, thought needs to be given as to whom should be tasked with creating this database. Should this, for example, be part of the functions of the Ministry of Justice, or the courts, or the Joint Committee on Human Rights, or should a new agency be created to carry out this task?

173. Third, although a database would be useful, if the aim of the database is also to achieve legal certainty, then more will need to be done to ensure that this objective is fully realised. It may be better, for example, to combine this database with annotations on legislation – for example on the legislation.gov.uk website, in a manner similar to how the French legal system, for example, updates the civil code. These annotations would further legal certainty as it would provide easily accessible information as to how a legislative provision had been read to give effect to human rights, without individuals having to read judgments in order to discern these interpretations.
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?

Summary
We argue for no change to the current position, given the consequences of any change for legal certainty, parliamentary sovereignty, the separation of powers and devolution.

174. The Consultation Paper invites views as to whether there is a case for providing that declarations of incompatibility should be the ‘only remedy’ available to courts in relation to ‘certain’ secondary legislation.\(^\text{257}\) No further information is given as to what is meant by ‘certain’ secondary legislation.

175. To make declarations of incompatibility, the ‘only remedy’ available to the courts in relation to subordinate legislation which breaches convention rights is an undesirable and unnecessary restriction on the court’s remedial flexibility for the following reasons.

176. First, it would undermine parliamentary sovereignty. A declaration of incompatibility is the only remedy available to the court with regard to primary legislation that cannot be interpreted in a manner compatible with Convention rights. This preserves the sovereignty of Parliament. It is also the only remedy available to the court when primary legislation would prevent the removal of a provision in secondary legislation which is incompatible with a Convention right.\(^\text{258}\) This, too, is designed to preserve the sovereignty of Parliament, ensuring that subordinate legislation is only quashed when this is beyond the

\(^{257}\) Government Consultation (n 2) at [250]–[251].
\(^{258}\) Human Rights Act 1998, ss 4(3) and 4(4).
scope of the parent legislation. There is no need to extend the application of declarations of incompatibility to secondary legislation in order to preserve parliamentary sovereignty. Moreover, any extension of declarations of incompatibility may undermine parliamentary sovereignty. It would effectively insulate unlawful government action from effective oversight by the courts, essentially placing secondary legislation on a par with primary legislation.\textsuperscript{259} It would also upset the balance of powers between the legislature, the executive, and the judiciary. It would remove an important safeguard over secondary legislation which receives little, if any, parliamentary scrutiny.\textsuperscript{260}

177. Second, this would contradict the spirit of a domestic Bill of Rights and would create inconsistency between grounds of review. The aim of a Bill of Rights is to single out essential rights which merit stronger protection than other rights. Courts should be empowered to strike down secondary legislation which breaches these essential rights, save from situations in which this is prevented by primary legislation. To prevent courts from quashing secondary legislation would create an anomaly. Courts would be able to quash secondary legislation which was unlawful under the normal heads of judicial review but would be unable to quash secondary legislation that was unlawful because it breached essential rights protected in the new Bill of Rights.\textsuperscript{261}

178. This would be to provide a weaker as opposed to a stronger protection for ‘essential’ rights.

179. Third, this would provide an ineffective remedy.\textsuperscript{262} A declaration of incompatibility does not affect the legal validity, force, or effect of a measure declared incompatible. Consequently, a declaration of incompatibility fails to provide an effective remedy for individuals whose rights are breached by secondary legislation. This, in turn, provides little incentive for the executive to

\textsuperscript{259} See on this point, Independent Review (n 3) ch7, at [61].
\textsuperscript{260} Ibid, at [63].
\textsuperscript{261} See Kruse v Johnson [1898] 2 QB 91.
\textsuperscript{262} See on this point: Independent Review (n 3) ch7, at [37], commenting on RR v Secretary of State for Work and Pensions (2019) UKSC 52, and referring to paragraph 49 of Oxford University’s Public Lawyers’ response.
modify its unlawful conduct. It is not clear whether a declaration of incompatibility would only be able to be remedied by an Act of Parliament, or through section 10 of the Human Rights Act – or its equivalent in the new Bill of Rights. If this is the case, then this may place the onus of resolving any incompatibility on Parliament. However, this runs the risk of taking up parliamentary resources. In addition, this may undermine the importance of declarations of incompatibility. If they are used too frequently, then the political pressure created on the legislature to amend legislation to ensure its compatibility with human rights may be undermined.\textsuperscript{263}

\textbf{180.} Fourth, the argument in favour of only allowing declarations of incompatibility for secondary legislation is based on a mistaken premise of a lack of judicial restraint, implying a need for declarations of incompatibility as courts have been quick to strike down secondary legislation which breaches Convention rights. However, since 2014, there have only been 14 successful challenges in which secondary legislation has been quashed by the courts.\textsuperscript{264} Six of those were regarding secondary legislation enacted under the negative resolution procedure, which has the weakest form of parliamentary scrutiny. Moreover, four of these 14 successful challenges concerned secondary legislation enacted under the same parent Act – the Welfare Reform Act 2012.\textsuperscript{265}

\textbf{181.} Further, evidence demonstrates that courts are statistically more likely to issue a declaratory order, or to modify provisions than to quash secondary legislation, as noted by the Independent Human Rights Act Review in respect of \textit{Tigere}.\textsuperscript{266} In this case, the Supreme Court issued a declaratory order, rather than quashing delegated legislation.\textsuperscript{266} Moreover, the case demonstrates a

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{263}] See on this point: Supplementary Written Evidence from Dr Hélène Tyrrell, Newcastle University and Professor Alison Young, University of Cambridge submitted to the Joint Committee on Human Rights, \textit{Inquiry: Human Rights Act Reform} (26 January 2022), at [40].
\item[\textsuperscript{264}] This was noted by the Independent Review (n 3) at [14].
\item[\textsuperscript{266}] \textit{R (Tigere) v Secretary of State for Business, Innovation and Skills} [2015] UKSC 57, [2015] 1 WLR 3820.
\end{itemize}
\end{footnotesize}
careful weighing up of the issues, as evidenced by the close division between the majority and the minority opinions. It was also clear that the majority were influenced by the fact that the issue in the dispute had not been directly considered by the Secretary of State.

182. In addition, courts have demonstrated that they are willing to apply the principle of nullity in a more flexible manner when faced with the problems that may arise for third parties who have acted on the basis of a regulation which is later deemed to be unlawful. For example, when faced with systemic illegality in rules relating to the fast-track procedures for asylum seekers, the Supreme Court concluded that it was not the case that all individual decisions determined through the use of these fast-track procedures were automatically void. Rather, individuals had the opportunity to seek review of an individual decision if they could prove that the application of the fast-track procedures have given rise to unfairness in their particular case.267

183. Finally, if declarations of incompatibility were the only remedy available for secondary legislation, this would create an unwelcome distinction between secondary legislation and devolved primary legislation. The Scottish Parliament,268 the Senedd Cymru,269 and the Northern Ireland Assembly270 currently do not have the power to enact legislation which is incompatible with Convention rights. Consequently, Acts of the devolved legislatures which contravene Convention rights can be struck down as beyond competence. However, secondary legislation which breached human rights under the new Bill of rights could only be declared incompatible. It is not clear whether this would only include secondary legislation enacted by UK ministers, which may also apply in Scotland, Wales, and Northern Ireland, or whether this would also include secondary legislation enacted by Ministers in Scotland, Wales, and

270 Northern Ireland Act 1998, s 6(2)(c).
Northern Ireland. This anomaly is likely to create tensions between Westminster and the devolved legislatures and governments.

184. To the extent that the quashing of delegated legislation may create problems for third parties who have acted on the basis of delegated legislation that has since been quashed, we would argue that this would be better dealt with by applying remedial flexibility, rather than extending the availability of declarations of incompatibility to secondary legislation beyond instances already listed in section 3(3) and 3(4) of the Human Rights Act 1998.

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.

Summary
We argue that there is a case for suspended and prospective only quashing orders, but that these should be considered as exceptional and not the norm and should be at the complete discretion of the courts.

185. Suspended quashing orders may reinforce existing remedial flexibility, enabling a quashing effect to take effect at a later date to enable Parliament to rectify incompatible secondary legislation. However, there are potential problems with the proposals for suspended and prospective quashing orders as currently included in the Judicial Review and Courts Bill.

186. First, prospective only quashing orders may undermine the right to an effective remedy, found in Article 13 ECHR (which is not currently included as a Convention right incorporated into domestic law through Schedule 1 of the
Human Rights Act 1998). This would occur as, although a prospective only remedy may mean that human rights were not harmed following the judgment of the court, no remedy was provided for breaches of Convention rights that had taken place before that date. This may also undermine the rule of law, effectively endorsing unlawful action by the executive.

187. Second, the provisions of the Judicial Review and Courts Bill would insert a new section 29A (9) into the Senior Courts Act 1981, which would require the courts to issue a suspended or a prospective only quashing order when this would ‘offer adequate redress in relation to the relevant defect’ unless the court ‘sees good reason not to do so’. This clause has been interpreted as intended to ‘nudge’ the court towards regarding suspended and prospective only quashing orders as the normal remedy, rather than an exception. Whilst it is true that courts would have sufficient discretion when determining whether these remedies were an ‘adequate redress’, or when determining whether there were good reasons not to issue a suspended or a prospective only quashing order, nevertheless the wording of the provision would limit the remedial discretion of the court.

188. As discussed above, the delineation of human rights is designed to recognise these rights as essential and therefore of requiring stronger protection than other rights and liberties. Consequently, an even stronger argument is required to justify restricting an individual’s right to an adequate remedy, particularly as the lack of an effective remedy may deter individuals whose rights have been harmed from bringing a legal action to protect their human rights.

189. Therefore, whilst there may be a case for suspended and prospective only quashing orders, there is no justification for making these the default remedy, or for limiting the discretion of the court when determining remedies. Both suspended and prospective only quashing orders would only be justified in exceptional circumstances. These exceptional circumstances would need to

---

be sufficient to justify the potential undermining of the rule of law and of the right to an effective remedy. One example of a situation in which a suspended quashing order would be justified is that which arose in *Her Majesty’s Treasury v Ahmed (No 2)*, where quashing secondary legislation would have placed the UK in breach of its obligations in international law.\(^{272}\) Prospective only remedies may also be justified when quashing delegated legislation would remove vested rights.\(^{273}\)

**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.

190. Our view on this point was articulated in our response to the Call for Evidence for the Independent Human Rights Act Review which we submitted in March 2021. We recommended a number of changes to the existing procedure including enhanced powers for the JCHR, a ‘stronger affirmative resolution procedure than that currently found in Schedule 2 of the HRA’, and the introduction of limits on the scope of remedial orders.\(^{274}\)

191. We note that this topic was reviewed comprehensively in the IHRAR report, which recommended that the remedial order power should be limited so that it

---

\(^{272}\) [2010] UKSC 5.


\(^{274}\) Cambridge University, Centre for Public Law, ‘The Independent Human Rights Act Review Call for Evidence – Response’ (March 2021) at [116]–[121].
cannot be used to amend the HRA, as well as a number of other methods of enhancing Parliamentary scrutiny of remedial orders. Some of our own suggestions were rejected, as was the option of abolishing remedial orders altogether.

192. **Our view remains unchanged from our submission to this earlier consultation process.**

**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.

**Summary**

We believe that the section 19 procedure is operating well enough in practice to warrant it remaining as a tool to enhance scrutiny and accountability, and given its purpose, it is most appropriately made by a Minister. However, when there is more clarity about what the Bill of Rights will achieve vis-a-vis Convention rights (see our Introduction and responses to Questions [1 and 2]), the statement may need to be changed to encompass not only Convention rights but also Bill of Rights rights.

193. We note the purpose of the section 19 statement as set out in the consultation, namely to ‘demonstrate to Parliament that the relevant Minister has considered and come to a view as to the compatibility of the Bill with Convention rights’.

As such, it links to the doctrine of Ministerial accountability to Parliament. By requiring a Minister to make a section 19 statement in each House prior to the second reading of a Government Bill, not only is the Minister forced to satisfy themselves of the extent of any human rights implications prior to introducing the Bill but the Minister’s views are also on the record. It also enables Parliament to vote on the Bill cognisant of potential issues.

---

275 Government Consultation (n 2) at [260].
194. The section 19 statement should not be considered in isolation. As the 2022 version of the Cabinet Office ‘Guide to the Making of Legislation’ states, ‘[c]onsideration of the impact of legislation on Convention rights is an integral part of the policy-making process, not a last-minute compliance exercise.’276 The section 19 statement is part of a series of steps that require any engagement with Convention rights to be noted, together with an explanation for how any interference with qualified rights can be justified and why it is proportionate. The process provides a focus for the Joint Committee on Human Rights (JCHR) and facilitates Parliamentary scrutiny more generally.

195. As well as noting the purpose of section 19, it is as important to note what section 19 does not do. A section 19(1)(a) statement does not indicate that the Bill actually is compatible with the Convention. That is for the courts to determine. Neither does a section 19(1)(b) statement necessarily indicate incompatibility. It does not amount to a positive statement that the Government believes the Bill to be incompatible with the Convention, just that the Government is unable to make a statement that the Bill is compatible.

196. Understanding the purpose is key to any considerations of how the statement sits with the constitutional balance. Given that the Minister has the opportunity to take advice from civil servants prior to introducing a Bill, given that the Minister needs to consider the human rights implications more broadly anyway and given the statement is part of the accountability process and focuses scrutiny on complex issues, it is not only sensible but necessary for a Minister to make the statement. If Parliament were to make the statement, the purpose would be very different. Such a statement could only logically take place once the Bill had been passed, rendering its utility as an aid to scrutiny nugatory. It is unclear who would make the statement – surely it could not be subject to a vote leading to a collective declaration as many MPs would not have had the

opportunity to take advice. It would also bestow a quasi-adjudicative or quasi-interpretative role onto Parliament, which would be inappropriate.

197. The section 19 process does not prevent innovative policies from proceeding. Even if the relevant minister is unable to make a section 19 statement declaring that the provisions of the Bill are compatible, the Bill can still proceed. The statement is changed to suggest that, whilst the Minister is unable to make the statement, the Government nonetheless wishes to proceed with the Bill. Whilst rare, that has happened. For example, the Government did not feel able to make the section 19 statement in connection with s. 321 Communications Act 2003 because the duty to secure a ban on general political advertising was possibly in contravention of Vgt Verein gegen Tierfabriken v Switzerland. 277 Because the Government did not believe the ban would necessarily be found incompatible if it were to be challenged in the UK courts or before the ECtHR, it nonetheless wanted to proceed with the Bill and notified Parliament accordingly. The JCHR commented ‘... pending an opportunity to advance before the courts its arguments relating to the compatibility of a ban with Article 10 ECHR, the Government has good reasons for believing that the policy reasons for maintaining the ban outweigh the reasons for restricting it, particularly as it would be difficult to produce a workable compromise solution’, 278 Further, the JCHR was satisfied that the introduction of the Bill with a statement under section 19(1)(b) ‘did not evince a lack of respect for human rights’. 279

198. Accordingly, it is our view that the section 19 statement should remain and should continue to be made by Government prior to scrutiny of a Bill (i.e. before its second reading). However, the Government may like to consider broadening the scope of the statement to include the Bill of Rights as well as the Convention. Depending on what effects will result from any incompatibility with

277 (App no 32772/02), 30 June 2009.
279 ibid, at [41].
the Bill of Rights, and the extent to which the rights it contains depart from Convention rights, there may be some utility in having a dual statement.

**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?

**Summary**

Any British Bill of Rights must address the perspectives, concerns and needs of the devolved nations. In responding to the Independent Review of the Human Rights Act 1998 representatives from the devolved nations clearly, carefully and powerfully articulated the very real threat that repeal of the HRA1998 poses to the devolved nations and the unity of the UK. We urge the Government to listen.

In the light of those concerns we emphasise the following:

- The system under the Human Rights Act in relation to devolved legislatures has worked well and not been a point of contention between the four nations.
- If the Westminster Parliament is to pass a Bill of Rights, it should do so in line with the Sewel Convention and secure a legislative consent motion from each devolved legislature.
- A recent Supreme Court decision presents a worrying development in regard to limitations on the competence of devolved legislatures to give courts interpretive duties when deciding human rights matters. A Bill of Rights would need to clarify that such powers are available to devolved legislatures.
- There is an inevitable tension between the universality of human rights and the nature of a devolved settlement. The ECHR provides a model that is able to recognise different ways of achieving protection of fundamental human rights through the margin of appreciation. A British Bill of Rights that takes seriously the perspectives of the devolved legislatures both in the process of drafting the new Act, and in the framework that is ultimately adopted, would be in line with this model.
199. Clearly a British Bill of Rights must be truly British, and therefore must address the perspectives, concerns and needs of the devolved nations. In responding to this question, we recognise that the CPL’s contribution comes from Cambridge in the heart of England. Cambridge is therefore not best placed in this consultation to claim legitimacy in response to these aspects of the question.

200. In this regard we note in responding to the Independent Review of the Human Rights Act 1998 that representatives from the devolved nations clearly, carefully and powerfully articulated the very real threat that repeal of the Human Rights Act 1998 poses to them. We urge the Government to listen.

201. In particular, we share the grave concerns consistently expressed by those working in Northern Ireland as to the implications of these proposals for the Belfast (Good Friday) Agreement in Northern Ireland.

Taking into account the UK Government commitment to uphold the GFA [Belfast (Good Friday) Agreement] we would caution against any proposals which diminish access to remedies against ECHR violations through reform of the machinery of the Human Rights Act.²⁸⁰

Northern Ireland Human Rights Commission

The HRA therefore has a distinctive constitutional function in Northern Ireland unlike other parts of the UK and any efforts to alter this under the terms of this Review risks unsettling a delicate balance.²⁸¹

The Bar of Northern Ireland

Our strong view is that the Review you are conducting into the workings of aspects of the HRA presents significant potential risks to stability and

²⁸⁰ Northern Ireland Human Rights Commission, ‘Submission to the Independent Human Rights Act Review Team’s Call for Evidence’ (March 2021), at [2.3].
peace in Northern Ireland. It is widely perceived here as the latest in a long line of developments calling into question the Government's commitment to human rights and its willingness to retain the ECHR at the centre of the UK's constitution. We suggest that changes in the operation of the HRA in Northern Ireland are neither necessary nor desirable. Indeed, the debate in Northern Ireland is currently focused on the potential *extension* of human rights, rather than their diminution.\(^2\)

Queens University Belfast Human Rights Centre

There is an ongoing lack of recognition of the ‘particular circumstances’ of Northern Ireland in relation to the centrality of human rights and the continued threats to the Human Rights Act by the Conservative government. Or just blatant disregard.\(^3\)

Pat Finucane Centre

202. Serious concerns over the constitutional implications of these proposals were also evident in the submissions that the Independent Review of the HRA received from representatives from Scotland.

The Act is a pillar of the constitutional framework of devolution in Scotland. Convention rights are protected in Scotland under both the Act and the Scotland Act. Any change to the Act could upset this constitutional arrangement.\(^4\)

Scottish Human Rights Commission

203. In the light of these concerns, we highlight three issues. The first is that the system under the Human Rights Act in relation to devolved legislatures has worked well and not been a point of contention between the four nations. The second is that if the Westminster Parliament is to pass a truly British Bill of

---


\(^3\) Pat Finucane Centre, ‘Evidence to the Independent Human Rights Act Review’ (3 March 2021), at [3].

Rights, it should do so in line with the Sewel Convention and secure a legislative consent motion from each devolved legislature. The third is that the recent Supreme Court decision in the Convention on the Rights of the Child (Incorporation) case\textsuperscript{285} presents a worrying development with regard to limitations on the competence of devolved legislatures to give courts interpretive duties when deciding human rights matters. A British Bill of Rights would need to clarify that such powers are available to devolved legislatures.

204. Finally, we recognise the inevitable tension between the universality of human rights and the nature of a devolved settlement. The European Convention on Human Rights provides a model that is able to recognise different ways of achieving protection of fundamental human rights through the margin of appreciation. A British Bill of Rights that takes seriously the perspectives of the devolved legislatures both in the process of drafting the new Act, and in the framework that is ultimately adopted, would be in line with this model.

The Human Rights Act system has been a success

205. The system under which the UK has been operating for the last 20 years in relation to human rights and devolved nations has been effective. Scotland, Wales and Northern Ireland have resisted calls for the repeal of the Human Rights Act.

206. Scotland is the devolved nation that has expressed the greatest desire to go beyond the rights protections in England. Under the current framework, the Scottish Parliament may only legislate in a manner compatible with the Convention rights as defined in the HRA: see Scotland Act 1998, sections 29(2)(d) and 126(1). Furthermore, human rights is partially a devolved matter in terms of the Scotland Act, which means that Scotland is free to legislate beyond the standards set out in the Convention, and frequently has done so.

207. In Northern Ireland, human rights is also a devolved matter. Furthermore, the Human Rights Act is mentioned specifically in the Northern Ireland Act 1998: the competences of devolved institutions in Northern Ireland do not extend to acting incompatibly with Convention rights as defined in the Human Rights Act, so this would need to be amended immediately if the HRA were repealed. A commitment to the ECHR forms part of the Belfast (Good Friday) Agreement and if the Human Rights Act were to be amended in ways that made it more difficult to protect Convention rights it would give the appearance that the UK was weakening its commitment to the Belfast (Good Friday) Agreement and would tend to undermine the Agreement, potentially leading to political destabilisation and diplomatic difficulties.

208. While human rights is not a devolved matter in Wales, the Welsh Government has expressed strong support for the retention of the Human Rights Act indicating its satisfaction with the applicability of the Act to Wales.\textsuperscript{286}

The importance of consultation and consent

209. The Government has indicated its commitment to enacting a truly British Bill of Rights. In order for this to be the case, there must be a robust consultation process in which devolved nations participate and are able to contribute meaningfully to the drafting process. The current consultation process does not place sufficient emphasis on involvement of the devolved nations.

210. Given that human rights is a devolved matter in Scotland and Northern Ireland, the Sewel Convention requires that these devolved legislatures should pass legislative consent motions before the Human Rights Act is repealed. Though this is not legally binding, the spirit of a British Bill of Rights requires that it should be observed, and that consent should equally be secured from the Welsh Legislature.

Devolved legislatures and interpretive duties

211. The recent Supreme Court decision the UNCRC case\textsuperscript{287} is a worrying development in regard to the powers of devolved legislatures to impose interpretive duties on courts in regard to the interpretation of human rights. As part of the commitment to take seriously the perspectives of devolved nations on human rights, the British Bill of Rights must clarify that the devolved legislatures have the power to introduce the sorts of interpretive duties on courts that were denied to them by the Supreme Court in the UNCRC case.

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.

Summary
The concept of a core public authority is relatively uncontroversial and straightforward to apply. It does not need reform.

The notion of a public function has, however, proved much trickier. From the point of view of legal certainty this is unsatisfactory. We therefore recommend amending the legislation to provide for three distinct strands of public function under s 6(3)(b) HRA by inserting a provision into section 6 along the following lines:

(3A) For the purposes of subsection (3)(b) a function is not public in nature unless:

(a) it would be a public function that would render the same body amenable to judicial review at common law;

(b) it has been delegated by the state to the body performing such that it would engage the responsibility of the United Kingdom before the European Court of Human Rights; or
(c) it appears in an order made by the Secretary of State under this section.

We recommend repealing s 6(5) HRA 1998.

We recommend making clear that a hybrid public authority performing public functions is a victim unless it would not be so regarded by the Strasbourg Court under Article 34 ECHR in the same circumstances.

The Definition of a Public Function

212. We note and have considered this question in the light of the Government’s intention that a new definition ‘should not add new burdens for private sector bodies and charities’.288

213. Other than courts and tribunals, which are expressly dealt with by s 6(3)(a), s 6 HRA gives rise to two species of public authority. The first are ‘core’ public authorities. These are obviously public bodies like central and local government departments and the police. They are amenable to the ECHR in respect of everything they do, whether public or private activity.289 The second are ‘hybrid’ public authorities. These are non-state bodies like charities, private companies, and so on, which are only amenable to the ECHR when they perform ‘functions of a public nature’ under s 6(3)(b). When engaged in non-public activity they fall to be treated like any other non-state organisation and do not owe ECHR duties.

288 Government Consultation (n 2) at [269].
289 This is apparent not just from s 6(5) but also from the state responsibility scheme in Strasbourg. Bodies that are clearly emanations of the state will trigger the state’s responsibility even then they engage in activity that might be described as private.
214. The courts have grappled well with the concept of a core public authority, which is relatively uncontroversial and straightforward to apply. In our view that aspect of the law does not need reform.

215. However, the notion of a public function has proved much trickier. The case law is evolving but does not seem to become any clearer over time. It is notoriously difficult, arguably increasingly so, for prospective claimants and defendants to assess their positions.

216. From the point of view of legal certainty, this is unsatisfactory. But it is not unique to the HRA. In the abstract the question of whether a function is public is inherently political. The answer will largely depend on which functions the person tackling the question believes the state should or should not perform, and/or how far ECHR liability should extend into the private sphere. There is no magic formula for distinguishing public from private functions.

217. We do not therefore attempt our own novel definition of a public function in this response. This task is best left to Parliament. But in our view the existing formula can still be usefully clarified by reference to the legal context in which the HRA operates. We would suggest that there is not a single, catch-all definition of a public function but rather three distinct strands of function. These are explained below.

**Strand One: Domestic Judicial Review**

218. In the non-HRA context, claimants can seek judicial review against the decisions or acts of bodies that perform a public function. A detailed body of case-law has developed on the meaning of a public function for this purpose.

---

291 This is especially evident from *R v Panel of Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815 (CA) and for procedural purposes is reflected in CPR 54.1(2)(a)(ii).
219. As with the Strasbourg scheme, domestic courts have recognised the relevance of the case-law concerning common-law judicial review to the meaning of publicness under s 6(3)(b). But the precise difference between publicness in these contexts remains unclear. The courts’ position seems to be that a public function has a substantially similar meaning in each context, although judges tend to stop short of declaring the two common-law definitions to be identical. 292

220. In our view this position is needlessly harmful to legal certainty. The courts’ view of publicness is either the same in each context or it is not. And if it is not, then the courts should have been able to articulate the distinction reasonably precisely during the 20 years that the HRA has operated. While we accept that the ECHR context requires a certain amount of adjustment to the meaning of publicness, we cater for that via our second strand of publicness, discussed below. Beyond that distinction, we doubt that the meaning of a public function is or should be any different at common law according to whether the courts are considering ECHR rights or ‘ordinary’ principles of judicial review. At any rate it seems sensible to us that the notion of a public function should not be any less broad in the human rights context than in the context of ordinary judicial review.

221. We would therefore suggest tying the HRA and ordinary judicial review schemes more closely together, by emphasising that judicial review functions are one of the three strands of public function under s 6(3)(b) HRA.

222. We appreciate that directing the courts to the judicial review case law would not of course ‘solve’ the problem of what constitutes a public function. The scope of ordinary judicial review is a difficult question in its own right. But our suggestion would remove a layer of conceptual uncertainty by putting paid to the idea that the case law on ordinary judicial review is to be considered but not necessarily applied; in other words, that there might still be differences

between the English courts’ conceptions of publicness in each context. In our view the legislation should be clarified so that judicial review case-law falls to be applied as one of multiple strands of public function under s 6(3)(b) HRA.

**Strand Two: The Strasbourg Scheme**

223. The HRA’s basic aim was to ‘bring rights home’, by providing ECHR remedies in English courts against bodies whose acts would trigger the UK’s international liability in Strasbourg. Many of the bodies for which the UK is responsible are of course what the HRA would call core public authorities so are already catered for by s 6 HRA in domestic law. But some are also non-state bodies that perform a function that has been delegated to them by the state. In these cases, although the body is not an organ of the state, its performance of that function may trigger a positive obligation on the part of the state to ensure that the body complies with the ECHR.\textsuperscript{293} The state may ensure compliance in a variety of ways including by enacting legislation to guarantee ECHR protection. If the state fails to do this and permits the body to behave incompatibly with ECHR rights, then the state is liable for the body’s actions in Strasbourg.

224. In our view such functions should in principle be regarded as public in domestic law, even if they would not normally fall within the first strand of public functions discussed above. Otherwise, a rights gap arises, in that the state remains internationally responsible for the actions of a body that cannot owe human rights duties in English law.

225. We would make three points of clarification.

226. First, not all positive obligations involve the performance of delegated functions by non-state bodies. Some activities are uncontroversially private, such as when a prisoner kills a cellmate or when media organisations behave incompatibly with the privacy rights of the public. We do not suggest that these

functions should be regarded as public in domestic law. Not only would this unduly distort the meaning of publicness, but it will usually be unnecessary because private behaviour that is liable to interfere with ECHR rights is almost always regulated through the existing private and criminal law.

227. Second, the domestic courts have already drawn links between s 6(3)(b) and the concept of state responsibility in Strasbourg. They see the basic sense in trying to cast the domestic net at least as widely as the Strasbourg one. Ours is therefore a modest recommendation. We simply suggest amending the legislation to clarify the link between the two schemes. It should not impose any greater burdens on the charity or private sectors than currently exist, having regard to the international scheme and the HRA’s broad purpose to deliver domestic remedies accordingly.

228. Third, clarifying these links also has the potential to address concerns about the rights gap that arises when a core public authority engages a non-state contractor to deliver services or perform other functions on its behalf. The domestic courts tend to regard these contracted-out functions as private rather than public, even though the core public authority would itself have been liable when performing the same function. If this position conflicts with Strasbourg’s approach, then it seems to us that domestic law should track the Strasbourg position unless good reason exists for departing from it.

*Strand Three: Public Functions Designated by Order*

229. The Government may of course decide to put beyond doubt that certain functions are public under s 6(3)(b), or to expand upon the categories of public function contained in the first two strands. This may be useful if powerful non-

---

294 Notably in *YL v Birmingham City Council* [2008] 1 AC 95, in relation to eg *Costello-Roberts v United Kingdom*, ibid.


296 This was the effect of the majority’s judgment in *YL v Birmingham City Council* [2008] 1 AC 95.

297 Although it is not entirely clear that it does, given the relatively piecemeal development of Strasbourg’s case-law on positive obligations and the Court’s apparent refusal to articulate any general theory as to when they apply.
state bodies threaten fundamental rights, but it is not clear that the function in question would be public according to pre-existing judicial review or Strasbourg case law. Social media organisations, for instance, have acquired considerable power to threaten free expression in a relatively short period of time. Yet there is very little case law suggesting that they are amenable to judicial review or engage the state’s responsibility before the European Court of Human Rights.

230. In cases such as these, the Government ought to be free to decide on an individual basis whether such functions should be amenable to ECHR challenge. We would recommend that it has the power to do so by way of delegated legislation. It may choose for instance to list particular functions of particular bodies, or to provide more broadly that certain categories of functions are included.

231. There are two precedents for such an approach. The first is the Freedom of Information Act 2000, which sets out in a schedule the various public authorities to which the legislative duties apply. Although we would not recommend simply replacing s 6 HRA with a schedule, there is some merit in being able to schedule certain functions in order to supplement the more general definition of a public function given by our strands one and two; in other words, to allow the Government to ‘mop’ up individual functions or categories of function that might not otherwise be caught by the pre-existing case law. The second precedent is the similar mopping-up exercise carried out by Parliament through s 145 of the Health and Social Care Act 2008 and s 73 of the Care Act 2014, which provide(d) for the care functions of private care operators to be public functions under s 6(3)(b) HRA.

232. **We would therefore recommend amending the legislation to provide for three distinct strands of public function under s 6(3)(b) HRA.**
233. We recommend inserting a provision into section 6 along the following lines:

(3A) For the purposes of subsection (3)(b) a function is not public in nature unless:

(a) it would be a public function that would render the same body amenable to judicial review at common law;
(b) it has been delegated by the state to the body performing such that it would engage the responsibility of the United Kingdom before the European Court of Human Rights; or
(c) it appears in an order made by the Secretary of State under this section.

Section 6(5) HRA

234. Section 6(5) HRA provides that: ‘In relation to a particular act, a person is not a public authority by virtue only of subsection 6(3)(b) if the nature of the act is private’.

235. The provision is drafted clumsily but the legislative intention seems to have been to create a two-stage test for determining hybrid liability: first, assess the nature of the function under s 6(3)(b), and, second, assess the nature of the particular act complained of. If a function is public but the act is nevertheless private, the body is not a public authority and is not amenable to human rights challenge.

236. The courts have not applied s 6(3)(b) in that way, however. In earlier cases they tended to ignore it altogether, simply deciding hybrid liability by reference to the nature of the function alone. Where the courts have noticed and attempted to apply s 6(5), the result has been confusing and lacking in logic.²⁹⁸

²⁹⁸ For commentary, see Alex Williams, ‘The Pointlessness of Section 6(5) HRA 1998’ (2018) 23 Judicial Review 128.
237. Section 6(5) is difficult to apply coherently partly because the conceptual distinction between functions and acts is so inherently unclear, and not explained any further by the HRA itself. But it is also because there is no equivalent distinction between functions and acts in either the Strasbourg case-law or the courts’ own case law concerning ordinary judicial review. The two-stage assessment suggested by s 6(5) is unlike anything the courts have seen in related contexts.

238. Perhaps understandably given these difficulties, the courts tend to have interpreted s 6(5) in way that strips it of any real purpose, taking the view that if the function is public then the act will also be public if it is part and parcel of the function. On this reading there is no real point in having s 6(5) at all, because it is really the nature of the function, not the act, that decides whether a hybrid will be liable. We are not aware of a single reported case in which the courts have found that an act is private despite being performed pursuant to a public function. Accordingly, s 6(5) has not made a difference to the outcome of any previous case.

239. We would therefore recommend clarifying the law by repealing s 6(5). It is needlessly confusing for the legislation to suggest a two-stage test to hybrid liability when in reality there is only one. In our view, it should be clear that if the act complained of is performed pursuant to a public function, the body in question is straightforwardly amenable to human rights challenge. This is already the courts’ position in the context of ordinary judicial review.

The Rights of Hybrid Authorities

240. If a non-state body becomes a hybrid public authority when it performs public functions, does that mean it also loses the right to rely on its own human rights?

---

300 In R (Weaver) v London and Quadrant Housing Trust [2009] EWCA Civ 587, [2010] 1 WLR 363, their Lordships were doubtful that such a situation could ever arise.
241. The HRA does not answer the question, and the courts have not yet had the opportunity to rule on it. But it is sometimes assumed that performing a public function means losing the opportunity to rely on human rights.\textsuperscript{301}

242. This is an important question. A non-state body may have ample reason to rely on its own human rights against another public authority, including the court during litigation, despite performing a public function at the time. In our view it is unwise to assume that hybrids lose human rights when they act in their public capacities. Hybrid liability is an important safeguard for the users of various services provided by hybrids, but it can also be onerous for the hybrids themselves. They should not in principle be stripped of their own fundamental rights unless the case for such a position is clear.

243. We recommended reform of the victim test currently contained in s 7 HRA in our responses to questions 8 and 10, above, if the Government is intending to rebalance human rights litigation to focus more on the public interest. However, if that suggestion is not taken up, then as currently drafted sections 7(1) and 7(7) HRA provide that the ability to rely on the ECHR depends on demonstrating ‘victim’ status under Article 34 ECHR. This means governmental organisations are inherently unable to rely on the ECHR, which means in turn that core public authorities, which are by their nature inherently governmental, do not have ECHR rights of their own.\textsuperscript{302} But the position under Article 34 with hybrid authorities is far from clear. We are not aware of a single case in which Strasbourg has held that a private body becomes a governmental organisation and therefore loses its ECHR rights when it performs a public or governmental function. Accordingly, in our view it cannot be assumed that a hybrid body loses its own human rights when it engages in public activity.

244. We would therefore recommend clarifying this position, regardless of whether or not the victim test is reformed in general, by providing that a hybrid authority

\begin{footnotesize}
\textsuperscript{301} See eg \textit{YL v Birmingham City Council} [2007] EWCA Civ 26; [2008] QB 1, at [75] (per Buxton LJ).

\end{footnotesize}
performing public functions is a victim unless it would not be so regarded by the Strasbourg Court under Article 34 in the circumstances.

245. We acknowledge that this may give rise to a distinction between ECHR rights and the other British rights that the Government is considering adding under the new legislation. Parliament would of course be able to set the terms on which hybrids have access to non-ECHR rights, because there would be no scope for conflict with Strasbourg’s position under Article 34 ECHR. But in principle we would suggest allowing hybrids to rely on any of the rights protected by the new legislation unless there is good reason not to do so. At any rate the case for depriving hybrids of their own rights would need careful consideration by Parliament and should not be adopted lightly.

246. Finally, we acknowledge that this recommendation might be better implemented as an amendment to s 7 HRA than s 6(3). We have included it for discussion alongside public functions because of its relevance to the breadth of s 6(3)(b). The more onerous the burden of hybrid status becomes to non-state bodies, the more hesitant Parliament should of course be to embrace a broader definition of a public function.
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.

Summary
We reject both options outlined in the Government Consultation paper. We suggest an alternative, namely that Section 6(2)(b) is expunged, and that Section 6(2)(a) is amended to include both primary legislation and ‘provisions of, or made under, primary legislation’.  

247. The government has expressed a desire to ‘give public authorities greater confidence to perform their functions within the bounds of human rights law’, and, notably, ‘without the fear that this will expose them to costly human rights litigation’. Question 21 asks how this might be best achieved and offers two options.

248. Our views on these options are set out below, following a brief overview of the function and operation of Section 6(2). We also discuss a third option that the government should consider. This option recommends expunging Section 6(2)(b) and amending Section 6(2)(a) to include both primary legislation and ‘provisions of, or made under, primary legislation’.  

---

303 Government Consultation (n 2) at 78.
304 ibid, at 6.
Background

249. Section 6(1) stipulates that ‘it is unlawful for a public authority to act in a way which is incompatible with a Convention right.’

250. By virtue of S. 6(2) the general rule in S. 6(1) does not apply to an act if:
   (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently (S. 6(2)(a)); or
   (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. (S. 6(2)(b)).

   It is helpful to think about the two subsections in terms of what type of legislation is at issue and whether the public authority (PA) had any discretion in acting.

Section 6(2)(a)

251. Section 6(2)(a) deals with the situation where, as the result of primary legislation, the public authority had no discretion but to act in the way it did. On the logic that primary legislation remains effective despite its incompatibility with Convention rights, Section 6(2)(a) aims to extend a protective effect to PAs in situations where the PA is under a duty flowing from primary legislation to act in a way which may be Convention non-compliant.

Section 6(2)(b)

252. Section 6(2)(b) is not worded in a particularly lucid manner. As far as we can tell, this subsection seeks to deal with situations where the public authority was exercising a discretion of some sort, and it is this element of discretion which sets it apart from Section 6(2)(a).
253. Section 6(2)(b) is perhaps best understood by going through the following steps

a. Is the PA acting pursuant to primary legislation or secondary legislation?
   If no, Section 6(2)(b) does not apply.

b. If yes: could the provision be read or given effect in a Convention compliant manner?
   If yes, Section 6(2)(b) does not apply.

c. If no, was the PA acting “so as to give effect to or enforce” the provision/s in question?
   If yes, Section 6(2)(b) applies.
   If no, Section 6(2)(b) does not apply.

A. Option 1

254. The effects of the government’s proposals on each of the two subsections are best assessed in turn.

Should Option 1 replace Section 6(2)(a)?

255. As far as primary legislation is concerned, Section 6(2)(a) is clear in its requirements, preserves the sovereignty of Parliament and has not given rise to undue difficulties. While Option 1 would widen the defence currently available in that it extends it from situations where the PA had no discretion to situations where it was ‘clearly giving effect’ to primary legislation, this change would likely create more difficulties for the PA. It is not clear to us at what point a public authority is ‘clearly’ giving effect to legislation, given that all public authorities will be acting for a public purpose and will endeavour to act within the scope of their enabling powers. In our view this option would in practice engender confusion and potentially generate costly litigation. Judges would also be likely to read such a provision narrowly, given that a wide interpretation would undermine the basic purpose of the legislation and entail a breach of Convention standards.
256. In view of the government’s wish to avoid subjecting public authorities to costly human rights litigation and to give them greater confidence that they are acting in a manner consistent with human rights, we do not recommend Section 6(2)(a) be replaced with Option 1.

**Should Option 1 replace Section 6(2)(b)?**

257. As far as Section 6(2)(b) is concerned, the crux of the government’s concern appears to be the qualification of reading or giving effect to legislation in a Convention compliant manner. As such, the government sees the virtue of Option 1 replacing Section 6(2)(b) as solving ‘the problem by removing the qualification ‘which cannot be read… compatib[ly] with the Convention rights’. The effect of this would be to allow any public authority lawfully acting, enforcing, or giving effect to provisions of or made under primary legislation, in the way Parliament clearly intended, to do so without attracting litigation’.\(^{305}\)

258. We do not agree. First, as to allowing PAs to act in a manner which Parliament had clearly intended, these situations are already covered by Section 6(2)(a). Quite obviously, an instance where a public authority could not have acted in any other way than it did can only occur where the intention of Parliament is clear. A clear intention of Parliament, in turn, can only be expressed as a result of one or more provisions of primary legislation.

259. Where an element of discretion is at play the matter is different. In such a situation, the PA must turn its mind to the legislation at issue and make a determination about how best to give effect to it bearing in mind its duty to do so in a Convention compliant manner (unless absolutely impossible). While we recognise that this requires a degree of engagement and a balancing act on the part of the PA, it is not obvious to us that this is detrimental to the aim of acting in a rights-compliant manner whenever possible. Nor is it obvious to us that replacing the current Section 6(2)(b) with a provision such as proposed in Option 1 would remedy the interpretative difficulties. Indeed, enshrining the

\(^{305}\) ibid, at 77.
idea of ‘clearly giving effect to primary legislation’ in statute is not only a considerable challenge in and of itself, but would then require public authorities to engage in a thought exercise which is no simpler, and likely more complex, than that imposed by the current regime, particularly when it comes to secondary legislation.

260. In the final analysis, both the current subsection and Option 1 entail an interpretative exercise. Insofar as the latter would not include any assessment of the PA’s compliance with Convention rights, we do not see this as an improvement and, consequently, do not see Option 1 as an improvement on the status quo.

B. Option 2

261. Option 2 can be dealt with briefly. The benefit that the Government perceives appears to be recasting the focus of Section 6(2) towards those situations where there is ambiguity as to what the primary legislation requires, in which case the PA ought to choose the rights-compliant course of action. Conversely, where ‘there is no ambiguity, it would be a defence to a public authority to enforce or give effect to the clear intentions of Parliament’.

262. Like the somewhat nebulous interpretative analysis which ‘clearly giving effect to’ primary legislation requires, shifting the focus towards a determination of ambiguity would not be a material improvement. Indeed, the situations where PA’s must conduct interpretative exercises deriving the will of Parliament from legislation should be reduced, not increased. If there is an increase in PAs determining situations of ambiguity, there is likely to be a parallel increase in litigants arguing that the PA was wrong in its determination and, as such, its actions are open to challenge. While, of course, a PA’s actions will never be entirely immune (nor should they be), it is preferable for the focus of the PA to remain on the question of whether it was able to act in a Convention compliant manner.

306 ibid.
263. Option 2 is to be rejected.

C. Option 3

264. In line with the government’s desire for greater clarity we also offer for its consideration a third option. Option 3 entails expunging Section 6(2)(b) and amending Section 6(2)(a) to include both primary legislation and ‘provisions of, or made under, primary legislation’.

265. The key purpose of 6(2)(b) is to give a defence to PAs where they are acting, with discretion, in a manner which gives effect to the will of Parliament where this will cannot be read or given effect consistent with the Convention. It is important to remember, however, that the touchstone is still primary legislation. Section 6(2)(b) is not simply a mirror of Section 6(2)(a) for subordinate legislation. As the Supreme Court has observed, in its view the defence in Section 6(2) ‘only applies to acts which are required by primary legislation. If it had been intended to disapply the obligation in section 6(1) to acts which are required by subordinate legislation, the HRA would have said so’.307

266. With these thoughts in mind, the aim of protecting PAs where they are seeking to give effect to primary legislation (either directly or indirectly) can also be achieved by Section 6(2)(a) alone if modified to include both primary legislation and ‘provisions of, or made under, primary legislation’. This would mirror part of the current s 6(2)(b)) yet, crucially, retain the proviso of the PA not having been able to act in any other way, i.e. the proviso that the PA had no discretion (which is currently not in 6(2)(b). In a sense, this leaves with Parliament the duty of ensuring all legislation is Convention compatible or, where not, making this abundantly clear, which in turn sets out clear instructions for how PAs must act. Conversely, where there is any discretion, the PA must act Convention compliantly (rather than turning its mind to interpreting the will of Parliament).

267. This proposed amendment would also, where necessary and under certain conditions, entail giving PAs the power to disregard incompatible secondary

---

legislation. Although drastic at first sight, there is nothing inherently objectionable. As Lady Hale opined in *RR v Secretary of State for Work and Pensions*:

There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear.308

268. Importantly, a PA would only be entitled to disregard the provision where it is ‘clear how the statutory scheme can be applied without the offending provision’.309 This also makes sense.310 If the statutory scheme could not be applied without the offending provision, then *ipso facto* it was the clear intention of Parliament for the PA to act in that manner. This requirement therefore provides a check on the power to disregard the provision but falls short of burdening the PA with extensive interpretative burdens regarding Rights compatibility. As indicated, it should not be for the PA to engage in an interpretative exercise of assessing whether the secondary legislation under which it is acting, while *prima facie* non-compliant with the Convention/Rights, is nevertheless compliant with primary legislation. That is a matter for Parliament and the government.

308 ibid, at [27] (per Lady Hale).
309 ibid, at [30] (per Lady Hale).
310 For an example of the ‘as far as possible’ approach, see *Cameron Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47.
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.

Summary

In our view, the European Court of Human Rights has taken a cautious approach to the extraterritorial jurisdiction of the European Convention on Human Rights. Its approach is in line with the nature of human rights, and with preventing a ‘human rights vacuum’ from arising in which neither the territorial state (because it is deprived of control), nor the extraterritorial state is responsible for protecting human rights. Such a situation would go against the spirit and intended application of the ECHR. The ECtHR’s approach is compatible with the general position in international law, but it is not as extensive as that of other international human rights law instruments. In this respect, the cautious approach of the ECtHR renders the ECHR an outlier.

We do not accept the assumption in Question 22 that there is a tension between the Law of Armed Conflict (LOAC) (also known as International Humanitarian Law, or IHL) and the ECHR for conflicts abroad. On the contrary, the two bodies of law are complementary and work together to achieve the same humanitarian objectives. The ECtHR has sensibly and carefully applied Convention Rights to conflict zones, taking account of LOAC to ensure that the rights are applied pragmatically and in a way that is appropriate to the relevant context.

As this consultation concerns the Human Rights Act 1998 (that is, a domestic statute), it is important to keep in mind that whatever changes are made to this Act, they will not on their own change the reality that, in international law, the ECHR applies in certain circumstances to the UK’s extraterritorial conduct. Nor will any changes that limit the UK’s ability to protect rights extraterritorially change the fact
that the UK remains bound by other international human rights treaties and customary international law.

In summary, we

a. do not consider there to be any reason to restrict the extraterritorial application of the ECHR;

b. do not consider there to be a tension between the LOAC and the ECHR – on the contrary, the two bodies of law have been applied to conflicts abroad sensibly and carefully by the ECtHR;

c. consider that updating the UK’s Joint Service Manual on the Law of Armed Conflict would provide a valuable opportunity to provide clarity to members of armed forces on the extraterritorial application of the ECHR; and

d. recommend that the UK government consider discussing with other states the possibility of expanding further the extraterritorial reach of the ECHR to ensure that the ECHR is more closely aligned with other international human rights instruments and to ensure that human rights protection keeps up with an increasingly globalised and interconnected world.

269. The two assumptions underlying the Government Consultation and Question 22 (that the ECtHR’s jurisprudence has given the ECHR an excessive extraterritorial reach, and that there is a tension between the LOAC and ECHR rights) are not supported by the jurisprudence of the Strasbourg Court. Our response to Question 22 will outline the cautious approach taken by the ECtHR in considering the ECHR’s extraterritorial application, before addressing the specific concerns raised regarding the applicability of the ECHR to situations of armed conflict.

**Extraterritorial Application of the ECHR: General Position**

270. The ECtHR considers ‘jurisdiction’, and thus the applicability of the ECHR, to be ‘primarily territorial’. Its application beyond the state’s territory occurs only in narrowly defined ‘exceptional circumstances’, namely the following:

311 MN and others v Belgium (App no 3599/18), 5 May 2020, at [98], [102].
i. Circumstances in which the state has effective control over the relevant territory.\(^\text{312}\)

271. Situations in which a state has effective control over the territory of another state are inherently exceptional, since international law prohibits states from taking control over the territory of other states, save for a few exceptional circumstances.\(^\text{313}\) However, where such control arises, it is essential that the controlling state is subject to international human rights law obligations in respect of its conduct on the relevant territory. If this were not so, individuals on that territory would be deprived of the benefit of effective human rights protection by the state which has lost control, without the benefit of human rights enforceable against the state which has taken over.\(^\text{314}\) This would result in a dangerous gap in human rights protection and would go against the spirit and intended application of the ECHR.

272. The International Court of Justice (ICJ) has made it clear that international human rights treaty obligations, including regional ones, apply to the conduct of states which have control over territory outside their own.\(^\text{315}\) The jurisprudence of the ECtHR reflects this general position in international law.

\(^{312}\) **Al-Skeini and others v the United Kingdom** [2011] ECHR 1093, at [131]–[132] (‘Al-Skeini’). The Government Consultation relies upon the concerns expressed by Lord Rodgers in the House of Lords decision in **Al-Skeini** as to the lack of clarity regarding the ECHR’s extra-territorial extent. However, it should be recalled that those comments were made before the ECtHR’s own ruling on **Al-Skeini**, which considerably (although not completely) clarified the position regarding the application of the ECHR to extraterritorial state conduct.

\(^{313}\) Specifically, with the consent of the territorial state, the authorisation of the United Nations Security Council exercising its powers under Chapter VII of the United Nations Charter, or to the extent necessary and proportionate to repel an armed attack.

\(^{314}\) See, for example, similar arguments advanced by several organisations in response to the call for evidence by the Independent Human Rights Act Review, eg Public Law Project, ‘Response to Call for Evidence’ (March 2021), at [64].

ii. Circumstances in which the state effectively exercises authority or control over the applicant.

273. In addition to circumstances where a state exercises effective control over territory abroad, the ECtHR have established that the ECHR may be engaged in situations where a state exercises authority or control over an applicant. This model of establishing jurisdiction is necessary to ensure that, for example, the state is not able to torture persons whom their agents hold in custody in territory which it does not control. It was also the basis on which the ECtHR was able to hold that the assassination of Aleksandr Litvinenko in the United Kingdom violated Russia’s ECHR obligations.³¹⁶

274. The model was first articulated in one of the ECtHR’s earliest decisions on the scope of the ECHR, in which they held that contracting states are bound to secure the rights and freedoms in the ECHR to ‘all persons under their actual authority and responsibility’.³¹⁷ However, in the Al-Skeini judgment, the ECtHR emphasised that such exercises of jurisdiction are ‘exceptional’; and the Court has since developed this form of ‘jurisdiction’ in a restrained manner. In the recent case of Georgia v Russia No 2, for example, the Court held that in armed hostilities, it was not possible to say that a state had effective control over the territory of another state or authority and control over individuals due to the ‘context of chaos’ of the active stage of armed hostilities. It reaffirmed that the ECHR will only be engaged where the state exercises authority over individuals in the territory of another state in a way that is akin to having ‘effective control’ over territory. Further, even in situations where the state has been found to exercise ‘authority and control’ over individuals in the territory of another state, the ECtHR have made it clear that the state is not obliged to comply with the full range of ECHR rights, but only those ‘relevant to the situation’ of the individual.³¹⁸

³¹⁶ Carter v Russia (App no 20914/07), 21 September 2021, at [170] ('Carter').
³¹⁷ Cyprus v Turkey (App Nos 6780/74 and 6950/75), 26 May 1975, at [8].
³¹⁸ Al-Skeini and others v the United Kingdom [2011] ECHR 1093, at [137].
iii. Circumstances in which ‘specific circumstances of a procedural nature’\textsuperscript{319} connect the state to specific events outside its territory.

275. It has been the longstanding jurisprudence of the ECtHR that the right to life involves both substantive duties, not to unlawfully take life, and procedural duties to conduct an effective investigation into the unlawful loss of life; and, to this extent, the ECtHR considers the procedural duty to be separate from and independent of the Article 2 substantive duty.\textsuperscript{320} The ECtHR held that procedural obligations impose investigative duties on the state to secure effective implementation of domestic law that protects the right to life and, where state agents are involved, ensure accountability for deaths occurring under their responsibility.\textsuperscript{321} However, procedural obligations are not limited to circumstances where it is established the killing was caused by the state.\textsuperscript{322} This is to ensure that effective investigations into all unlawful deaths are carried out.

276. The separate and independent nature of the state’s procedural duties under Article 2 entails that it is possible for the procedural duty to independently trigger the jurisdiction of the state even where unlawful deaths occur outside their territory.\textsuperscript{323} However, in practice, the ECtHR has tightly confined these cases to circumstances where it is possible to establish a genuine jurisdictional link between the Convention state and the applicant.\textsuperscript{324} This arises primarily where the state commences criminal investigations or proceedings in respect of the relevant death.\textsuperscript{325} The commencement of civil proceedings in the state’s courts in respect of extra-territorial events may also establish a limited

\textsuperscript{319} MN and others v Belgium (App no 3599/18), 5 May 2020, at [107].
\textsuperscript{320} See, for instance, Aliyeva v Azerbaijan (App no 35587/08) [2014] ECHR 854, at [58].
\textsuperscript{321} Bazorkina v Russia (App no 69481/01), 27 July 2007, at [117]–[119]; Finucane v United Kingdom, (App no 29178/95), 1 July 2003, at [67]–[70]; Aslakhanova and others v Russia (App no 2944/06), 18 December 2012, at [121].
\textsuperscript{322} Ergi v Turkey (App no 23818/94), 28 July 1998, at [82].
\textsuperscript{323} Güzelyurtlu v Cyprus & Turkey (App no 36925/07), 29 January 2019 (‘Güzelyurtlu’), in which the ECtHR’s Grand Chamber considered the deaths of Elmas, Zerrin and Eylül Güzelyurtlu, who had moved from the Turkish-controlled area of Cyprus to Larnica, where their deaths had occurred. The Grand Chamber held that Turkey was under a duty to investigate the killing despite it happening outside of the territory it controlled.
\textsuperscript{324} Güzelyurtlu v Cyprus & Turkey (App no 36925/07), 29 January 2019, at [181]–[188].
\textsuperscript{325} ibid, at [188].
procedural form of state jurisdiction.\textsuperscript{326} The underlying extra-territorial events do not come to be governed by the ECHR as such, but the obligations relevant to the procedural activity in question will apply to that activity.\textsuperscript{327} It will be apparent that decisions of the state’s own authorities, or rights to bring proceedings established by its domestic laws, will be the basis of jurisdiction arising in such cases. The ECtHR has also been prepared to limit this concept of jurisdiction to ensure that not all criminal investigations initiated by states into deaths occurring outside their territory will trigger ECHR obligations.\textsuperscript{328}

277. Although the ECtHR has found that ‘special features’ may sometimes justify finding a ‘jurisdictional link’,\textsuperscript{329} these are in practice very limited, and apply only to cases in which effective investigation by the state in whose territory the suspected crime occurred is impossible,\textsuperscript{330} or would be significantly hindered by the relevant ECHR state’s failure to co-operate.\textsuperscript{331} They therefore avoid what would otherwise be a material gap in the rights of victims of crimes which could otherwise not be properly responded to by the relevant law enforcement authorities. This is relevant for crimes involving a cross-border element, such as human trafficking.\textsuperscript{332} However, even in such cases, a jurisdictional link has generally been found only where the state has obligations under international law to undertake or assist the relevant criminal proceedings.\textsuperscript{333} Accordingly, the state will generally not on this basis be made subject to obligations which it has not already assumed.

\textsuperscript{326} Markovic and others v Italy [2006] ECHR 1141.
\textsuperscript{327} Hanan v Germany (App no 4871/16), 16 February 2021, at [143] (‘Hanan’).
\textsuperscript{328} Hanan, ibid, at [135].
\textsuperscript{329} Güzelyurtlu v Cyprus & Turkey (App no 36925/07), 29 January 2019, at [190].
\textsuperscript{330} Hanan v Germany (App no 4871/16), 16 February 2021, at [138].
\textsuperscript{332} Rantsev v Cyprus and Russia (App no 25965/04), 7 January 2010.
\textsuperscript{333} Makuchyan and Minasyan v Azerbaijan and Hungary (App no 17247/13) 26 May 2020, at [50]; Romeo Castaño v Belgium (App no 8351/17) 9 July 2019, at [41], Aliyeva and Aliyev v Azerbaijan [2014] ECHR 854, at [57], Hanan v Germany (App no 4871/16), 16 February 2021, at [137], Rantsev v Cyprus and Russia (App no 25965/04), 7 January 2010, at [179]–[185] and [245]. Although in Carter v Russia and in Güzelyurtlu v Cyprus and Turkey, a relevant exception existed to the respondent state’s treaty obligation to co-operate, those cases involved particularly unusual circumstances (an assassination by Russian agents on United Kingdom territory and Turkey’s illegal occupation of Northern Cyprus, respectively).
Application of the ECHR in Extraterritorial Armed Conflicts: the ECHR and LOAC are Complementary

278. Question 22 also asks about ‘the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict’. While this is an appropriate matter for dialogue, LOAC is complementary to, rather than in tension with, the ECHR and analogous international human rights law. Overall, the ECHR and IHL are being pragmatically and sensitively interpreted, developed, and applied by the ECtHR and others, as well as armed forces themselves. The ECtHR shows considerable deference to the realities of armed conflict. **CPL continues to be of the view that there is no case for change.**\(^{334}\)

279. The ECtHR’s approach to questions of Article 1 jurisdiction in extraterritorial armed conflicts has been described as ‘principled and yet realistic’.\(^{335}\) Its analysis of Article 1 jurisdiction in this context relies on the same categories set out above. Indeed, the ECtHR’s Article 1 jurisprudence, including *Al-Skeini* itself, primarily arises from alleged rights breaches during armed conflicts.\(^{336}\) The ECtHR acknowledges that the ECHR, including Article 1 specifically, ‘should so far as possible be interpreted in harmony with other rules of international law’.\(^{337}\) These include the basic rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties 1969 (Vienna Convention),\(^{338}\) as well as the principles of IHL, such as the provisions of the Geneva Conventions.\(^{339}\)

---

334 Cambridge University, Centre for Public Law, ‘The Independent Human Rights Act Review Call for Evidence – Response’ (March 2021), at [10].
335 *Georgia v Russia (II)* (App no 38263/08) (2021) 73 EHRR 6, at [8] (concurring opinion of Judge Keller).
336 *Al-Skeini and others v the United Kingdom* [2011] ECHR 1093, at [130]–[142]. See also *Georgia v Russia (II)* (App no 38263/08), (2021) 73 EHRR 6, at [81]; *Hassan v United Kingdom* (App no 29750/09), (2014) 38 EHRC 358, at [74]–[80].
337 *Hassan v United Kingdom* (App no 29750/09), (2014) 38 EHRC 358, at [77], [102]; see *Georgia v Russia (II)* (App no 38263/08), (2021) 73 EHRR 6, at [94].
280. Significantly, in the context of armed conflicts, the ECtHR recognises that, where ‘the safeguards under the [ECHR] continue to apply,’ they must then be ‘interpreted against the background of the provisions of [IHL].’ This complementary synthetic application of both IHL and, exceptionally, the ECHR is similar to the approach by other international and foreign courts considering the extraterritorial application of international human rights in armed conflicts, including the International Convent of Civil and Political Rights — to which the UK is party — as well as the New Zealand Bill of Rights Act 1990. The ECtHR’s approach is also informed by analogous jurisprudence from the International Court of Justice and Inter-American Court of Human Rights.

Recent Examples Demonstrate a Cautious, Principled Approach by the ECtHR

281. As with its general approach to Article 1, the ECtHR approaches questions of extraterritoriality cautiously, pragmatically, and on a case-by-case basis, as the following examples demonstrate.

282. As noted above, the ECtHR recently rejected calls to extend ECHR protections ‘during the active phase of hostilities’ of an international armed conflict involving ‘armed attacks, bombing, [and] shelling’ in Georgia v Russia (II). It attached ‘decisive weight’ to the fact that ‘the very reality of armed confrontation and fighting between enemy military forces’ involved attempts to

340 Hassan v United Kingdom (App no 29750/09), (2014) 38 EHRC 358, at [104].
344 Al-Skeini and others v the United Kingdom [2011] ECHR 1093, at [132];
345 Georgia v Russia (II) (App no 38263/08), (2021) 73 EHRR 6, at [125]–[144].
‘establish control over an area in a context of chaos’. In that context, neither ‘effective control’ over territory nor ‘State agent authority and control’ over individuals were present on the facts and thus the ECHR did not apply extraterritorially.

283. Even where extraterritorial jurisdiction is recognised during armed conflicts, the ECHR is interpreted and applied sensitively, mindful of and consistently with the realities of armed conflict and with IHL. For example, this is clearly demonstrated in both Hassan v United Kingdom and Hanan v Germany. In Hassan, the ECtHR found that the UK was required to respect the Article 5 rights of an Iraqi national arrested and detained extraterritorially, but ultimately dismissed the substantive claim. Crucially, the ECtHR was able to dismiss this Article 5 claim only by reinterpreting Article 5’s obligations in light of IHL — including, in accordance with the Vienna Convention, the consistent subsequent practice of ECHR member states in this context. In reliance on these sources, the ECtHR held that ‘[i]t can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.’

284. Similarly, in Hanan, the ECtHR held Germany subject to Article 2’s procedural to conduct an effective investigation into deaths resulting from an extraterritorial airstrike in Afghanistan under Article 2 ECHR. It found, however, that

---

346 ibid, at [137].
347 ibid, at [137]–[138].
348 See also Varnava v Turkey [2008] ECHR 30, at [185] (‘Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict’).
349 ibid, at [108]–[111].
350 ibid, at [104], [97].
351 See ibid, at [101] (citing Vienna Convention, art 31(3)(b)) (‘[A] consistent practice on the part of [ECHR member states], subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention … The[ir] practice … is not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts.’).
352 ibid, at [104].
353 Hanan v Germany (App no 4871/16), 16 February 2021, at [134]–[145].
Germany had complied with its requirements, stressing that the requirements of an effective investigation ‘must be applied realistically’ taking into account the armed conflict to which it related.\(^{354}\) Both Hassan and Hannan, and the ECtHR’s approach to Article 1 jurisdiction in extraterritorial armed conflicts generally, exemplify that the ECtHR will only recognise such jurisdiction cautiously, on principled grounds, and in full appreciation of complementary principles of IHL.

285. The circumstances in which the ECtHR has found violations of the ECHR during armed conflicts abroad nonetheless underscore the importance of its extraterritorial potential. Russia, for example, has been found subject to, and in violation of, the ECHR on multiple occasions in respect of extraterritorial operations of insurgents operating in other ECHR member states, including violations of inhumane and degrading treatment contrary to Article 3, for the acts of insurgents in Moldova.\(^{355}\) The ECtHR has also notably recognised that Russia’s ongoing military excursions within Ukraine’s sovereign territory comprise extraterritorial conduct triggering Russia’s ECHR obligations under Article 1.\(^{356}\) The ECtHR’s cautious yet principled recognition that such conduct is subject to the overarching protections provided by the ECHR is welcome.

**Updating the Joint Services Manual of the Law of Armed Conflict**

286. The United Kingdom should update its Joint Services Manual of the Law of Armed Conflict (2004), which provides invaluable guidance on the law governing its armed forces. This would enable the UK to reflect the applicable ECHR caselaw outlined above.\(^{357}\) For avoidance of doubt, CPL does not agree that the ECtHR’s approach to Article 1 during armed conflicts ‘has

\(^{354}\) Ibid, at [224] (citing Al-Skeini and others v the United Kingdom [2011] ECHR 1093, at [168]). See, for example, Hanan, at [223] (‘Insofar as the applicant alleged a delay and a lack of independent in relation to the on-site reconnaissance, the Court considers that this aspect has to be examined against the background of ongoing hostilities in the bomb release areas.’); and [223] (‘The investigative material contained sensitive information concerning a military operation in an ongoing armed conflict, and it cannot be regarded as an automatic requirement under Article 2 that a deceased victim’s surviving next-of-kin be granted access to [it]’).

\(^{355}\) See Sandu v Moldova (2019) 69 EHRR 25, at [32]–[38]; for example, Mozer v Republic of Moldova and Russia (App no 11138/10), 23 February 2016 (holding Russia responsible for Article 3 and other violations of insurgents).

\(^{356}\) Ukraine v Russia (Re Crimea) (App no 20958), 14 January 2021, at [303]–[352].

created uncertainty for [UK] armed forces.' While the interaction between the ECHR and IHL may potentially be ‘complex’, the ECtHR’s jurisprudence continues to develop cautiously on a case-by-case, principled basis. However, we are concerned that uncertainty may arise for UK armed forces because the UK’s Joint Services Manual, published in 2004, does not take into account the significant developments in applicable Article 1 jurisprudence across the last two decades. It therefore recommends that the UK publishes an updated Joint Service Manual properly addressing the applicability of the ECHR for its armed forces.

287. Insights on how to effectively update the Joint Services Manual are available from other jurisdictions, both ECHR member states and others. The recently published Danish Military Manual is perhaps the most illustrative. This devotes significant detail to the jurisprudence outlined above. It emphasises that, where international human rights apply extraterritorially alongside IHL, ‘the Danish armed forces are required, to the greatest extent possible, to interpret the two sets of rules in a manner that ensures maximum consistency between them’. Both Denmark and France also highlight particular human rights likely to be triggered during armed conflicts. The German Law of Armed Conflict Manual, similarly acknowledges the complementary nature of the ECHR and IHL. It also advises that applicable standards for individual missions ‘will be specified for each mission so that legal certainty is ensured for all soldiers’. Other equivalent publications are to similar effect. The UK should draw on and expand guidance of this nature in a new Joint Services Manual. This would

\[\text{\ref{fn:358}}\]

\[\text{\ref{fn:359}}\]

\[\text{\ref{fn:360}}\]

\[\text{\ref{fn:361}}\]

\[\text{\ref{fn:362}}\]

\[\text{\ref{fn:363}}\]

\[\text{\ref{fn:364}}\]

\[\text{\ref{fn:365}}\]

\[\text{\ref{fn:366}}\]
significantly clarify the scope and application of ECHR rights for its armed forces, both during armed conflicts and other operations.

**Looking Forward: “the most appropriate approach” to Extraterritoriality**

288. As this contribution has demonstrated, the ECtHR has clearly taken a restrained approach to the extraterritorial application of the ECHR. Although the ECHR is a regional instrument (in the sense that only ‘European’ states are party to it), it is nevertheless a human rights instrument. As such, the recognition of those rights by States Parties should be relevant whenever the behaviour of those states negates any individual’s enjoyment of rights. The approach of other international human rights bodies, considering regional and global international human rights law instruments, is informative in this regard. Other international bodies and regional human rights tribunals have reached interpretations which give fuller effect to the recognition by state parties of the rights contained in other international human rights treaties in respect of individuals outside their territory, and in many instances have gone far beyond the restrained approach of the ECtHR.

289. Under Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), state parties are required to ensure rights ‘to all individuals within its territory and subject to its jurisdiction’, and the United Nations Human Rights Committee has interpreted the notion of jurisdiction in far broader terms than the ECtHR. According to the Committee, the concept refers not to the place that the breach occurred, but to the relationship between the person and the state with regards to a violation of human rights, ‘wherever it occurred’.\(^\text{367}\) For the Committee, this interpretation is a natural extension of the fact that ‘[i]t would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory’,\(^\text{368}\) and this ‘cause and effect’ model of establishing jurisdiction has enabled the Committee to find violations in much wider circumstances than the


\(^{368}\) ibid, at [12.3].
ECtHR. The Committee considers that the right to life under the ICCPR applies to activities occurring (even if only in part) within the relevant state’s jurisdiction, if they have ‘a direct and reasonably foreseeable impact on the right to life of individuals outside their territory’. That approach evidently extends considerably beyond the extraterritorial reach of the ECHR, for example in relation to the state’s obligation to regulate arms exports.

290. The Inter-American Court of Human Rights has also gone much further than the ECtHR in this regard. Under Article 1(1) of the American Convention on Human Rights, state parties are required to ‘respect and ensure’ the rights in the Convention to all those ‘subject to their jurisdiction’. The Inter-American Court made its primary statement on the subject in their Advisory Opinion on state obligations under environmental law and human rights in the transboundary context. The Advisory Opinion considered whether the reference to ‘jurisdiction’ in the Convention should be interpreted so as to allow a claim by an individual outside of the territory of the state for violations of human rights caused by environment harm emanating from the state; if so, whether it would be a breach of the Convention for that state, by act or omission, to cause transboundary environmental damage that undermined the right to life; and, in order to protect the human rights of persons outside their territory, the Convention required states to comply with international environmental law. The Inter-American Court answered in the affirmative on all three questions, finding that it was a longstanding principle in international human rights law that state parties to human rights treaties ‘may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside of that state’s own territory’. In making this finding, the Inter-American Court went far beyond the ECtHR’s understanding of what constitutes ‘effective control’, and their rejection of a ‘cause and effect’ mode of establishing jurisdiction, determining that ‘[a]s regards transboundary harm, a person is under the jurisdiction of the State of

369 Human Rights Committee, General Comment no 36, CCPR/C/GC/R.36/Rev.7 (2018), at [22].
370 A topic which the European Commission on Human Rights case of Tugar v Italy (App no 22869/93), 18 October 1995, considered fell beyond the reach of the ECHR.
origin if there is a causal relationship between the event that occurred in its territory and the affectation of the human rights of a person outside its territory. The exercise of jurisdiction arises where the State of origin exercises effective control over the activities carried out that caused the harm and consequent violation of human rights.\(^3\)

291. The cause-and-effect approach of other international human rights bodies makes it clear that the approach of the ECtHR is restrained. However, it also shows that the focus on the application of the ECHR to situations of armed conflict where the state exercises effective control over territory is myopic. Both the environmental crisis and the global COVID-19 pandemic illustrate the transboundary effect that one state’s actions can have on human rights in another state, and it is our opinion that extraterritorial human rights can act as a crucial tool to protect individuals in times of global crisis. We consider that there would be considerable benefit in negotiating changes to bring the ECHR into line with other global and regional human rights treaties, as interpreted by their authoritative monitoring bodies.

292. We note that bringing the application of the ECHR in line with other international treaties would involve extending the ECHR’s extraterritorial applicability beyond the cautious approach adopted by the ECtHR to date. The IHRAR called for a ‘national discussion’ of the extraterritoriality issue, and for the initiation with other ECHR states of a process aiming towards ‘a new Protocol to the Convention, setting out a clear, logically coherent, well thought out approach to its territorial and temporal scope, together with the Convention’s relationship with IHL’.\(^4\) However, whilst we would welcome further clarity, we would caution against any material changes to the law that could restrict the application of the Convention further. In present circumstances we would observe that Ukraine and Georgia have both brought legal proceedings before the ECtHR against Russia, relying on the extraterritorial obligations which the ECHR imposes on Russia. Seeking

\(^3\) ibid, at [104(h)].

\(^4\) Independent Review (n 3) at 390.
limitations to the extraterritorial extent of the ECHR would seem especially unsupportive of states who face the risk or the reality of international aggression at the hands of ECHR states.

293. **Human rights are universal.** In line with the original drafters of the Convention, we strongly urge any changes to be only in the direction of ‘widening the category of persons’ to whom the ECHR applies. We also welcome the recognition in the IHRAR and Consultation Paper that any change in this area must be undertaken through negotiation with other ECHR states rather than unilaterally. This is an opportunity for the UK to take the lead internationally in ensuring that human rights protection keeps up with an increasingly globalised and interconnected world.

**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.

**Summary**

When applying the principle of proportionality, the courts give appropriate weight to the balance struck by Parliament when enacting legislation to the rights of individuals on the one hand and the interests of the community on the other. Accordingly, the application of the principle has not given rise to problem in practice insofar as problems are characterised as uncertainty and impinging upon the role of elected lawmakers. The courts have been especially deferential to the decision-making of Parliament in cases involving controversial issues of social and economic policy and those with major implications for public expenditure. Further, the fact that the UKSC reached the conclusion it did in recent cases such as *Elan-Cane* and *SC* is reflective of the fact that legislation purporting to compel the courts to give ‘great weight’ to Parliament’s decision-making is unnecessary. Further, the wording of the purported legislation runs the risk of prompting litigation concerning the meaning of ‘great weight’.

294. The ECHR contains absolute rights as well as non-absolute or qualified and limited rights. Absolute rights, such as Article 3, can never be justifiably infringed and must be fulfilled without exception. On the other hand, qualified and limited rights can be subject to certain restrictions. Once an interference with a qualified or limited right is found, this interference is evaluated to see if it is justified. The justification analysis is similar for all qualified rights, despite slight differences in wording.\(^{374}\) For an interference to satisfy the justification test, it needs to (i) be ‘in accordance with the law’ or ‘prescribed by law’, (ii), pursue a legitimate aim set out in the text of the right, and (iii) be ‘necessary in a democratic society’.

295. Although the term ‘proportionality’ finds no mention in the text of the Convention, the European Court of Human Rights has declared the principle of

---

proportionality to be ‘inherent in the adjective “necessary”’. In fact, the principle of proportionality has been found to be ‘inherent in the whole of the Convention’. According to the Strasbourg Court, an interference will be considered ‘necessary in a democratic society’ for a legitimate aim if (i) it answers a pressing social need, (ii) it is proportionate to the legitimate aim pursued, and (iii) the reasons given by the national authority to justify it are ‘relevant’ and ‘sufficient’.

296. In the case of Huang v Secretary of State for the Home Department, the House of Lords adopted a four-stage proportionality test in the UK to test interferences with qualified Convention rights under the Human Rights Act 1998. This domestic proportionality test largely mirrors the Strasbourg approach.

297. The consultation identifies two problems that the application of the principle of proportionality has given rise to under the HRA. It is alleged that the application of the principle of proportionality has, first, ‘created considerable uncertainty’ and, second, ‘impinged on the ability of elected lawmakers to balance individual rights with due respect for the wider public interest’.

298. In response, we suggest that there is no need to change how the principle of proportionality has been applied in practice under the HRA. Proportionality is not a principle where ‘one size fits all’. More specifically, while the test of proportionality remains the same, ‘the intensity [of review] – that is to say, the

---

375 Handyside v United Kingdom (1976) 1 EHRR 737, 754, at [58].
376 Sporrong and Lönnroth v Sweden (App no 7151/75; 7152/75), 23 September 1982, at [69].
378 See also Bank Mellat v Her Majesty’s Treasury (No. 2) [2013] UKSC 39, at [20] (per Lord Sumption), [72ff] (per Lord Reed); R (Aguilar Quila) v Secretary of State for the Home Department [2012] 1 AC 621, at [45] (per Lord Reed); R (Pro Life Alliance) v BBC [2004] 1 AC 185, at [144] (per Lord Walker).
degree of weight or respect given to the assessment of the primary decision-maker – depends on the context."381 The application of the principle of proportionality thus varies depending on the specific context. Sensitivity to context and facts should not, however, be equated with lack of certainty or clarity.

299. Based on the context of the case, courts already balance individual rights whilst giving due respect to the wider public interest and the fact that Parliament has acted in public interest. Furthermore, courts already place appropriate weight on Parliament’s views on complex and diverse issues in determining what is ‘necessary in a democratic society’. There is, thus, no case for changing the approach currently adopted by courts as regards the application of the principle of proportionality.

300. Given the contextual nature of proportionality assessments, if Options 1 and/or 2 were to be introduced, courts would be required to determine what ‘great weight’ in a given case means, risking further ambiguity and unnecessarily protracted litigation. Further, there is a risk of confusion regarding the weight to be afforded to jurisprudence that predated the proposed amendments.

Response to Option 1

301. Under Option 1, the Consultation proposes that ‘where a court or tribunal is required to consider what is necessary in a democratic society’ in determining rights compatibility, ‘[t]he court or tribunal must give great weight to Parliament’s view of what is necessary in a democratic society’.

302. The application of the test of proportionality is context-specific, and requires courts to take into account ‘relative institutional competence’ on a particular subject-matter. Since the courts in the UK already give great weight to Parliament’s view, there is no need to legislate Option 1.

381 Bank Mellat v Her Majesty’s Treasury (No. 2) [2013] UKSC 39, at [69] (per Lord Reed).
303. A clear statement that reflects the approach of courts in already affording great weight to Parliament’s views and choices was delivered by Lord Mance in *Nicklinson*: ‘Whether a statutory prohibition is proportionate is, in my view, a question in the answering of which it may well be appropriate to give very significant weight to the judgments and choices arrived at by the legislator, particularly when dealing with primary legislation.’ This is especially so because ‘[t]he democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament.’ In fact, the Government Consultation notes that ‘courts have recognised to some degree the importance of giving due weight to the views of Parliament’.

304. At the same time, given the context-sensitive application of the principle of proportionality, what is considered to be ‘necessary in a democratic society’ may vary from case to case. Accordingly, in line with this contextual application, courts agree that the ‘weight to be accorded to the judgment of Parliament depends on the circumstances and the subject matter’, when examining whether the measure is ‘necessary in a democratic society’.

UK courts are, however, mindful of ‘relative institutional competence’ and expertise. In the *Belmarsh* case, Lord Bingham elaborated upon the idea of relative institutional concept thus:

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

---

382 R (on the application of Nicklinson and another) v Ministry of Justice [2014] UKSC 38, at [164] (per Lord Mance).
383 ibid.
384 Government Consultation (n 2) at [285].
Parliament it is the function of the courts and not of political bodies to resolve legal questions.  

305. The court has readily recognised that ‘certain matters are by their nature more suitable for determination by Government or Parliament than by the courts.’ For instance, in matters of national security, the courts ‘give great weight to the views of the executive’. For example, courts have held that ‘it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so.’

306. Courts have also clarified that the legislature would be accorded a ‘considerable degree of latitude’ in issues of ‘broad social policy’. In the case of Nicklinson, Lord Mance opined as follows:

Parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas. The legislature has access to a fuller range of expert judgment and experience than forensic litigation can possibly provide. It is better able to take account of the interests of groups not represented or not sufficiently represented before the court in resolving what is surely a classic “polycentric problem”.

307. In a host of benefit cap cases, such as R (SC and others) v Secretary of State for Work and Pensions and others – which has been cited with approval in the Consultation – courts have reiterated the need to give due weight to the considered assessment of Parliament in ‘controversial issues of social and

---

389 Secretary of State for the Home Dept v Rehman [2002] 1 All ER 123, at [31] (per Lord Steyn).
390 R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15, at [33] (per Lord Bingham).
391 For example, Williamson & Ors, R (on the application of) v Secretary of State for Education and Employment & Ors [2005] UKHL 15, at [51].
economic policy, with major implications for public expenditure’. This contextualised approach to the application of the principle of proportionality is in line with Strasbourg jurisprudence too.\(^{394}\)

308. It is noteworthy that SC is only one of several occasions where courts have recognised the importance of giving due weight to Parliament’s views. In *Kay v Lambeth London Borough Council*, for instance, Baroness Hale observed that courts should ‘think long and hard’ before intervening in legislative decisions about housing policy.\(^{395}\) Similarly, in the case of *Nicklinson*, Lord Reed emphasised that when issues raise ‘highly controversial questions of social policy and, in the view of many, moral and religious questions on which there is no consensus’, such issues require ‘Parliament to be allowed a wide margin of judgment’.\(^{396}\) While this approach does not oust the jurisdiction of courts, it means that ‘courts should attach very considerable weight to Parliament’s assessment’.\(^{397}\) In a similar vein, the panel report of the Independent Human Rights Act Review, after conducting a survey of domestic jurisprudence, affirmed that the cases demonstrate that the courts are ‘acutely aware of the importance of considering where institutional responsibility lies for issues falling within the margin of appreciation’.\(^{398}\)

**Response to Option 2**

309. Under Option 2, the Consultation proposes that ‘where a court or tribunal is required to consider the public interest’ in determining rights compatibility, ‘[t]he court or tribunal must give great weight to the fact that Parliament was acting in the public interest in passing the legislation.’ Again, this is unnecessary as courts already afford appropriate weight to the fact that Parliament was acting in the public interest in passing legislation.

\(^{393}\) ibid, at [93].  
\(^{394}\) For example, *Blecic v Croatia* (2004) 41 EHRR 185, at [65].  
\(^{395}\) [2006] UKHL 10, at [187].  
\(^{396}\) *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38, at [297] (per Lord Reed).  
\(^{397}\) ibid.  
\(^{398}\) Independent Review (n 3) at 120.
310. Consideration of the public interest is built into the domestic proportionality test. The fourth step of the proportionality assessment requires courts to strike a fair balance between the rights of the individual and interests of the community.\textsuperscript{399} In striking this balance, particularly in cases involving complex issues or policy questions, the courts afford appropriate weight to the legislative decisions of Parliament:

In the field of what may be called macro-economic policy, certainly including the distribution of public funds upon retirement pensions, the decision-making power of the elected arms of government is all but at its greatest, and the constraining role of the courts, absent a florid violation by government of established legal principles, is correspondingly modest. I conceive this approach to be wholly in line with our responsibilities under the Human Rights Act 1998. In general terms I think it reflects a recurrent theme of the Strasbourg jurisprudence, the search for a fair balance between the demands of the general interest of the community and the protection of individual rights...\textsuperscript{400}

311. Similarly, in the case of \textit{R (Countryside Alliance) v Attorney General}, Lord Bingham observed that the impugned Act, having been enacted by a democratically elected legislature, was to be ‘taken to reflect the conscience of a majority of the nation’.\textsuperscript{401} As Lord Bingham further noted, it is ‘in the first instance, for Parliament to decide what laws are necessary in accordance with what it judges to be in the general interest’,\textsuperscript{402} and ‘respect should be paid to the recent and closely-considered judgment of a democratic assembly’.\textsuperscript{403}

\textsuperscript{399} For example, A v Secretary of State for the Home Department [2005] 2 AC 68, at [101] (per Lord Hope); Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35, 52, at [69].
\textsuperscript{400} Carson & Another v Secretary of State for Work and Pensions [2003] EWCA Civ 797 (17 June 2003), at [73].
\textsuperscript{401} Countryside Alliance and others, R (on the application of) v Attorney General & Another [2007] UKHL 52 (28 November 2007), at [45] (per Lord Bingham).
\textsuperscript{402} ibid, at [47].
\textsuperscript{403} ibid.
312. Indeed, as Lord Woolf has recognised:

Legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle pay, a degree of deference to the view of Parliament as to what is in the interest of the public generally in upholding the rights of the individual under the Convention.404

313. The domestic approach is in line with Strasbourg jurisprudence in this regard. The European Court of Human Rights has found it ‘natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one’.405 The Court has also acknowledged that it is ‘for the national authorities to make the initial assessment as to the existence of a problem of public concern’ because of their ‘direct knowledge of their society and its needs’.406 For instance, in cases engaging Article 1 of Protocol 1 which typically include the promotion of economic development or social justice, the Court has on several occasions afforded the legislature a wide margin of appreciation and ‘respect[ed] the legislature’s judgment as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation.’407

314. The Consultation states that incorporating Option 2 ‘would also reflect the respect accorded to the will of Parliament by the UK Supreme Court in the SC case in the context of the right to non-discrimination in the protection of other rights under Article 14’.408 Since the respect accorded to the will of Parliament in the SC case was not an exception, especially in the context of Article 14409 jurisprudence, legislation in the form proposed by Option 2 is unnecessary.

---

405 James v United Kingdom (1986) 8 EHRR 123, at [46].
407 See also Bah v United Kingdom (App no 56328/07), 27 September 2011, at [37]; Stummer v Austria (2012) 54 EHRR 11, at [89].
408 Government Consultation (n 2) Appendix 2, at [9].
409 See, for instance, R (Hooper) v Secretary of State for Work and Pensions [2005] UKHL 29, at [32]; Bank Mellat v Her Majesty’s Treasury (No. 2) [2013] UKSC 39, at [71] (per Lord Reed); and The Queen (On the Application of Claire Wilson) v Wychavon District Council, The Secretary of State for Communities and Local Government [2007] EWCA Civ 52, at [57].
315. Finally, we submit that proportionality assessments are context and fact sensitive. Legislating in the terms of Option 2 would not alter this assessment as the courts would be required to assess the proportionality of each measure in light of the specific circumstances of each case, based on the subject-matter, relative institutional competence, as well as the will of Parliament. The fact that a law ‘represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled.’ Furthermore, incorporating Option 2 runs the same risk of uncertainty and protracted litigation identified in respect of the phrase ‘great weight’ in Option 1. And it may prompt uncertainty and a lack of clarity regarding how courts are to distinguish case law prior to the enactment of Option 2 from case law following its codification.

316. To conclude, the courts apply the principle of proportionality in a context-sensitive manner while taking into account the ‘relative institutional competence’ of Parliament, Government, and courts on a given subject-matter. On subject-matters that are more appropriate for political decision-making including, for instance, economic policies, social welfare and highly sensitive issues such as assisted suicide, the courts already give ‘great weight’ to Parliament’s views on what is ‘necessary in a democratic society’ or in ‘public interest’. The two Options proposed by the Consultation are, thus, unnecessary and run the risk of creating confusion (and, relatedly, further costly litigation) as to what constitutes ‘great weight’.

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.

Summary

Options 1 and 3 are incompatible with our obligations under Article 8 ECHR. This leaves option 2 as the only model that may in principle operate in a manner that is compatible with Article 8 ECHR. It is, however, essential to that compatibility that courts are able to balance the public interest in deportation against Article 8 ECHR in accordance with the criteria established in the Convention case law. If option 2 seeks to prohibit or restrict the courts in engaging with that balancing exercise then it would be incompatible with our convention obligations. We therefore doubt that option 2 could require the courts to do anything other than what they currently do under the existing legal framework. Anything more restrictive than this is likely to lead to the European Court of Human Rights finding further violations of Article 8 ECHR in respect of the UK.
317. As deportation did not form part of the terms of reference of the Independent Review of the Human Rights Act this proposal is not substantiated or supported by that report. We have therefore examined with interest the Government’s case for reform as set out in the Consultation document.

318. We were reassured to note that the Government will ‘safeguard … vital protection for the right to life and the absolute prohibition on torture, confirming that people should not be deported to face torture (or inhuman or degrading treatment or punishment) abroad’.\textsuperscript{411} We read this as meaning that the Government will not seek to amend the protection that is accorded by Articles 2 and 3 ECHR. Such an assurance is essential, and we would oppose any attempt to reduce the protection accorded by those rights. Indeed, any such move would be incompatible with the UK’s obligations under the European Convention on Human Rights and under international law.

319. Consequently, we gather from the Government’s Consultation paper\textsuperscript{412} that the impetus for reform stems from concern about the application of Articles 5, 6 and 8 in deportation cases. We have examined the evidence that the Government has provided in respect of these rights.

**Article 5 ECHR**

320. With regard to Article 5 ECHR no evidence was provided – it is therefore not apparent in the Consultation document what problems the Government perceives in respect of this right.

\textsuperscript{411} Government Consultation (n 2) at [9].
\textsuperscript{412} ibid, at [292].
Article 6 ECHR

321. In respect of Article 6 ECHR the Consultation pinpoints the now decade old Abu Qatada case. In that case, the Strasbourg Court held that Article 6 ECHR precluded the UK from deporting the applicant to Jordan because there would be a real risk that evidence obtained through torture of his co-defendants would be used against him during his retrial. The following year the UK deported the applicant once a treaty was agreed between the UK and Jordan guaranteeing a fair trial. The Government has not indicted why it believes that the right remains problematic. Nor has it provided any argument as to why we should consider reducing the protection of a right to a fair trial to allow for the admission of evidence obtained by torture. Indeed, it is not possible to discern from the Consultation document how the Government envisages its proposals applying in respect of Article 6 ECHR.

322. Moreover, whilst Othman is the sort of high-profile and divisive case that is likely to appeal to a certain sector of the press, it is evident that the substance of the Government’s case for reform is directed at Article 8 ECHR. In that regard it is important that the issues raised by different cases, which concern different Convention rights are not conflated.

Article 8 ECHR

The Current Legal Framework

The Strasbourg Jurisprudence

323. Article 8 ECHR provides for a right to respect for private and family life. It may provide some protection for persons subject to a deportation order who have private life ties or family ties in the UK. This is not an absolute right, consequently the state may be able to justify an interference under Article 8(2) ECHR. Indeed, in many Article 8 ECHR cases state have been able to justify deportation.
324. In considering whether deportation is justified the Court has identified a number of criteria that domestic authorities need to consider.

325. In assessing the relevant criteria in such a case the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relations; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country or origin, although the mere fact that a person may face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion.

326. In Uner, the Court added two further criteria that must be considered by the domestic authorities:

The best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled;

The solidity of social, cultural and family ties with the host country and with the country of destination.

413 Othman (Abu Qatada) v United Kingdom (2012) 55 EHRR 1.
414 See Government Consultation (n 2) at 37–38, 45.
415 Boultif v Switzerland (App no 54273/00), 2 August 2001, at [48].
416 Üner v The Netherlands (App no 46410/99), 18 October 2006, at [58].
327. The Court affirmed the application of all of these criteria in *Unuane v UK*:

All the above factors [Boultif + Üner] should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction.\(^{417}\)

328. These criteria were also emphasised by the Grand Chamber in *Savran v Denmark* which stated that these criteria apply from the standpoint of either family or private life as appropriate:\(^{418}\)

All of the relevant criteria established in the Court’s case-law should be taken into account by the domestic courts, from the standpoint of either “family life” or “private life” as appropriate, in all cases concerning settled migrants who are to be expelled and/or excluded from the territory following a criminal conviction.\(^{419}\)

329. The European Court of Human Rights has indicated that where the domestic authorities have applied these criteria it will defer to the decision of a domestic court. See, for example, *Ndidi v United Kingdom*\(^{420}\) and *Unuane v United Kingdom*\(^{421}\) where the Court indicated that there have to be strong reasons for it to carry out a fresh assessment of the balancing exercise where an independent and impartial domestic court has carefully examined the facts and applied the relevant human rights standards consistently with the Convention. The Grand Chamber recently affirmed this understanding of its role in *Savran v Denmark* emphasising that:

---

\(^{417}\) *Unuane v United Kingdom* (App no 80343/17), 24 November 2020, at [74].

\(^{418}\) *Savran v Denmark* (App no 57467/15), 1 October 2019, at [183].

\(^{419}\) See Üner v The Netherlands (App no 46410/99), 18 October 2006, at [60], and Saber and Boughassal v Spain (App nos 76550/13 and 45938/14), 18 December 2018, at [47].

\(^{420}\) *Ndidi v United Kingdom* (App no 41215/14), 14 September 2017.

\(^{421}\) *Unuane v United Kingdom* (App no 80343/17), 24 November 2020.
188. Domestic courts must put forward specific reasons in the light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it. Where the reasoning of domestic decisions is insufficient, without any real balancing of the interests in issue, this would be contrary to the requirements of Article 8 of the Convention. In such a scenario, the Court will find that the domestic courts failed to demonstrate convincingly that the respective interference with a right under the Convention was proportionate to the aim pursued and thus met a “pressing social need” (see El Ghatet v. Switzerland, no. 56971/10, § 47, 8 November 2016).

189. At the same time, where independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for the Court to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so (see Ndidi, cited above, § 76; Levakovic, cited above, § 45; Saber and Boughassal, cited above, § 42; and Narjis, cited above, § 43).

330. It is thus evident that Article 8 ECHR requires states to engage in careful balancing in accordance with the criteria established in the case law, but that where states have done so and have advanced specific reasons for their decision the Strasbourg Court is unlikely to intervene.

**Domestic law already makes special provision in respect of Article 8 ECHR**

331. The current legal framework provides that where a person is sentenced to 12 or more months in prison the Secretary of State must issue a deportation order unless this would violate Article 8 ECHR.
332. Domestic legislation also provides criteria which dictate how Article 8 ECHR is to be assessed. The effect of those provisions is that deportation will be deemed compatible with Article 8 ECHR unless one of the exceptions set out in s.117C applies. The thresholds for those exceptions are very high, with an even higher threshold applicable if the person concerned has been sentenced to at least four years imprisonment.

333. Those provisions were inserted into the 2002 Act by the Immigration Act 2014. Prior to this they existed as a set of immigration rules. The compatibility of those rules with Article 8 ECHR was considered by the Supreme Court in Hesham Ali v Secretary of State for the Home Department, and by the European Court of Human Rights in Unuane v United Kingdom. Both courts determined that the provisions were not incompatible with Article 8 ECHR.

The Government’s Case for Reform
334. Despite the fact that domestic law already heavily circumscribes the application of Article 8 ECHR, the Government seeks to advance the case for reform by relying heavily on: (i) the number of deportations that the courts have found to be incompatible with human rights; and (ii) examples of the types of cases in which deportation has been precluded.

The Number of Deportations found to be Incompatible
335. The Government Consultation seeks to make the case for reform by highlighting the scale of appeals against deportation.

Home Office internal data shows that, from April 2008 to June 2021, 21,521 appeals against deportation were lodged by FNOs. Of these, 6,042 FNOs had their deportation appeal allowed at the First Tier Tribunal, with around 40% (2,392) of them doing so on human rights grounds.

---

422 See, for example, Nationality, Immigration and Asylum Act 2002, s 117.
423 [2016] UKSC 60.
Furthermore, a review of a sample of recent cases indicates that a high proportion of successful human rights appeals at First Tier Tribunal are on Article 8 grounds. In the period 1 April 2016 to 8 November 2021, of 1,011 appeals against deportation by FNOs that were allowed on human rights grounds at First Tier Tribunal, an estimated 70% were allowed solely on Article 8 grounds.

These figures do not include those foreign national offenders who, after case law has been relatively well established on points related to the right to family life, are not served with deportation orders at all.

The expanding human rights restrictions on the government’s ability to deport serious foreign offenders engages the government in costly litigation, and puts the public at additional risk by enabling dangerous criminals to frustrate the process. Some progress has been made in confronting the use of the Human Rights Act to prevent deportation of FNOs, most notably through the changes in the Immigration Act 2014, but serious problems arising from the Human Rights Act remain.\textsuperscript{424}

336. The manner in which statistics are presented in relation to foreign national offenders appears to overstate the role that Article 8 ECHR, and the Human Rights Act more broadly, has in preventing the deportation of FNOs. For example, the Consultation Paper states that ‘in the period 1 April 2016 to 8 November 2021, of 1,011 appeals against deportation by FNOs that were allowed on human rights grounds at First Tier Tribunal, an estimated 70% were allowed solely on Article 8 grounds.’\textsuperscript{425} However, the footnote to the relevant statistics notes that this 70% figure is from a ‘random sample’ of 296 cases taken from the broader 1011 ‘relevant’ First Tier Tribunal cases. It is unclear how the Home Office chose which First Tier Tribunal cases were ‘relevant’ for the purposes of compiling these statistics, which would make it impossible to determine their accuracy and replicate these findings by the Home Office. For

\textsuperscript{424} Government Consultation (n 2) at 45.
\textsuperscript{425} ibid.
an issue that appears to cause the Government such concern it is unusual why the estimates from random samples would need to be relied upon and why the Government does not have exact statistics for the number of Article 8 appeals which are successful. Taking First Tier Tribunal cases and not considering the outcome of Upper Tribunal cases or further appeals also misrepresents the number of FNOs which have successfully challenged a deportation order on Article 8 grounds.

337. In any event, whilst the Government believes that these figures demonstrate that human rights law is too oppressive, we have serious reservations about jumping to such a conclusion. Indeed, an opposing view is that in thousands of cases the Home Office would have violated human rights if these decisions had not been considered by the tribunals: an outcome that one might rightly regard as indicative of the need for judicial protection of human rights. Moreover, whilst the Government states that these figures do not include those foreign national offenders who have not been served with deportation orders at all, nor do they include those who were unable or unaware that they could challenge deportation orders that were contrary to human rights.

**Examples of Cases in which Deportation has been Precluded**

338. The Government Consultation offers three cases as evidence of the case of reform: (i) Case X, (ii) AD v Turkey, and (iii) OO (Nigeria). We are of the opinion that these three examples do not clearly indicate a need for reform.
**Case X**

339. Case X is depicted in a redacted form in the Government Consultation as follows.

*Case X*

Case X was a foreign national who had leave to remain in the UK, and who committed a series of crimes including common assault, battery, destruction of property and grievous bodily harm.

Whilst Case X was serving a custodial sentence for possession of cocaine with intent to supply, the Home Secretary made a deportation order against Case X. Case X appealed, claiming it would violate their Article 8 right to a private and family life. The Asylum and Immigration Tribunal found that it would be a disproportionate interference with the appellant’s rights to deport them, given their relationship with their child.

The immigration tribunal noted that they had relatives in their native country, they did not provide care or funds for their child’s maintenance, and they were not a reliable witness. Nevertheless, the tribunal upheld Case X’s appeal against deportation on Article 8 grounds. Case X’s former partner commented publicly that they had not seen their child since they had been released from prison.

340. As the details of this case have been redacted it is unclear whether this case preceded or followed the introduction of the current provisions. On the one hand the statement that the ‘Immigration Act 2014 sought to address cases such as Case X and to strengthen the public interest in the deportation of FNOs’ might suggest that the case preceded that legislation. On the other hand, the footnote which accompanies Case X explains that ‘[t]he specific details of this case have been omitted in view of other legal proceedings’ suggesting that it is an ongoing matter. We are therefore unsure as to whether the Government is seeking to suggest that Case X subsists following the Immigration Act 2014.
341. This lack of clarity is regrettable. Given the vast number of reported cases, it is odd that the Government has premised its case for reform upon an unidentifiable case of which no independent assessment can be made. This is particularly unfortunate given that the Case X is all too reminiscent of the scenario that Theresa May sought to depict during her notoriously misleading ‘pet cat’ speech at the 2011 Conservative Party conference. The Government will recall that on that occasion the Judicial Office at the Royal Courts of Justice issued a statement correcting her account of the decision.

This was a case in which the Home Office conceded that they had mistakenly failed to apply their own policy - applying at that time to that appellant - for dealing with unmarried partners of people settled in the UK. That was the basis for the decision to uphold the original tribunal decision - the cat had nothing to do with the decision.\textsuperscript{426}

Against this backdrop it is paramount that the Government clearly states its case for reform.

342. It is, however, evident that the Government believes that the courts continue to exercise too great a discretion and that they are striking the wrong balance in some cases.\textsuperscript{427}

In the case of FNOs, the 2014 Act provided that their deportation will be required by the public interest except where specific exceptions are met. However, the discretion left to the courts to ‘balance’ the respective criteria has enabled the Human Rights Act to be used to dilute the intended impact, intended and articulated by Parliament through the passage and enactment of the 2014 Act, namely to deport FNOs who have shown little or no regard for the rights of others by committing crimes in the UK. A number of cases since 2014 help to demonstrate this.

343. Two cases are offered as evidence for this assessment: \textit{AD v Turkey} and \textit{OO (Nigeria)}. 
AD v Turkey

344. The Government describes this case in the consultation document as follows:

In 2018, a Turkish national was convicted of an offence of grievous bodily harm and sentenced to 54 months’ imprisonment. In September 2019, the First Tier Tribunal allowed his appeal against deportation, on human rights grounds. After protracted litigation, relying on his period of lawful residence and marriage to a UK national, the Upper Tribunal allowed the appeal on Article 8 Convention grounds.  

345. This account broadly indicates the facts, but we feel that more details are needed in order to determine whether the case demonstrates the case for reform. Fortunately, the following further details can be derived from the Tribunal’s judgment.

346. AD had lived in the UK with his British wife for over 30 years. They have two adult children and five grandchildren. As the Consultation document indicates the claimant was convicted of GBH in 2018, it is, however, important to know a little more about that conviction. The claimant’s wife had been diagnosed with cancer of the uterus and had endured three major operations. As the Tribunal noted AD could not cope, he started to drink excessively and was convicted of a number of drink-driving offences. In 2018, he was convicted, shortly after the death of his father, of a serious offence involving the use of his car as a weapon against a taxi driver. This resulted in a prison sentence of 54 months which triggered the automatic deportation provisions under s.32 Borders Act 2007. The Tribunal therefore had to consider whether an exception applied. In considering the application of the Immigration legislation the Tribunal noted that it ‘impose[s] a very high threshold, when properly applied, and [will] so be very rarely met’ at [39]. It is also important to note that the Tribunal, whilst finding that the claimant posed a ‘low risk of recidivism’, nevertheless gave very serious weight to the broader public interest in deportation, in particular the

\[428\] ibid.
public interest in (i) maintaining the integrity of the immigration control system designed to deport foreign criminals and (ii) deterring other would be foreign criminals'. Applying those standards the Tribunal judge determined:

In conclusion I must weigh the strong public interest in the deportation of the claimant who has committed a most serious crime of violence and spent four and a half years in prison against the right to respect for family and private life of him as a person who can meet two exceptions to deportation, who has significant aspects of meeting those exceptions which I find to be properly over and above the minimum basis of meeting them, particularly his 31 year marriage to a British citizen, and who has in addition a family life relationship providing real, effective and committed support to his adult son R, and is uniquely able to assist R who is in a parlous physical and psychological condition. I conclude that it can properly be said that there are very compelling circumstances in this case, and that this is one of the rare and exceptional cases where the claimant is entitled to succeed in his appeal as deportation would ultimately amount to a disproportionate interference with his right to respect for his Article 8 ECHR rights.429

347. We are not convinced that this case demonstrates that the public interest in deportation is being ‘frustrated’ by human rights obligations. In any event, as we will explain in more detail below we are of the opinion that the result that the Government seeks for this case could only be achieved by options 1 and 3 of its proposals for reform, neither of which are compatible with our obligations under the European Convention on Human Rights.

OO (Nigeria)

348. The other case that the Government cites in support of reform is OO (Nigeria). This case is described in the Government consultation as follows:430

---

429 Appeal number: HU/01512/2019, at [45].
430 Government Consultation (n 2) at 38.
In 2016, a Nigerian national was convicted at trial of two counts of the possession of Class A drugs, namely crack cocaine and heroin, with the intention to supply, and the concealment or conversion of criminal property. He was sentenced to a total term of imprisonment of four years. In 2017, he pleaded guilty to two offences of violence; assault occasioning actual bodily harm and battery. He was sentenced to a total of eight months’ imprisonment, to run concurrently with the four-year sentence he was already serving for his earlier convictions.

In 2020, the First Tier Tribunal allowed his appeal against deportation on Article 8 grounds. Before the Upper Tribunal, the Home Secretary argued that insufficient weight had been given to the public interest in deportation and that [26], the findings that very significant obstacles would be encountered in integrating in Nigeria were not made out. The Upper Tribunal upheld the findings relying on OO’s ‘very significant obstacles’ to integrating back in Nigeria.

349. The grounds in that case were that the First Tier Tribunal had failed to provide sufficient reasons for why the statutory threshold was met and that the judge failed to identify any circumstances which could rationally be described as ‘very compelling’. Both failed as the Upper Tribunal held that judge had not given insufficient reasons and that the judge’s finding was one that was rationally open to him.
The Government’s Proposed Options for Reform

Option 1 - Certain rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment

350. This proposal is shrouded in ambiguity as it does not specify ‘which rights’ nor ‘what threshold’ is envisaged. We assume that at the very least the proposal intends to target Article 8 ECHR (and that further rights such as Articles 5 and 6 ECHR may also be under consideration). Nevertheless, whichever combination of rights is contemplated, and whatever threshold is proposed a model of this nature would be inherently incompatible with our obligations under the European Convention on Human Rights.

351. As noted above, the current legal framework already contains in s 32 Border Act 2007 an automatic deportation provision where a foreign criminal is sentenced to a period of imprisonment of at least twelve months, or is convicted of a serious criminal offence. When either of those conditions are met then deportation of the foreign criminal is deemed to be conductive to the public good and the Secretary of State must make a deportation order. An exception is included in section 33(2) of the Act if the deportation order would breach a person’s Convention rights, or the obligations of the United Kingdom under the Refugee Convention.
352. Option 1 would therefore remove at least some aspects of s 33, namely the mechanism by which the UK ensures that deportation is compatible with our obligations in respect of Article 8 ECHR. Consequently, if option 1 is enacted then section 33 of the Borders Act 2007 (and evidently section 6 of the Human Rights Act) would need to be amended or repealed. Presumably legislation would then be needed to direct the Secretary of State to order deportation even where it breached a person’s Convention rights. The extent to which that safety-mechanism will be removed depends upon the threshold for the denial of rights i.e. the length of imprisonment. For example, if the proposal applies to all sentences of at least 12 months then s 33 would be removed in its entirety. If, for example, it applies to sentences of four or more years imprisonment then only part of s 33 could be preserved, whilst other parts would be repealed.

353. Such a provision would clearly lead to violations of Article 8 of the ECHR, as some deportations would be disproportionate to the legitimate aims of national security, public safety and the prevention of disorder or crime, even where an FNO had reached the required threshold for automatic deportation.

354. This would have the opposite effect of providing clarity and legal certainty for the Home Office and Secretary of State as it would lead to a greater number of cases before the ECtHR.

355. The UK Supreme Court has unanimously affirmed in the recent decision of Sanambar v Secretary of State for the Home Department that, for ‘settled migrants’ in particular, a holistic assessment is required under the Convention in order to justify expulsion. The Court held that:
It is clear that a delicate and holistic assessment of all the criteria flowing from the Convention’s case law is required in order to justify the expulsion of a settled migrant like the appellant who has lived almost all of his life in the host country. It must be demonstrated that the interference with the appellant’s private life was supported by relevant and sufficient reasons (see Levakovic v Denmark Application No 7841/14, 23 October 2018).\textsuperscript{431}

356. A single determining criterion for expulsion is antithetical to this approach.

357. It is also clearly contrary to the Convention’s case law. What is required for the purposes of Article 8, even where a threshold for expulsion is reached, is a case-by-case assessment of whether the expulsion may be disproportionate. In this respect, the recent ECtHR decision of Khan v Denmark is instructive:

63. As to the question of whether the interference was “necessary in a democratic society”, the Court notes that the Danish courts’ legal point of departure was the relevant sections of the Aliens Act, the Penal Code, and notably the relevant criteria to be applied in the proportionality assessment by virtue of Article 8 of the Convention and the Court’s case-law. The Court recognises that the domestic courts thoroughly examined each criterion and that they were fully aware that very serious reasons were required to justify the expulsion of the applicant, being a settled migrant, who had been born in Denmark and lawfully spent his whole childhood and youth in the host country (see Maslov, cited above, § 75). The Court is therefore called upon to examine whether such “very serious reasons” were adequately adduced by the national authorities when assessing the applicant’s case...

\textsuperscript{431} Sanambar v Secretary of State for the Home Department [2021] UKSC 30, at [49].
68. The Court points out that it has never set a minimum requirement as to the sentence or seriousness of the crime which ultimately results in expulsion, nor has it in the application of all the relevant criteria qualified the relative weight to be accorded to each criterion in the individual assessment. That must be decided on a case-by-case basis, in the first place by the national authorities, subject to European supervision.

70. The Court cannot exclude that it may raise an issue under Article 8 and militate against ordering expulsion if the crime that triggered the expulsion order viewed in isolation cannot be deemed very serious, in particular if the sentence imposed is lenient. Nevertheless, it will be recalled that the assessment of proportionality must be based on a concrete examination of each case, taking into account all the criteria of relevance as established by the Court’s case-law, including the totality of the applicant’s criminal history. It should also be taken into account in this connection that member States have different legislations, not only in respect of criminal sanctions to be imposed for various criminal offences, but also as regards issuing expulsion orders. In some member States, like Denmark, the expulsion order is decided on by the courts in connection with the criminal proceedings relating to the most recent criminal offence, whereas in other member States, for example, such a decision is taken administratively, having regard to the overall criminal behaviour of the alien in question. [emphasis added]\(^\text{432}\)

358. Indeed, in this regard, it is important to emphasise that in *Unuane v United Kingdom* the Court found that the UK immigration rules were not themselves incompatible with Article 8 ECHR precisely because the courts could apply the *Boultif* criteria.\(^\text{433}\) Option 1 would preclude the courts from making that assessment and would therefore be incompatible with our obligations under the European Convention on Human Rights.

---

\(^{432}\) *Khan v Denmark* (App no 26957/19) 12 January 2021, at [63]–[70].  
\(^{433}\) *Unuane v United Kingdom* (App no 80343/17), 24 November 2020, at [83].
Option 2 - 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

359. There is, as with Option 1, some uncertainty as to the parameters of Option 2. We have, however, assumed for these purposes that ‘certain rights’ is intended to refer (at a minimum) to Article 8 ECHR.

360. In this regard, Option 2 most closely reflects the current legal framework. Indeed, of the three options it is the only proposal capable of preserving the balance between the legitimate public interest, and the interference with Article 8 ECHR, which is required by the Convention. The Consultation Paper notes that this option would seek to enact legislation or secondary rules ‘that properly balance’ the public interest with a relevant right, while ensuring that deportation would only be prevented in accordance with the prescriptive regime.\(^{434}\)

361. In theory, there is no reason why a prescriptive regime, either through legislation or secondary rules, could not encompass all of the considerations required to be taken into account prior to a deportation order being granted. However, unless such a regime takes into account all of the ‘criteria of relevance’ established by the ECtHR’s case law in determining the ‘proper balance’ between the public interest and the right, it is unlikely to comply with the Convention.

362. The current prescriptive UK regime contained within the Borders Act 2007, Nationality, Immigration and Asylum Act 2002, and the Immigration Rules 2014 have been upheld by both the UK Supreme Court and the European Court of Human Rights.\(^{435}\) This is despite the current UK regime not expressly requiring a decision maker to take into account all of the relevant considerations drawn from the ECtHR’s case law. In Unuane v United Kingdom, the ECtHR upheld the current regime noting that despite the regime’s prescriptive nature, the UK

---

\(^{434}\) Government Consultation (n 2) at [295].

domestic courts had held that it did not preclude them from employing the relevant *Boultif* criteria for assessing whether an expulsion order was necessary and proportionate and therefore the regime was still compatible with the Convention. A regime that did not cover all of the relevant ECtHR criteria, and indeed precluded them from being taken into account, is unlikely to be compatible with the Convention and would lead to further cases before the ECtHR.

363. This is arguably similar to the conclusion drawn by the UK Supreme Court in the recent case of *Sanambar v Secretary of State for the Home Department*. In that case, the Court noted that although the prescriptive regime did not require all of the relevant Article 8 factors to be considered, the Upper Tribunal had taken them into account in their proportionality analysis in any case. As such, the deportation order was upheld and no violation of Article 8 was found. Specifically, the Court stated that:

52. It was recognised that although the 2002 Act and the 2014 Rules did not expressly require consideration of the circumstances of the offending it was necessary to do so in order to consider whether there were very compelling circumstances outside the exception which made it disproportionate to deport. The Upper Tribunal noted that the entirety of the applicant’s offending occurred between the ages of 14 and 17 and that the most recent conviction was his first custodial sentence. These were, however, plainly very serious, violent offences which distinguished this case from *Maslov*.

...  

64. The tribunal give careful consideration to the four criteria derived from Üner and *Maslov*. Given the seriousness of the offending and the continuing risk of serious harm resulting from criminal offending it did not consider that the deportation of the appellant was disproportionate or that there were very compelling reasons to prevent it. It gave relevant and sufficient reasons for its conclusion. There was substantial material to support its view that the interference with the private and family life of
the appellant was outweighed by the public interest in the prevention of
crime. I would, therefore, dismiss the appeal. 436

364. Under the present regime, deportation of an FNO who was imprisoned for
less than four years can only be prevented on Article 8 grounds where there
are ‘very significant obstacles’ to their integration into the country in which it is
proposed they be deported, or if deportation would be ‘unduly harsh’ on their
qualifying child or partner. 437 The deportation of an FNO who was imprisoned
for more than four years can only be prevented on Article 8 grounds where there
are ‘very compelling circumstances’ for doing so. The Consultation Paper does
not identify any issues with these thresholds or what the Government would
seek to change.

365. UK courts have interpreted these terms to mean that the threshold for
preventing deportation is high.

366. Unless the regime proposed prescribed definitions for the relevant thresholds
in complete terms, thus removing the interpretive functions of UK Courts and
Tribunals, considerations of the relevant criteria would likely still be used by
judges to determine the meaning of relevant terms and the parameters of the
relevant thresholds.

367. Finally, in 2019 the Law Commission published a report on the Simplification
of the Immigration Rules. One of its key considerations was the examination of
causes of complexity and incoherence within the existing immigration
framework. With respect to the incorporation of Article 8 into the immigration
framework, the Law Commission noted that these provisions were a significant
source of confusion. Specifically, the Law Commission stated that:

We looked in particular at the way in which a prescriptive approach
generates a need for frequent amendments in a cycle of “detail begetting

436 Sanambar v Secretary of State for the Home Department [2021] UKSC 30, at [52], [64].
437 NIAA 2002, s 117C.
"detail"; the drive towards prescriptive detail, intended to create greater clarity in the Rules, instead begins to result in greater confusion.\textsuperscript{438}

Careful consideration must be taken to reduce the complexity and confusion of any prescriptive regime instituted by the Government.

368. Option 2 most closely replicates the current legal position but what is fundamental to ensuring compatibility with our convention obligations is that courts retain the power to evaluate deportation against the criteria established in the Convention case law. Any legislation which seeks to curtail that assessment will be incompatible.

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

369. Option 3 would preclude any assessment by the courts of whether the deportation was incompatible with the Convention rights. For the reasons advanced in respect of option 1 this would be incompatible with our convention obligations.

370. The Strasbourg Court has clearly stated that whilst it has a supervisory role such that it will not intervene unless the state has made an obviously flawed assessment that this is conditional upon states ensuring that independent and impartial domestic courts have carefully examined the facts and applied human rights standards consistent with the criteria established in the Convention case law. This is evident in the following extract from \textit{Unuane v United Kingdom}.\textsuperscript{439}


\textsuperscript{439} \textit{Unuane v United Kingdom} (App no 80343/17), 24 November 2020, at [76], [78]–[79].
The requirement for “European supervision” does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court’s task to conduct the Article 8 proportionality assessment afresh. On the contrary, in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant’s personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so.

The Court would stress that the criteria which emerge from the Court’s case-law and which are spelled out in the Boultif and Üner judgments are primarily meant to facilitate the application of Article 8 in expulsion cases by domestic courts.

As a consequence, where the domestic courts properly apply Article 8 of the Convention with reference to the criteria which emerge from the aforementioned judgments, the Court will only substitute its own assessment of the merits where there are shown to be strong reasons for doing so.

371. Indeed, in this regard it should be recalled that the European Court of Human Rights determined that it must exercise its supervisory function in Unuane precisely because ‘the Upper Tribunal neither made any substantial further findings adverse to the applicant nor a separate balancing exercise as required by the Court’s case law under Article 8’. It thus went on to determine that the deportation was disproportionate and that there had been a violation of Article 8 ECHR.
Moreover, it is important to note that the very absence of such analysis by the domestic courts may well lead to a finding of a violation, regardless of what balance would be struck on the facts. In this regard note that the ECtHR’s own Guidance on Immigration notes the following:

In recent cases concerning expulsion of “settled migrants” and Article 8, the Court emphasised that, where the domestic courts have carefully examined the facts, applying the Convention case-law, and adequately balanced the applicant’s personal interests against the more general public interest in the case, it is not for the Court to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities, except where there are strong reasons for doing so (Ndidi v. the United Kingdom, § 76; Levakovic v. Denmark). By contrast, where the domestic courts do not adequately motivate their decisions and examine the proportionality of the expulsion order in a superficial manner, preventing the Court from exercising its subsidiary role, an expulsion based on such decision would breach Article 8 (I.M. v. Switzerland; see also M.M. v. Switzerland, § 54, in respect of the requirement of judicial review of the proportionality of an expulsion order, including in situations where the legislature may seek to suggest situations of “mandatory” expulsion). This also holds true where the domestic courts do not take all relevant facts into consideration, such as an applicant’s paternity of a child in the respondent.442

440 ibid, at [84].
441 ibid, at [90].
373. For these reasons we are of the opinion that option 3 is incompatible with Article 8 ECHR.

Additional Concerns

374. It must be noted that the Convention and the HRA are not the only barriers to successfully deporting an FNO. Just because a deportation order has been issued by the Secretary of State does not mean deportation can actually be effected. As noted in the 2013 report by the Independent Chief Inspector of Borders and Immigration titled *An Inspection of the Emergency Travel Document Process*, many FNOs are detained in immigration detention for years after a deportation order is issued because they cannot obtain the relevant documents to travel. Specifically, the Independent Chief Inspector noted that:

We found that many non-compliant FNOs were being detained for long periods after their custodial sentences were completed, while the Home Office sought to obtain an ETD. Among the 52% classified as individually non-compliant who were detained under immigration powers when we conducted our sampling, the average detention time was 523 days; for those where the embassy was categorised by the Home Office as ‘non-compliant’, the average detention time was 755 days. In many of these cases, we assessed that there was little prospect of a travel document being obtained within a reasonable timescale. 1.11 Given that a criterion for maintaining detention is that there must be a realistic prospect of removal within a reasonable timescale, these long detention times are a serious concern. We recognise the importance of deporting those who represent a threat to the public. However, the practice of detaining FNOs for months or years in the hope that they will eventually comply with the ETD process is not only potentially a breach of their human rights, it is also poor value for money for the taxpayer, given the high costs involved.
375. Similarly, the Home Office’s own guidance on Article 8 Criminality Cases notes that the best interests of children is a primary consideration in immigration decisions. Specifically, the Guidance states that:

The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of a child in the UK, together with Article 3 of the UN Convention on the Rights of the Child, means that consideration of the child’s best interests must be a primary consideration in immigration decisions affecting them. This guidance and the Immigration Rules it covers form part of the arrangements for ensuring that we give practical effect to these obligations.444

---


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?

Summary

We do not consider that there are ways to ‘tackle the challenges posed by illegal and irregular migration’ whilst respecting the UK’s international obligations. In our opinion, if the UK want to respect their international obligations, the UK will not be able to deal with ‘illegal and irregular’ migration through a practice of ‘pushbacks’, which are contrary to numerous obligations within the law of the sea, refugee law, and international human rights law.

376. International law affirms that states have the right to control entry to their borders. However, international law also provides that states have responsibilities towards migrants, including ‘illegal and irregular’ migrants. The Consultation does not detail ways that the UK envisions to ‘tackle the challenges posed by illegal and irregular migration’ whilst respecting the UK’s international obligations. In our opinion, in order to respect our international obligations, the UK cannot deal with ‘illegal and irregular’ migration through a practice of ‘pushbacks’, which are contrary to numerous obligations, not simply under the European Convention on Human Rights, but also within the law of the sea, refugee law and international human rights law.
The Law of the Sea


378. We consider that the obligations set out in these conventions are particularly relevant to any proposed plan on the part of the UK to ‘pushback’ ‘irregular and illegal’ migrants on the English Channel, before migrant boats reach the UK.

379. Article 25 of UNCLOS gives States a wide power to prevent non-innocent passage in its territorial sea. Article 25 of UNCLOS provides as follows:

(1) The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

(2) In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

(3) The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

380. Pursuant to Article 19(2)(g) of UNCLOS, the passage of a vessel through the territorial sea is to be considered prejudicial to the peace, good order or security of the coastal state, and thus not innocent, where the vessel engages in ‘the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal state.’
381. Article 98 of UNCLOS, however, imposes on States an obligation to render assistance to persons and ships in particular circumstances. Article 98 of UNCLOS provides as follows:

(1) Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
   a. to render assistance to any person found at sea in danger of being lost;
   b. to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
   c. after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

(2) Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where the circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

382. The obligations of master’s to rescue those in distress at sea are reiterated, and further elaborated, in Chapter V, Regulation 10, of the International Convention for Safety of Life at Sea 1974 (SOLAS). Similarly, the obligations of States to co-operate and develop search and rescue services to ‘ensure that assistance is rendered to any person in distress at sea’ is provided for in the International Convention on Maritime Search and Rescue, 1979.\(^\text{445}\)

Refugee Law

383. The UK is a party to: (i) the Convention relating to the Status of Refugees (1951) (the ‘Refugee Convention’); (ii) the 1967 Protocol to the Refugee Convention; (iii) the Convention relating to the Status of Stateless Persons (1954); and (iv) the Convention on the Reduction of Statelessness (1961).

384. Question 25 is framed with respect to ‘irregular and illegal’ migration. The above-mentioned conventions, however, impose obligations on the UK with respect to all refugees, no matter their ‘illegal’ or ‘irregular’ status.

385. Article 31 of the Refugee Convention provides that States must not impose penalties on refugees who enter a State illegally. It provides as follows:

(1) The Contracting States shall not impose penalties on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

386. Lord Simon-Brown in Adimi, famously reiterated the importance of art 31 of the Refugee Convention, particularly in light of the fact that a State need not facilitate a refugee’s arrival. He stated the following in full:

The need for Article 31 has not diminished. Quite the contrary. Although under the Convention subscribing States must give sanctuary to any
refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier’s liability has made it well-nigh impossible for refugees to travel to countries of refuge without false documents.446

387. Article 33 of the Refugee Convention sets out the ‘non-refoulement’ principle, which in effect prevents a State from deporting a refugee. It provides as follows:

(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

388. Article 33 of the Refugee Convention reflects the rule against refoulement which exists at customary international law.447 This ‘non-refoulement’ principle applies whether or not a person has entered the territory of the state legally or illegally.

Regional Human Rights Law

(i) European Human Rights Regime

389. In addition to international obligations under the Refugee Convention, the UK also has international obligations to migrants under international human rights law.

European Human Rights Law Regime

390. The ECHR does not contain explicit rights to asylum or non-refoulement. However, in line with state obligations under the Refugee Convention, the ECtHR considers the principle of non-refoulement to come under the ambit of several existing rights. In the case of *Soering v the United Kingdom*,\(^\text{448}\) which concerned the extradition of a German national from a prison in the UK to the US, the ECtHR considered whether the UK would be in violation of their obligations under the Convention by sending the applicant to a state where he was at risk of the death penalty. Answering in the affirmative, the Court held that sending a person to another state where there was a risk that they would be subject to torture or inhumane treatment would be a violation of the Convention; and since that case, the ECtHR have consistently held that the right to non-refoulement could be imported into the content of Article 3 (prohibition of torture and inhumane or degrading treatment).

391. Non-refoulement is broader under the European Human Rights Law Regime than under the Refugee Convention. This is because, as an inclusion to Article 3, the principle of non-refoulement is characterised by its absolute nature without exception.\textsuperscript{449} To this extent, the ECtHR have established that non-refoulement obligations go beyond war, ethnic, tribal, and religious violence in accordance with the five grounds set out in the Refugee Convention. For example, in the case of \textit{MSS v Belgium and Greece},\textsuperscript{450} the ECtHR held that sending a person to a state where there was a risk of degrading conditions violates Article 3, which includes severe violations of economic, social, and cultural rights. The ECtHR have also held that the principle of non-refoulement falls within the ambit of Article 2 (right to life). In the case of \textit{FG v Sweden}, the affirmed that ECtHR the expulsion of an alien may engage the responsibility of the state where substantial grounds are shown that the person, if deported, would face a real risk of being subjected to treatment contrary to Articles 2 or 3 in the destination country.\textsuperscript{451}

392. As part of the principle of non-refoulement, in the case of \textit{Hirsi Jamaa v Italy},\textsuperscript{452} the ECtHR addressed the practice of ‘interdicting’ i.e., ‘turning away’ boats on the high seas. The ECtHR held that although the state is generally permitted to interdict boats, the interdicting state owes a duty of protection to those on board. In this regard, the ECtHR confirmed that the practice of interdicting engaged the jurisdiction of the state under Article 1 ECHR and that ‘in the maritime environment’ there is ‘no area outside of human rights law’. Applying the ‘effective control’ doctrine, the ECtHR considered that the jurisdiction of the state was engaged ‘whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction’.

\textsuperscript{449} See \textit{Chahal v United Kingdom} (App no 22414/93), 15 November 1996.
\textsuperscript{450} \textit{(App no 30696/09)}, 21 January 2011.
\textsuperscript{451} \textit{FG v Sweden} (App no 43611/11), 23 March 2016.
\textsuperscript{452} \textit{Hirsi Jamaa and Others v Italy} (App no 27765/09), 23 February 2012.
393. In another recent case, *ND and NT v Spain*, the ECtHR also defined the position on pushbacks at land borders and emphasised that domestic rules governing border controls may not render inoperative or ineffective the rights guaranteed under the Convention and that problems managing migratory flows ‘cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto’.

394. Further, in *Sharifi and Others v Italy and Greece* the ECtHR held that, in addition to violating Article 3, the collective expulsion of migrants who are prevented from requesting asylum violates the right to a remedy in accordance with Article 13 of the Convention.

395. It should be noted that the ECtHR concern about ‘pushbacks’ follows the jurisprudence of other international human rights tribunals. In the *Haitian Interdiction Case*, the Inter-American Commission addressed the US practice of interdicting boats on the high seas and held that US was in violation of the American Declaration by sending Haitians back to a state where there was probable cause to believe they would be harmed.

---

454 Ibid, at [170].
455 (App no 16643/09), 21 October 2014.
International Human Rights Law Regime

396. Article 14 of the Universal Declaration of Human Rights provides that everyone has the right to seek and enjoy in other countries asylum from persecution. Under international human rights law, the principle of non-refoulement is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance. Article 3 CAT prohibits the removal of a person to a country where there are substantial grounds for believing he or she would be in danger of being subjected to torture.

397. The UN Committee Against Torture has also confirmed that this obligation applies beyond the territory of the state. In the Conclusions and recommendations of the Committee against Torture concerning the second report of the United States on the extraterritorial applicability of Article 3 CAT in the context of Guantánamo Bay, the Committee stressed that ‘The State Party should apply the non-refoulement guarantee to all detainees in its custody … in order to comply with its obligations under article 3 of the Convention …’.457

398. Neither the International Covenant on Civil and Political Rights (ICCPR) nor the International Covenant on Economic, Social and Cultural Rights contain the principle of non-refoulement. However, the Human Rights Committee (HRC) have kept step with the ECtHR and have held that the principle of non-refoulement falls within the ambit of numerous rights in the ICCPR.

457 ibid, at [20].
399. In relation to Article 7 of the ICCPR (prohibition of torture and inhumane treatment), the UN Human Rights Committee have stated in General Comment No.20 that ‘States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment by way of their extradition, expulsion or refoulement. The Committee has also held to this interpretation in their case law. For example, in the case of *Kaba v Canada*, the Committee found that expelling a person to a state where they risked female genital mutilation would fall foul of this obligation.

400. The UN Human Rights Committee also stated in General Comment No. 36 on the right to life that the practice of refoulement risks violations to rights to life. In General Comment No. 36, the Committee also specifically found that obligations under international human rights law include providing assistance to those in distress at sea. Specifically, the HRC has stated that:

> States parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea.

---

460 ibid, at 63.
401. Recently, the HRC has held that Italy violated article 6 of the ICCPR with respect to a migrant vessel that sank in Malta’s search and rescue area after Italy was first notified that the ship was in distress and failed to take appropriate action. The HRC found that Italy’s jurisdiction was engaged under the ICCPR on the basis that a ‘special relationship of dependency had been established between the individuals on the vessel in distress and Italy.’ The Committee expressly relied on Article 98 of UNCLOS and the relevant international legal obligations to provide assistance to those in distress at sea, as a basis for understanding the right to life in the maritime context. The HRC concluded that:

As a result, the Committee considers that the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and that they were thus subject to Italy’s jurisdiction for the purposes of the Covenant, notwithstanding the fact that they were within the Maltese search and rescue region and thus also subject concurrently to the jurisdiction of Malta.

402. The UN Human Rights Committee has also clarified in General Comment No.15 on the position of aliens under the Covenant that the redirection of migrant boats without considering individual claims to asylum will amount to collective expulsion.

403. The position of the UN Human Rights Commission in respect of ‘pushbacks’ echoes the UN Special rapporteur on the Human Rights of Migrants, who has called the practice ‘cruel and deadly’ and made calls for it to ‘immediately cease’.

462 ibid.
463 UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986 at [9]-[10].
464 ‘Deadly practice of migrant “pushbacks” must cease – UN Special Rapporteur’ (OHCHR, 23 June 2021)
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.

Summary

We conclude that none of the above considerations should be included in the Bill of Rights. Courts are already mindful of the factors proposed by the Government in their assessment of awards. The flexible and judicially influenced approach taken by the courts is preferrable to applying a list of statutory factors. We further note that the sums awarded are generally modest, and that courts are sensitive to public interest impacts in reaching their quantum.

Damages as Secondary Remedy

404. Section 8 of the HRA empowers the court to grant remedies including damages if any act of public authority is unlawful under s 6 of the Act. The court should not award damages, unless it is satisfied that the award is ‘necessary to afford just satisfaction’ to the person to whom the damages are awarded.\(^465\)

\(^465\) Human Rights Act 1998, s 8(3).
Furthermore, the court should take into account ‘all the circumstances of the case’ including the availability of ‘any other remedy’ and ‘the consequences of any decision’ in respect of the impugned act of public authority. Therefore, damages are a discretionary remedy for violation of human rights under the Act.\textsuperscript{466}

405. To determine the award and quantum of damages, the court must ‘take into account’ the principles applied by the ECtHR under Article 41 of the Convention.\textsuperscript{467} The House of Lords has held although the domestic courts are ‘not inflexibly bound by the ECtHR awards, they ‘should not aim to be significantly more or less generous than the [European] Court might be expected to be’.\textsuperscript{468} In \textit{R (Faulkner) v Secretary of State for Justice},\textsuperscript{469} the Supreme Court confirmed that to determine the award of damages, domestic courts should rely on the ECtHR decisions, particularly in ‘comparable cases brought by applicants from the UK or other countries with similar costs of living’.\textsuperscript{470}

406. In a landmark case on damages, \textit{Anufrijeva}, Woolf LJ noted that unlike private law, the role of damages under the HRA is secondary:

\begin{quote}
The remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages … Where an infringement of an individual’s human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance.\textsuperscript{471}
\end{quote}

\textsuperscript{466} \textit{Anufrijeva v London Borough of Southwark} [2003] EWCA Civ 1406, at [55].
\textsuperscript{467} Human Right Act 1998, s 8(4).
\textsuperscript{468} \textit{Greenfield, R (on the application of) v. Secretary of State for the Home Department} [2005] UKHL 14, at [19].
\textsuperscript{469} [2013] UKSC 23, at [29].
\textsuperscript{470} ibid, at [39].
\textsuperscript{471} \textit{Anufrijeva v London Borough of Southwark} [2003] EWCA Civ 1406, at [52], [53].
407. In *R (Greenfield) v Secretary of State for the Home Department*,\(^\text{472}\) the House of Lords affirmed the principles laid down in *Anufrijeva*. When an act of public authority breaches Article 6, often, the public law remedies will be sufficient to vindicate the violation of the victim’s Convention rights, and thus, afford just satisfaction under s 8. Pointing out the limited role of damages in the ECtHR decisions, Lord Bingham, with whom other Lords agreed, further emphasised:

> The 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.\(^\text{473}\)

408. The decision as to whether the damages generally take into account the consideration of whether ‘the wrong committed ... cannot be put right by any more habitual public law order’.\(^\text{474}\) As a result, damages for the violation of the Convention rights tends to be ungenerous when compared with damages under domestic tort law.\(^\text{475}\) Although the ECtHR may award compensation for pecuniary and non-pecuniary loss if the vindication of the violation does not offer just satisfaction, it does not usually award exemplary, aggravated or punitive damages.\(^\text{476}\)

---

\(^{472}\) [2005] UKHL 14.

\(^{473}\) Ibid, at [9].

\(^{474}\) *DSD v The Commissioner of Police for the Metropolis* [2014] EWHC 2493 (QB), at [24].

\(^{475}\) *Watkins v Home Office* [2006] UKHL 17, at [26].

\(^{476}\) *BB v United Kingdom* (2004) 39 EHRR 635, at [36].
Factors Proposed in the Consultation

409. In the consultation, it is proposed that for awarding the damages the courts should take into account ‘the impact on the provision of public services’. The existing jurisprudence on s 8 of the HRA already recognises that ‘in considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole’. The interest of the public in ‘the continued funding of a public service’ is regarded to be a crucial factor in analysing public interest. In this way, the existing jurisprudence clearly recognises the impact on public purse in determining whether and how much damages should be awarded.

410. Other factors proposed by the Consultation include ‘the extent of the breach’ and the ‘extent to which the statutory obligation had been discharged’. As emphasised in DSD, a case concerning the failure of the police to conduct an effective investigation into the rapes and other sexual assaults, the court held that it should take into consideration ‘the State’s overall conduct’. According to the court, the relevant conduct of the State for the purposes of determining whether and how much damages should be awarded include:

[Whether the violation was deliberate and/or in bad faith; whether the State has drawn the necessary lessons and whether there is a need to include a deterrent element in an award; whether there is a need to encourage others to bring claims against the State by increasing the award; whether the violation was systemic or operational.]

---

477 Government Consultation (n 2) at [299].
478 Anufrijeva v London Borough of Southwark [2003] EWCA Civ 1406, at [56].
479 ibid.
480 Government Consultation (n 2) at [299].
481 DSD v The Commissioner of Police for the Metropolis [2014] EWHC 2493 (QB), at [40].
411. The requirement of causal connection for awarding damages, as articulated by the Grand Chamber, and adopted by domestic jurisprudence, further constraints the discretion of courts in awarding damages. In *Kingsley v United Kingdom*, for instance, the Grand Chamber held:

The Court will award monetary compensation under Article 41 only where it is satisfied that the loss or damage complained of was *actually caused by the violation it has found*, since the State cannot be required to pay damages in respect of losses for which it is not responsible.

412. If ‘a clear causal connection’ cannot be established, the standard response of the ECtHR and the domestic courts alike has been to treat the finding of violation itself as ‘just satisfaction’. Furthermore, the courts in the UK also take into consideration other factors emphasised by the Consultation. For instance, in *Van Colle v Hertfordshire Police*, which concerned the failure of the police to protect the life of the deceased who was murdered, the court emphasised on ‘the extent and seriousness of the breach’ of a Convention right, and ‘the degree of culpability of the misconduct in question’ as relevant factors in determining the remedy and quantum of damages. In *Rabone*, the deceased committed suicide following a home leave from the hospital where she was going through a treatment for depressive disorder. When the family approached the court claiming damages for the breach of Article 2 operational obligations, the Supreme Court took into consideration the ‘gravity’ of the breach, ‘the circumstances of the death’, and the specific circumstances such as the

---

482 *Greenfield, R (on the application of) v Secretary of State for the Home Department* [2005] UKHL 14, at [10].
484 Ibid, at [40] (emphasis added).
485 *Greenfield, R (on the application of) v Secretary of State for the Home Department* [2005] UKHL 14, at [15]; *DSD v The Commissioner of Police for the Metropolis* [2014] EWHC 2493 (QB), at [18].
486 *Van Colle v Hertfordshire Police* [2006] EWHC 360 (QB), at [111].
487 Ibid, at [124].
closeness of family ties between the victim and the deceased to award damages.\textsuperscript{488}

413. In \textit{Anufrijeva}, the court held that particularly in cases of ‘maladministration’, such as the delay in processing asylum claims in this case, the quantum of damages must be modest. Since asylum claims are generally lengthy, the courts should lean in favour of ‘either no award of modest awards’ in cases of some delay in processing asylum claims.\textsuperscript{489} The court further emphasised upon a cautious approach for evaluating damages, as ‘substantial damages will deplete resources available for other needs of the public’.\textsuperscript{490} Similarly, in \textit{Faulkner}, in which there was a delay in deciding the lawfulness of detention, the court emphasised that ‘the extent to which there had been a failure to decide the matter “speedily”’ is a relevant factor for deciding the damages award.\textsuperscript{491}

\textbf{Conclusion}

414. In conclusion, the courts in the UK, following the practice of the ECtHR, have been cautious in awarding damages under s 8 of the HRA. Unlike in tort law claims, damages are considered to be a remedy of ‘last resort’ for human rights violations. In any case, the sums awarded by the courts under the HRA have been very modest, significantly smaller than the compensation that is awarded under common law.\textsuperscript{492} Furthermore, the courts are sensitive to the relevant considerations proposed by the Government. For instance, courts usually take into account the factors proposed in the consultation, such as ‘the impact on the provision of public services’, ‘extent to which statutory obligation has been discharged’, ‘the extent of the breach’, and whether the authority was acting in bad faith. Finally, although the approach adopted by the courts is often criticised by the scholars to be lacking clear principles, we submit that since the award of damages require courts to be sensitive to the factual complexity of a specific

\textsuperscript{488} Rabone & Anor v Pennine Care NHS Foundation [2012] UKSC 2, at [85].
\textsuperscript{489} Anufrijeva v London Borough of Southwark [2003] EWCA Civ 1406, at [76].
\textsuperscript{490} ibid, at [75].
\textsuperscript{491} R (Faulkner) v Secretary of State for Justice [2013] UKSC 23, at [63].
\textsuperscript{492} Greenfield, R (on the application of) v Secretary of State for the Home Department [2005] UKHL 14, at [11], [17].
case, the principles to guide the award of damages should come from the incremental development of judicial practice and doctrine rather than a statutory list of factors. In *DSD*, where the court sought to articulate principles for awarding damages under the HRA, after a survey of relevant case law, the court emphasised that ‘flexibility’ is an over-arching principle found in the ECtHR case law. Similarly, Grand Chamber explained the role of flexibility the court for determining ‘just satisfaction’:

> Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.\(^{493}\)

415. Therefore, as Lord Bingham emphasised in *Greenfield*, the field of damages for human rights cannot be constrained by strict rules, as exemplified by the principles of the ECtHR for awarding damages:

> Wisely, in my opinion, the [European] Court has not sought to lay down hard and fast rules in a field which pre-eminently calls for a case by case judgment, and the Court's language may be taken to reflect its assessment of the differing levels of probability held to attach to the causal connection found in individual cases.\(^{494}\)

---

\(^{493}\) (2011) 53 EHRR 23, at [114].

\(^{494}\) *Greenfield, R (on the application of) v Secretary of State for the Home Department* [2005] UKHL 14, at [15].
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.

Summary

We conclude that neither option is satisfactory, as courts already have the ability to consider a claimant’s conduct as part of its reasoning on remedies. We contend that the Options provided may unpredictably restrict or expand the interpretation of conduct. For reasons cited above, we argue that a flexible approach to damages is preferable to one constrained by statutory requirements. Alternatively, we conclude that Option 1 is preferable to Option 2, as it better aligns with the case-law and the objectives the Bill of Rights wishes to achieve, namely the proper and effective allocation of resources, legal certainty and an additional emphasis on personal responsibility.
416. The introduction of a requirement of conduct in relation to damages aims to draw the court’s attention to the claimant’s entitlement to financial compensation in light of their behaviour towards society. In doing so, the proposed changes intend to emphasize the role of responsibilities of private persons and to avoid rewarding ‘undeserving’ conduct through financial compensation.

417. The issues with the proposed options are twofold. First, we argue that the proposed Options are unlikely to be effective in reaching the Consultation’s stated goals. We submit that they are ineffective in tackling the issue of a claimant’s concurrent responsibility, redundant, and potentially limiting when compared to the court’s current jurisprudential approach. Second, we express concerns over the potential overreach or constraints that the proposed Options may create. We argue that they may lead to interpretative confusion and debate, and have the potential to expand, and not reduce, the amount of public resources invested in resolving a human rights claim.

**Current judicial approach to ‘conduct’**

418. The goal of judicial remedies under the Human Rights Act is to afford just satisfaction to claimants for whom a violation of their human rights has been found. Courts have repeatedly held that there is no automatic right to damages and that just satisfaction can be afforded without the need for a financial remedy. As detailed in our answer to Question 26, courts have emphasized that the role of compensation under the HRA is of secondary importance to the primary objective of bringing violations to an end.

---

495 Human Rights Act 1998, s 8(3).
419. As such, awards for damages are typically modest. We argue that the relative rarity of monetary awards and the modesty of their quantum is an overarching consideration that should be recalled throughout our analysis. Since the proposed Options aim to integrate considerations of a claimant’s responsibility by tying their conduct to the amount they may be entitled to, we believe the effectiveness of the proposed provisions should be analysed in relation to the total amount of damages they would receive absent any negative interference deriving from their conduct. As the sum of an award under a human rights scheme is typically small, as compared to amounts received under a tort claim, so are its effects on the accountability of a claimant. Integrating a statutory element of conduct within the assessment for remedies is unlikely to significantly ‘reflect the importance of responsibilities’ in an eventual Bill of Rights.

420. This is especially so since courts already take into consideration the claimant’s conduct as part of the overall exercise of assessing remedies. As has been recounted by Justice Green in DSD v Commissioner of Police of the Metropolis, there are two main ways in which the conduct of a claimant can lead to the reduction in full or in part of an award for damages: (1) when the conduct of the claimant is related to the loss for which they are claiming compensation; and (2) when the claimant was engaged in ‘reprehensible conduct at the time of the breach’. In the first scenario, the claimant’s contribution to the violation leads to the correlative reduction of the State’s responsibility. The second scenario, on the other hand, engages the Court in a reflection over whether awarding damages would be equitable considering the claimant’s behaviour at the time. Both approaches reflect the existing judicial concern that the award be ‘appropriate’ in light of the overall context of the violation, which includes considerations of the claimant’s conduct.


421. Thus, while we take the view that the proposed Options may be redundant when considering the current judicial approach, we are also concerned that the adoption of conduct as a statutory factor would constrain the current flexible approach that has been adopted by courts when assessing damages. For instance, in DSD, the Court recognized flexibility as an overarching principle in the allocation of damages and recalled the importance of taking a broad perspective, stating:

When all individual factors are taken into account the final stage in the quantum exercise is to consider "totality" i.e. whether – standing back – the final sum arrived at is a reasonable one in all the circumstances. The notion of "totality" (which is well known and understood in the context of criminal law sentencing) is a safeguard to ensure that a court does not apply an overly mechanistic approach by totting up relevant considerations adding values to each and arriving at a final figure which may then be divorced from the overall context.

422. To add a statutory requirement of conduct may stifle the benefits of the flexible approach adopted by the courts, which ensures that no sole factor takes precedence over others and that all factors are weighed according to their relevance to the factual circumstances of a case. We are therefore concerned that the proposed Options would provide no benefits to the current approach to damages, while simultaneously circumventing the courts’ ability to assess factors based on the relevant criteria.

**Concerns over the interpretative and practical risks of the proposed Options**

423. We are concerned that the wording of both Options cast doubts on the character and extent of the conduct to be considered, which could lead to interpretative confusion and a waste of public resources.

501 *DSD v The Commissioner of Police for the Metropolis* [2014] EWHC 2493 (QB), at [37].
502 *McCann v United Kingdom* [1995] 21 EHRR 97, at [219].
503 *DSD v The Commissioner of Police for the Metropolis* [2014] EWHC 2493 (QB), at [41].
424. When reviewing the case law that has applied conduct as a relevant factor, it appears that courts have typically interpreted conduct as worded by Option 1, that is ‘conduct specifically confined to the circumstances of the claim’. References to a ‘complainant’s own responsibility for what has occurred’\(^{504}\) and to ‘reprehensible conduct at the time of the breach’\(^{505}\) support the conclusion that the relevant conduct is temporarily and causally linked to the violation that has occurred. However, the introduction of the latter part – ‘specifically confined to the circumstances of the claim’ – may narrow the court’s ambit in ways that were not previously considered. In claiming damages, applicants may argue that certain aspects of their conduct were not ‘specifically confined to the circumstances of the claim’, thus creating new grounds for debate that were not previously available under the court’s jurisprudential understanding of conduct. Not only would the ‘specifically confined’ criterion undermine the court’s flexible approach to the assessment of damages, but it would also restrict its ability to regard for conduct that may be relevant but not temporarily and causally related to the breach at hand.

425. Similarly, the terms ‘wider conduct’ may also give rise to interpretative debate and a potential waste of public resources. The terms imply an interpretation of conduct that goes beyond what has previously been adjudicated. Since courts have understood an applicant’s conduct to relate to the circumstances of the case, the terms ‘wider conduct’ could potentially extend to conduct that is not directly relevant to the violation for which a claim is being brought. This approach not only departs from the case law but leads to additional questions as to which elements are to be included within those terms. Even if the terms were given statutory limits – whether temporal, causal or otherwise – the need to prescribe and further define those limits would still be present. The reference to wider conduct therefore has the potential to create judicial debate and inconsistencies, and lengthen, rather than expedite, proceedings.

\(^{504}\) Anufrijeva v London Borough of Southwark [2003] EWCA Civ 1406, at [65].
\(^{505}\) DSD v The Commissioner of Police for the Metropolis [2014] EWHC 2493 (QB), at [37].
426. The consultation’s reference to the court being ‘empowered to consider relevant past conduct, such as whether the claimant has respected the rights of others’ also cast doubts as to the extent to which a public authority could investigate and present evidence of a claimant’s former ‘undeserving’ behaviour in order to reduce the amount for which they may be liable. We submit that this approach is potentially wasteful, both in terms of public and judiciary resources. This concern is further emphasized when we recall the typically modest sums that will be afforded to claimants, even in cases where conduct does not weigh negatively on the quantum. On balance, we argue that affording public authorities with an unqualified opportunity to present and argue evidence of a claimant’s prior infringing behaviour would neither serve the goals of ‘emphasizing the role of responsibilities within the human rights framework’ nor those of public interest.

427. Likewise, the stated objective to ‘clearly link […] the remedies available under the Bill of Rights to how the claimant has lived by its underlying principles’ raises the apprehension that only ‘virtuous’ claimants may have access to just satisfaction for the violation of their human rights. This could only serve to shift the framework of the Bill of Rights away from its primary objective of protecting fundamental rights and into an investigation of a claimant’s past behaviour.
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.

Summary

On the former, we reiterate the importance of recognizing the primacy of the Strasbourg Court in international law as distinct from the constitutional role of Parliament and courts in the UK. On the latter, we would support a move to require Parliament to be informed of adverse Strasbourg judgments to facilitate scrutiny and increase accountability. However, the draft clause needs amendment to increase opportunities for debate.

428. This question overlaps with question 1 in relation to the relationship between the Strasbourg Court and UK courts in interpreting Convention rights, and question 18 in relation to the role of Parliament in upholding rights. We refer you to our answers to those questions.

429. Sub-clause (1) sets out the orthodox position under the law of the UK, reflecting both the principle of dualism and the constitutional fact of parliament’s legislative supremacy. It is therefore at first sight unobjectionable. For the same reason, however, it is redundant. We would suggest removing sub-clause (1) entirely, for two reasons. First, a declaratory statement in legislation does not change the constitutional reality and wording such as this could create more difficulties than it obviates. For example, if it were to be amended or repealed subsequently, a question might arise as to whether the principle of dualism and the fact of parliamentary sovereignty had been affected. Secondly, by not mentioning the authority in international law of the Strasbourg Court as final arbiter on questions relating to Convention rights, sub-clause (1) offers only a
partial picture. If, contrary to our suggestion, the sub-clause were to be enacted, we consider that it should include reference not only to the Westminster Parliament but also to the legislative competences of devolved legislatures, given the constitutional importance of those legislatures and the significance of Convention rights to their competences.

430. We would support a move to require Parliament to be informed of adverse Strasbourg judgments. The purpose would be to facilitate scrutiny and increase accountability. To achieve that though, the draft clause needs some amendment.

431. We would suggest broadening sub-clause (3) to allow for further opportunity for debate. As currently drafted, it does little. It merely permits Government Ministers to exercise any power they already have. We would suggest allowing any MP to table a motion for debate if an adverse judgment has been obtained. This would enable the Government to truly ‘test the temperature’ of Parliament.\(^{506}\) Alternatively, or in addition, the clause could include a process to ensure the issue were taken to the Joint Committee on Human Rights if Parliamentary time did not permit a full debate in the House. As a matter of drafting, the word ‘has’ appears to have been omitted from the third line of the sub-clause before ‘as a member’.

\(^{506}\) Government Consultation (n 2) at [314].
Appendix

Draft Clauses from the Government Consultation

Question 1

Option 1

Interpretation of rights and freedoms

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

(2) In particular, it is not necessary to construe a right or freedom in this Bill of Rights as having the same meaning as a corresponding right or freedom in—

   (a) the European Convention on Human Rights, or
   (b) the Human Rights Act 1998.

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

(4) The court or tribunal must follow a previous judgment or other decision given in relation to this Bill of Rights by—

   (a) that court or tribunal, or
   (b) any other United Kingdom court or tribunal,

   if the judgment or other decision is a precedent in relation to the question being decided.

(5) The court or tribunal may have regard to a judgment or other decision of a judicial authority made under—

   (a) the law of a country or territory outside the United Kingdom, or
   (b) international law,

   so far as the court or tribunal considers that it is relevant to the question being decided.

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

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

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

Option 2

Interpretation of rights under this Act

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

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

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

(4) The Court or tribunal must follow a previous judgment or other decision given in relation to this Act by—
(a) that court or tribunal, or
(b) any other United Kingdom court or tribunal,
if the judgment or other decision is a precedent in relation to the question being decided.
(5) Other matters to which the court or tribunal may have regard, so far as it considers them relevant to the question being decided, include—
(a) the development of any similar right or freedom under the common law in the United Kingdom;
(b) a judgment or other decision of a judicial authority under the law of a common law jurisdiction outside the United Kingdom in connection with a similar right or freedom;
(c) a judgment of the European Court of Human Rights.
(6) The court or tribunal is not required by any enactment, rule of construction or other law to follow or apply any judgment or other decision of the European Court of Human Rights.
(7) For the purposes of this section a judgment or other decision is a precedent in relation to the question being decided if, or to the extent that, the court or tribunal is required by any law to follow it in making the decision.
(8) Evidence of—
(a) the preparatory work of the European Convention on Human Rights;
(b) a matter to which regard may be had under subsection (5)(b) or (c);
is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

Question 12

Option 2A

Interpretation of legislation
(1) Where the words used in a provision of legislation can be given more than one interpretation which—
(a) is an ordinary reading of the words used, and
(b) consistent with the overall purpose of the legislation,
the interpretation to be preferred is one that is compatible with the rights and freedoms in this Bill of Rights.
(2) In this section 'legislation' means—
(a) primary legislation, and
(b) subordinate legislation (within the meaning of the Interpretation Act 1978).

Option 2B

Interpretation of legislation
(1) Legislation must be interpreted in a way that is compatible with the rights and freedoms in this Bill of Rights, but only if that interpretation is both—
(a) an ordinary reading of the words used in the legislation, and
(b) consistent with the overall purpose of the legislation.
(2) In this section 'legislation' means—
(a) primary legislation, and
(b) subordinate legislation (within the meaning of the Interpretation Act 1978)
**Question 23**

**Option 1**  
*Assessment of what is necessary in a democratic society*  
(1) This section applies in any case where a court or tribunal is required to consider what is necessary in a democratic society for the purpose of determining whether—  
(a) a provision of legislation, or  
(b) a decision of a public authority made in accordance with a provision of legislation,  
is compatible with one or more of the rights and freedoms in this Bill of Rights.  
(2) The court must give great weight to Parliament’s view of what is necessary in a democratic society (and the fact that Parliament has enacted the legislation is for these purposes determinative of Parliament’s view that the legislation is necessary in a democratic society).  
(3) In this section ‘legislation’ means—  
(a) primary legislation, and  
(b) subordinate legislation (within the meaning of the Interpretation Act 1978) which has been approved by a resolution of either or both Houses of Parliament.

**Option 2**  
*Assessment of public interest in determining rights compatibility*  
(1) This section applies in any case where a court or tribunal is required to consider the public interest in deciding whether—  
(a) a provision of legislation, or  
(b) a decision of a public authority made in accordance with a provision of legislation,  
is compatible with one or more of the rights and freedoms in this Bill of Rights.  
(2) The court or tribunal must give great weight to the fact that Parliament was acting in the public interest in passing the legislation.  
(3) In this section ‘legislation’ means—  
(a) primary legislation, and  
(b) subordinate legislation (within the meaning of the Interpretation Act 1978) which has been approved by a resolution of either or both Houses of Parliament.

**Question 28**

*Draft Clause on Parliament’s consideration of Strasbourg judgments*  
*Judgments of the European Court of Human Rights*  
(1) The Bill of Rights affirms that the judgments and decisions of the European Court of Human Rights—  
(a) are not part of the law of any part of the United Kingdom, and  
(b) cannot affect the right of Parliament to legislate or otherwise affect the constitutional principle of Parliamentary sovereignty.  
(2) If the European Court of Human Rights finds, in its final judgment in a case to which the United Kingdom is a party, that the United Kingdom has failed to comply with an obligation arising under the Convention (the ‘adverse judgment’), the
Secretary of State must lay notice of the adverse judgment before each House of Parliament during the notification period.

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

(4) In this section “notification period” means the period of [30] days beginning with the day on which the adverse judgment—

(a) is given (if it is final when it is given), or
(b) becomes final in accordance with the provisions of Article 44, paragraph 2 of the Convention (in any other case);

and for the purposes of calculating that period, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which either House is adjourned for more than four days.