Human Rights Act Reform: A Modern Bill of Rights

A consultation to reform the Human Rights Act 1998

POLICE ACTION LAWYERS GROUP RESPONSE

8 March 2022

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Police Action Lawyers Group (PALG)

Response to HM Government's 'Consultation to reform the Human Rights Act 1998' ('the Consultation')

8 March 2022

The Police Action Lawyers Group (PALG) is a national organisation comprised of lawyers who represent complainants against the police throughout England and Wales. PALG was formed in 1991 and its members are concerned first and foremost with the principal objectives of the complainants we represent: to ensure that the police are held accountable for their conduct through all available avenues, including: the police complaints system, judicial review, tortious and HRA compensation claims and the criminal justice system. Although, historically, our primary focus has been on police malpractice, PALG members also represent clients in respect of misconduct by other state authorities, particularly those with the power to detain and use force, including the prison service and immigration service.

Due to our large and varied membership, the collective experience of PALG is considerable. We include lawyers who act on behalf of victims of misconduct by police officers from virtually every force in England and Wales. All of our work as an organisation is voluntary and we receive no funding of any kind. The group is motivated by a desire to achieve the best possible outcome for our clients, many of whom have suffered the most serious abuse at the hands of the police. More information can be found on our website (http://www.palg.org.uk/).[1]

[1] This response has been prepared on behalf of PALG by a team of members including barristers, solicitors and trainee lawyers including: Christina Bodenes (Bhatt Murphy solicitors); Michael Etienne (Garden Court Chambers), Sam Hall (ITN solicitors), Alice Hardy (Hodge Jones & Allen solicitors), Lucinda Hawthorn (Tuckers solicitors), Marte Lund (Birnberg Peirce solicitors), Cian Murphy (Doughty Street Chambers), Jessica Webster (Bindmans LLP) and Toby Wilton (Hickman & Rose solicitors).

Introduction

1. In PALG's experience the criminal justice system in the UK is a key staging ground in the realisation of the rights protected by the European Convention on Human Rights ('ECHR' or 'the Convention') and, by extension, the Human Rights Act 1998 ('HRA') in the UK.

2. For the majority of our clients, interactions with the police and other state bodies are problematic, and our case work has been instrumental in improving systems of accountability and transparency within those bodies and driving positive change following hard fought legal claims.

3. Holding the police to account in tort for violations of individuals' rights caused by third parties or for police failures in the investigative process has been historically complex. The HRA has been crucial in providing our clients with a system of redress. It has also required the police to improve their investigation practices and secure justice for victims of serious crimes, as well as behaving more efficiently towards those wrongly accused of crime. There has been an inevitable improvement in the service provided to the public.

4. For example, in *DSD v Commissioner of Police* [2018],[2] under the HRA, the police were held liable to victims of the 'black cab' serial rapist, John Worboys. The Supreme Court agreed that the ECHR positive obligation to investigate allegations of ill-treatment is not confined to cases where allegations have been made against state agents. Article 3 ECHR places a positive duty upon the police to investigate crimes committed by all persons, to ensure that individuals are protected against serious ill-treatment. This is a duty owed to individual victims.

5. Article 3 also led to the police being accountable for the suffering of a boy with autism and epilepsy who was forcibly removed from a swimming pool by the police (see *ZH v Commissioner of Police* [2013]).[3]

6. In relation to the police duties to act properly and fairly, in the case of *Zenati v Commissioner of Police* [2015],[4] an innocent man was detained in custody even after evidence had emerged which showed there were no grounds to suspect him of the crime. The Court of Appeal held that the requirements of Article 5 ECHR were violated if people were detained when material information was not brought to the attention of the court.

[2] *DSD and another v Commissioner of Police* [2018] UKSC 11.
[3] *ZH v Commissioner of Police* [2013] EWCA Civ 69.
[4] *Zenati v Commissioner of Police* [2015] EWCA Civ 80 [2015] QB 758.

7. Our members are therefore heartened by the Consultation's stated support for the UK's continued membership of the Convention. Before setting out our response to the specific questions posed by the Consultation, it is important to recognise that the HRA was, at its inception, a compromise between empowering individuals to rely on their Convention rights in the UK courts, continuing the UK's leading voice in the protection of Convention rights, and protecting parliamentary sovereignty and the separation of powers.

8. The operation of the HRA, whilst by no means perfect, has respected this difficult balance remarkably well and remains a central and fundamental means through which individuals' rights are protected both in the UK and in other Convention states. In the words of Lady Hale, Former President of the Supreme Court, '*there is indeed a point to the Human Rights Act'*.[5]

[5] Nicolas Bratza, '*The relationship between UK Courts and Strasbourg*' (2011) EHRLR 505, 507, as cited by Lady Hale in 'What's the point of Human Rights' (Warwick Law Lecture, December 2013).

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

9. Questions 1 and 2 of the Consultation ask, in essence, whether there is any need to amend section 2 of the HRA, s.2(1) of which requires that UK courts or tribunals determining questions of Convention rights '*take into account'* jurisprudence of the European Court of Human Rights ('ECtHR') in Strasbourg.

10. Contrary to the implications of the Consultation, UK courts are not bound by decisions of the Strasbourg courts via s.2(1). Nor is the position of the UK Supreme Court being undermined by the ECtHR. Rather, under s.2 UK courts can, and do, disagree with, depart from, or enhance ECtHR decisions when interpreting and applying Convention rights in the UK courts, leaving our judiciary in the driving seat.

11. The wording of section 2(1) is deliberate and effective. Proposals that the domestic courts be 'bound' by Strasbourg decisions were expressly rejected when the HRA was being debated.[6] When in *Ullah* Lord Bingham discussed that the courts should usually follow Strasbourg case law, he emphasised this was only where that jurisprudence was '*clear and constant*'.[7] Moreover, the Supreme Court has repeatedly made clear that there are limits to the extent to which it will follow that case law when taking it into account under s.2, and that it will depart from it where necessary. As the Independent Human Rights Act Review ('IHRAR') noted, through s.2 '*the HRA supplemented, rather than replaced, the common law'* of the UK.[8]

12. Thus, in *Horncastle*,[9] a case concerning the right to a fair trial, the Supreme Court upheld the decision of the Court of Appeal and expressly rejected the decision of the Chamber of the EctHR in *Al-Khawaja and Tahery v UK*.[10] Similarly, in *Hicks*,[11] concerning the application of the right to liberty, the Court of Appeal decided not to follow a recent

[6] HL Deb 29 January 1998 vol 585 cc 379-422, at 378. Instead, Lord Irvine, the then Lord Chancellor, emphasised that s.2 *'allows the courts to use their discretion where appropriate in applying Strasbourg jurisprudence generally to cases before them*'. HL Deb 29 January 1998 vol 585 cc 379-422, at 388.
[7] *R (Ullah) v Special Adjudicator/ Do (FC) v Secretary of State for the Home Department* [2004] UKHL 26, [20] (Lord Bingham).
[8] The Independent Human Rights Act Review (CP 586, 2021) (IHRAR), p. 61, para 97.
[9] *R v Horncastle and others (appellants)* [2009] UKSC 14. See also *Manchester City Council v Pinnock* [2010] UKSC 45 in which Lord Neuberger states, at [48] that the Court was not bound to follow every decision of the European Court, and it would sometimes be inappropriate to do so, for example where '*inconsistent with some fundamental substantive or procedural aspect of our law'*.
[10] *Al-Khawaja and Tahery v UK* App Nos. 26766/05 and 22228/06, (ECtHR, 20 January 2009).
[11] *R (on the application of Hicks) v Commissioner of Police of the Metropolis* [2014] EWCA Civ 3.

ECtHR case, *Ostendorf v Germany*,[12] even though the facts of the two cases were similar. Instead, considering the judgment in *Ostendorf*, the Court of Appeal noted that, as it was not bound to follow the ECtHR, it would '*adopt the interpretation of the wording of article 5.1(c) that [they had] reached without regard to the Strasbourg case law'*.[13]

13. It is clear then, that domestic case law retains authority over its Strasbourg counterpart where necessary under the existing HRA. As noted in the Consultation, in *R v Abdurahman (Ismail)* [2019], on the application of Article 6, the Court of Appeal effectively ignored the Grand Chamber of the ECtHR.[14] Faced with conflicting domestic and ECtHR jurisprudence on the application of the right to liberty under Article 5, in *R (Kaiyam) v the Secretary of State for Justice* [2014][15] the Supreme Court declined to follow what it referred to as the '*inappropriate reading'* in the Strasbourg authorities, preferring the approach taken in domestic cases. In *R (Hallam) v Secretary of State for Justice* [2019],[16] concerning the right to a fair trial, the Supreme Court considered the differing approaches by the UK and Strasbourg and, again, took its own path; Lord Hughes noting that the Court's '*ultimate responsibility is to arrive at its own decision*'.[17]

14. Additionally, the ECtHR has frequently agreed with the UK courts' interpretation and application of the rights under the Convention.[18] Sir Nicholas Bratza, former President of the ECtHR, commented in 2011 that the ECtHR was '*particularly respectful of decisions emanating from courts in the United Kingdom'* and that in many cases analysis by national courts had '*formed the basis of the Strasbourg judgment'*.[19]

15. Against that background, it is clear that no change is necessary to s.2 HRA. Indeed, in IHRAR's words there is a '*a good deal of force'*[20] in leaving s.2 untouched, whereas '*abolition of section 2 cannot sensibly be contemplated'*.[21] In requiring UK courts and

[12] *Ostendorf v. Germany*, App No. 15598/08 (ECtHR, 7 March 2013).
[13] *R (on the application of Hicks) v Commissioner of Police of the Metropolis* [2014] EWCA Civ 3, [2014] 1 W.L.R 2152, at 2177. The case was appealed to the Supreme Court and dismissed, with the Supreme Court similarly considering *Ostendorf v Germany* (ibid). See *R (on the application of Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9.
[14] *R v Abdurahman (Ismail)* [2019] EWCA Crim 2239, [2020] 4 W.L.R. 6.
[15] *R (Kaiyam) v the Secretary of State for Justice* [2014] UKSC 66, [35]
[16] *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2
[17] *Ibid* [125] (Lord Hughes)
[18] See for example *Mustafa (Abu Hamza) v UK (No.1)* App No. 31411/07, (ECtHR, 18 January 2011), *Donaldson v UK*, App No. 5675/09, (ECtHR, 25 January 2011) and *Ali v UK*, App No. 40385/06 (ECtHR, 11 January 2011).
[19] Nicolas Bratza, '*The relationship between UK Courts and Strasbourg*' (2011) EHRLR 505, 507, as cited by Lady Hale in 'What's the point of Human Rights' (Warwick Law Lecture, December 2013).
[20] IHRAR, p. 80, at 150.
[21] The Independent Human Rights Act Review (2021), p. 84, at 166.

tribunals to '*take into account'* ECtHR case law, the HRA allows the UK courts to interpret and apply the UK's obligations under the Convention in accordance with UK law and UK society, whilst also allowing the UK to benefit from ECtHR jurisprudence where it improves accountability and strengthens the rule of law. Lord Bingham noted when the HRA was being debated that it is '*highly desirable that we in the United Kingdom should help mould the law by which we are governed in this area'*, as signatories to the Convention,[22] and that is what s.2 has allowed us to do. Lady Hale, former President of the Supreme Court, has rightly described the existing HRA (in part through s.2) as an '*ingenious solution'* to combining enforceable Convention rights with parliamentary sovereignty.[23] In IHRAR's words:

> *'[under s.2] Common law rights protection can still be developed, and can be developed further than that provided by the Convention, subject (as always) to judicial restraint and Parliamentary Sovereignty.'*[24]

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.

16. By comparison with the existing s.2 HRA, the proposed replacement clauses in Appendix 2 of the Consultation are unsatisfactory, highly concerning, and would not work.

17. Options 1 and 2, which seek to make clear that the courts are not required to follow or apply any judgment of the ECtHR but should follow domestic precedent, are redundant, since s.2 HRA does nothing to undermine the position of domestic courts or the principle of *stare decisis*. As IHRAR made clear in their review, under the current regime '*[t]here is an order of priority of assessing rights protection: domestic statute; the common law; and then, finally, Convention rights'*.[25]

18. By contrast, the proposed clauses in Options 1 and 2 would stand in clear breach of the UK's obligations under the Convention, the Belfast (Good Friday) Agreement and its commitments in the EU Withdrawal Agreement.

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[22] HL Vol. 582. Col. 1245 3 November 1997.
[23] 'What's the point of Human Rights', Warwick Law Lecture, by Lady Hale (2013).
[24] The Independent Human Rights Act Review (2021), p. 64, at 105.
[25] *Ibid*.

19. It is particularly unclear how the attempts to entirely divorce domestic human rights enforcement from the ECHR, and to wipe out decades of ECtHR and domestic case law, as proposed by ss.1 and 2 of the proposed 'Option 1', would possibly comply with the UK's obligations to secure Convention rights in the UK (Article 1 ECHR), or to ensure an effective remedy for breaches of Convention rights (Article 13 ECHR), and by extension its obligations under the Good Friday and EU Withdrawal Agreements.

20. Furthermore, the proposed clauses, s.4 of which would require UK courts and tribunals to follow previous judgments of '*any other United Kingdom court or tribunal'*, regardless of its position, would, at a stroke, reverse the doctrine of precedent that has made the common law system a model for the world. It could lead to the absurd situation of the UK Supreme Court being obliged to follow a decision of a local county court. The proposal demonstrates the inherent pitfalls of hasty replacement of well-drafted and long-embedded law.

21. The proposed Option 2 is similarly concerning and reveals the disingenuity of criticisms of s.2 HRA. In a legislative distinction without a difference, under s.5(c) of the proposed clause domestic courts may not '*take into account',* but may '*have regard'* to ECtHR decisions – a term used by Lord Irvine (the Lord Chancellor responsible for shepherding the HRA through Parliament) in 2012 to paraphrase the requirement to '*take into account'* under s.2.[26] Section 6 of the proposed clause would similarly set down that courts were '*not required'* to follow or apply ECtHR decisions, despite the present s.2 HRA involving no such requirement. The only practical consequence of these clauses would be to require the courts – and government departments, police forces, and other public bodies – to spend public money to unravel what, if anything, had been changed, before reaching the inevitable conclusion that the answer was 'nothing'.

22. The proposal in Option 2 s.3 for the courts to give particular regard to the literal '*text of the right or freedom'* as formed in the 1950s when interpreting rights and to reject the reality that the Convention is a 'living instrument' which must reflect contemporary society is patently unworkable. As IHRAR emphasised when rejecting just such a proposal:

[26] Speaking in 2011, Lord Irvine paraphrased the requirement as an obligation to '*have regard to'*, '*consider'*, '*treat as relevant'* or '*bear in mind*', emphasising that UK judges are not required to follow Strasbourg and, indeed, must '*decide…[cases] for themselves'*. Lord Irvine of Lairg 'A British Interpretation of Convention Rights', (UCL's Judicial Institute, December 2011).

'…it is fanciful to suppose that, even if desirable to do so, the living tree element of the Convention could be stripped out, leaving the Convention to be interpreted in its 'original' form (whatever that would now be taken to mean).'[27]

23. To give but one example, it is the 'living instrument' approach which has led to the decriminalisation of homosexuality in the United Kingdom (and other ECHR jurisdictions such as Ireland) and paved the way for equality on grounds of sexual orientation.[28] To suggest that courts should revert to 1950s understandings of the Convention is to reject the reality of modern British life.

24. We agree that the domestic courts should be able to draw from a wide range of law in interpreting human rights, including other international human rights law. However, this is something which is already possible, where Parliament has incorporated standards into national law. Moreover, the UK Supreme Court made clear in *R (SC and others) v Secretary of State for Work and Pensions* [2021],[29] and in other recent cases, that it would be cautious in its approach: '*it is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom*'.[30] It would be more useful for Parliament to incorporate specific treaty obligations (such as those in the UN Convention on the Rights of the Child) than to include a vague *carte blanche* provision such as the one envisaged by Option 2.

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?

25. As is clear from the above, the UK Supreme Court is already the ultimate judicial arbiter of UK law, including in the implementation of human rights. No amendments to, let alone replacement of, Section 2 HRA are necessary or desirable. As IHRAR made clear, under the current regime '*there is an order of priority of assessing rights protection: domestic statute; the common law; and then finally, Convention rights'*.[31]

[27] The Independent Human Rights Act Review (2021), p. 81, para 154.
[28] *Dudgeon v UK,* App *no. 7525/76* (ECtHR, 10 October 1980) and *B.B. v UK,* App no. 53760/00 (ECtHR, 10 February 2004).
[29] *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26.
[30] *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26, at 77.
[31] The Independent Human Rights Act Review (2021), p. 64, para 105.

The Margin of Appreciation

26. As noted in the Consultation, a further limit to the extent to which the ECtHR influences the interpretation and application of Convention rights in the UK is the doctrine of the 'margin of appreciation', which recognises that Convention states are in the main best placed to decide how human rights should be applied.[32] ECtHR decisions recognise that policies, customs and practices vary considerably between states and the ECtHR will not attempt to impose uniformity or specific requirements on domestic authorities, which are best positioned to reach a decision as to what is required on a particular subject.[33]

27. UK cases where the ECtHR has allowed a wide margin of appreciation include cases concerning cruelty to animals in the pursuit of sport,[34] the protection of public morals,[35] and fertility law.[36] The Court has also allowed states considerable discretion in cases of public emergency[37] or where the 'economic interests' of the state are at stake.[38]

Judicial Dialogue

28. The increasingly common and in IHRAR's view, '*strong*'[39] and '*effective*'[40] 'judicial dialogue' between UK courts and the ECtHR is a further means through which the UK courts, via the HRA, play an integral role in the interpretation and application of Convention rights not just in the UK but elsewhere.[41] Lord Lester of Herne Hill QC highlighted this in a House of Lords debate in 2015:

> *Our Supreme Court has been robust in recent years in subjecting Strasbourg reasoning to critical scrutiny, and explaining where it begs to differ. A valuable dialogue now takes place, and the judgments of our courts are influential in Strasbourg*.[42]

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[32] *Handyside v UK*, App No. 5493/72, (ECtHR 7 December 1976), [48].
[33] Equality and Human Rights Commission Research Report 83, 'The UK and the European Court of Human Rights', by Alice Donald, Grace Gordon and Philip Leach, (2012) https://www.equalityhumanrights.com/en/publication-download/research-report-83-uk-and-european-court-human-rights, accessed 7 March 2022.
[34] *Friend and Countryside Alliance and others v UK*, App Nos. 16072/06 and 27809/08, (ECtHR 24 November 2009.
[35] *Handyside v UK*, App No. 5493/72, (ECtHR 7 December 1976), [48].
[36] *Evans v UK*, App No. 6339/05 [GC], (ECtHR, 10 April 2007).
[37] *Brannigan and McBride v UK*, App Nos. 14553/89 and 14554/89, (ECtHR, 26 March 1993).
[38] *Hatton and others v UK*, App No. 36022/1997 [GC], (ECtHR, 8 July 2003).
[39] The Independent Human Rights Act Review (2021), p. 134, para 4.
[40] *Ibid*, p. 160, para 46.
[41] See *Manchester City Council v Pinnock* [2010] UKSC 45, [48] (Lord Neuberger).
[42] L Debs, Vol.762, Col.2186, 2 July 2015 (Lord Lester of Herne Hill QC).

29. The case of *Hicks*, noted above,[43] provides a clear example of such judicial dialogue. Before the Supreme Court, the appellants argued that there had been a breach of Article 5(1)(c) ECHR, the right to liberty. When the UK Supreme Court dismissed the appeal and declined to follow the recent and similar ECtHR decision of *Ostendorf* [2013],[44] the appellants filed applications with the ECtHR. Before the applications in *Hicks* were heard, the Grand Chamber of the ECtHR dealt with the same issue in *S, V and A v. Denmark* [2018][45] and largely followed the UK Supreme Court's reasoning in *Hicks*. Consequently, the appellants' applications were declared inadmissible.[46] See also the *Horncastle* saga, where the Supreme Court declined to follow ECtHR case law and the ECtHR subsequently agreed with the Supreme Court's decision.[47]

Change to section 2 HRA is not needed

30. In *Ambrose v Harris* [2011], Lord Kerr said that '*it is to be expected, indeed it is to be hoped, that not all debates about the extent of Convention rights will be resolved by Strasbourg'*.[48] Section 2 HRA ensures just that. Amendment to s.2 as proposed in Options 1 and 2, to reduce the weight to be attached to ECtHR jurisprudence, could only have a negative impact both in the UK and other Convention states. It would inevitably reduce the currently powerful voice the UK has, diminish recourse to the Convention in the UK, and increase the frequency of referrals to the ECtHR and judgments against the UK. IHRAR acknowledged this in their Review, noting:

> *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* [HRA].[49]

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

31. The right to trial by jury, as the Consultation recognises, exists to a different extent in different criminal jurisdictions in the UK: England and Wales, Scotland, and Northern Ireland. PALG is not aware of any threat to this right which requires its protection in new

[43] *R (on the application of Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9.
[44] *Ostendorf v. Germany* (no. 15598/08, 07.03.2013), see *Ostendorf v Germany* (2013) 34 BHRC 738.
[45] *S, V and A v. Denmark* App no. 3553/12 (ECtHR, 22 October 2018).
[46] *Eiseman-Renyard v. the United Kingdom* App no. 57884/17 (ECtHR, 28 March 2019).
[47] *Horncastle and Others v UK* App no. 4184/10 (ECtHR 16 December 2014).
[48] *Ambrose v Harris (Procurator Fiscal, Oban)*, *Her Majesty's Advocate v G (Scotland); Her Majesty's Advocate v M (Scotland*) [2011] UKSC 43, [129].
[49] The Independent Human Rights Act Review (2021), p. 45, para 52.

legislation and the Consultation does not describe any such threat. Moreover, given the myriad and established ways in which the right to trial by jury is provided for in UK criminal justice systems (or not in certain types of case), a further legislative recitation of that right would be doubly redundant.

32. The Consultation does state that the ECHR '*recognises the right to a jury trial, but only to the extent that the Strasbourg Court found that jury trials are consistent with the right to a fair trial which is protected by Article 6*'.

33. On 2 February 2022 Lord Wolfson of Tredegar QC gave evidence to the Joint Committee on Human Rights on the matter. He said that there had been challenges to jury trials in the ECtHR – although they were unsuccessful.

34. In *Taxquet v Belgium*[50] the ECtHR held that jury trials were not contrary to the Convention. Although there was a finding of a violation of Article 6 ECHR, it related to the particular arrangements in that State and the judgment does not call into question the operation of juries in this jurisdiction. Moreover, in *Chomir Ali* the Court of Appeal took note of *Taxquet* as follows:

> *The court in that case reviewed the different forms of jury trial prevailing in different countries in Europe -- and they vary enormously -- and they held that the institution of the lay jury is not contrary to the Convention, a conclusion which, given the origins of the Convention, is wholly unsurprising*.[51]

35. Ultimately, it is extremely unlikely that the ECtHR would take issue with the system. Consequently, a national law which sought to protect the right to jury trial is unnecessary.

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?

36. Article 10(1) ECHR holds that:

[50] *Taxquet v Belgium* App no. 926/05 (ECtHR, 16 November 2010).
[51] *R v Ali (Chomir)* [2011] EWCA Crim 1011, [50].

'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'

37. Article 10(2) states:

'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.'

38. Section 12 HRA provides that the right of freedom of expression must be held in special regard in any case where it is in issue, and the public interest in disclosure of material which has journalistic, literary, or artistic merit is to be considered. In this way, s.12 bolsters the Article 10 right to free speech by directing UK courts to assign weight in favour of freedom of expression when 'balancing' Article 10 with other rights.

39. Despite this legislative provision bolstering Article 10, at para 213 of the Consultation, the Government suggests that:

'Section 12(4) has not had any real effect on the way such issues have been determined by the courts. The government proposes that the Bill of Rights legislation should contain a stronger and more effective provision, making it clear that the right to freedom of expression is of the utmost importance, and that courts should only grant relief impinging on it where there are exceptional reasons.'

40. In light of the above, the Consultation reiterates that the Government '*believes there should be a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds, clearly spelt out by Parliament'*.

41. This is an odd position, for a multitude of reasons. First and foremost, the HRA is an Act of Parliament of the UK. Section 12 clearly spells out that courts should have '*particular regard to the importance of the Convention right to freedom of expression*', unless the court is satisfied that the specific steps under s.12(2)(b) have been taken. The '*presumption in favour of upholding the right to freedom of expression*' has already been '*clearly spelt out by Parliament*' in the HRA.

42. Moreover, the Government fails to substantiate its assertion that s.12 is ineffective. In fact, the test under s.12(3) applies to, for example, every hearing for an interim injunction to restrain publication.

43. In other initiatives, this government has sought legislation that would impede the Article 10 ECHR right, and conflict with s.12 HRA. It is therefore somewhat peculiar for it to seek to strengthen a right that, elsewhere, it has undermined.

Case Study: Proposed Legislation on Official Secrets

44. In 2021, the Home Office consulted on proposed legislation to counter state threats by amending the Official Secrets Act 1989 ('OSA Consultation').[52] In the OSA Consultation, the Home Office equates investigative journalism with spying, stating that it does '*not consider that there is necessarily a distinction in severity between espionage and the most serious unauthorised disclosures*'.[53] The proposal would increase the maximum sentence for these '*unauthorised disclosure[s]*' from two to 14 years.[54]

45. The Law Commission had, in 2020, raised concerns about the compatibility of the Home Office's plans with journalists' Article 10 rights. Accordingly, they proposed that a statutory public interest defence should be available '*that would enable a defendant to establish that his or her disclosure was in the public interest despite any damage caused: we therefore consider that this affords better protection to the public interest*'.[55]

46. The Home Office rebutted this proposal in the OSA Consultation, stating:

> *'As part of these considerations, we will also reflect on the Commission's comments regarding the compatibility of the Act with Article 10 of the European Convention on Human Rights – the right to freedom of expression. From our initial considerations, the Government believes that existing offences are compatible with Article 10 and that these proposals could in fact undermine our efforts to prevent damaging unauthorised disclosures, which would not be in the public interest.'*[56]

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[52] UK Home Office: Consultation on Legislation to counter state threats, 13 May 2021, <https://www.gov.uk/government/consultations/legislation-to-counter-state-threats> accessed 7 March 2022.
[53] *Ibid,* p.19.
[54] *Ibid,* p.59.
[55] Law Commission, Protection of Official Data Report (Law Com No 395, 2020) p.18.
[56] UK Home Office: Consultation on Legislation to counter state threats, 13 May 2021 (above), p. 64.

47. The Home Office took no steps to explain how the Government will ensure compatibility with Article 10 ECHR. Moreover, the refusal to include a 'public interest' defence is at odds with s.12(4)(a)(ii) HRA, which holds that a court should have consideration to the '*public interest for the material to be published*'.

48. Much of the most impactful and brave journalism that has held this state, and other states, to account has come from '*unauthorised disclosures*'. Whistle-blower Edward Snowden's leaks in 2013 of top-secret documents revealed the extent of the global surveillance programmes run by US and UK spy agencies. Snowden stated that he had made these unauthorised disclosures in the public interest, '*to inform the public as to that which is done in their name and that which is done against them*'.[57]

49. As a result of the public being informed, the UK Government's breaches of its citizens' privacy and freedom of expression rights were exposed. Accordingly, 10 NGOs filed an application to the ECtHR challenging two aspects of the UK's surveillance regime revealed by the Snowden disclosures: (1) UK bulk interception of internet traffic transiting undersea fibre optic cables landing in the UK; and (2) UK access to the information gathered by the USA through its various bulk surveillance programs. On 25 May 2021, the Grand Chamber of the ECtHR confirmed that the UK mass surveillance laws breached the rights to privacy and freedom of expression under the ECHR.[58]

50. Against this background the suggestion that s.12 HRA '*has not had any real effect on the way such issues have been determined by the courts*' is disingenuous in the extreme. Any failure of s.12 to effectively protect the rights of journalists is due to the government's conflicting legislation that impedes disclosure in the public interest. 'Unauthorised disclosure' often exposes breaches of citizens' rights, failures in public office, and other issues which will inevitably embarrass those in power (for example the 2009 MPs' parliamentary expenses scandal). Indeed, Maurice Frankel, director of the Freedom of Information Campaign, suggests the amendments are '*presumably intended to ensure that officials and journalists are too terrified of the consequences to risk making or*

[57] Greenwald, Glenn; MacAskill, Ewen; Poitras, Laura 'Edward Snowden: the whistleblower behind the NSA surveillance revelations'. *The Guardia* (London, 9 June 2013) <https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance> accessed 26 February 2022.
[58] *Big Brother Watch & ors v UK,* App Nos. 58170/13, 62322/14, 24960/15, (ECtHR, Grand Chamber, 25 May 2021).

publishing unauthorised disclosures about intelligence, defence, international relations or law enforcement'.[59]

No Change Needed to Section 12 HRA

51. Section 12 HRA is a clear and helpful provision that is intended to take the right to freedom of expression under Article 10 further and protect journalists' activities in the public interest. The suggestion in the Consultation '*a Bill of Rights legislation should contain a stronger and more effective provision*' is wholly disingenuous in circumstances where the Government continues to propose legislation that will impede journalists' ability to criticise those in power.

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?

52. Article 10(2) ECHR gives Convention states a wide berth to confine the scope for interference with Article 10; interference firstly must be 'prescribed by law'. It is first and foremost up to the national authorities, and notably the courts, to interpret domestic law. Unless the interpretation is arbitrary or manifestly unreasonable, the courts are confined to ascertaining whether the effects of that interpretation are Convention compatible.[60]

53. As discussed in response to question 4, it is this Government that has sought to expand (rather than confine) interference with Article 10 in its domestic legislation. If the government seeks to promote freedom of expression, they should refrain from legislating to impede Article 10 rights.

54. Rather than seeking to repeal or reform the HRA, the Government should enact the Law Commission's recommendation and insert a 'public interest' exception into the Official Secrets Act 1989. The failure to distinguish journalism from spying is an inevitable limit to freedom of expression and freedom of the press. PALG considers that failure to

[59] Maurice Frankel, as interviewed by Richard Norton-Taylor, 'Priti Patel's New Threat to British Journalists', (*Declassified UK,* 16 June 2021). <https://declassifieduk.org/priti-patels-new-threat-to-british-journalists/> accessed 27 February 2022.
[60] *Cangi v. Turkey* App No. 24973/15 (ECtHR, 29 January 2019), [42].

provide for 'unauthorised disclosure' made by journalists in the 'public interest' comprises an illegitimate interference with journalists' Article 10 rights.

Case Study: Police, Crime, Sentencing and Courts Bill

55. The greatest attempt by this government to interfere with Article 10 rights is found in the Police, Crime, Sentencing and Courts Bill, described as '*one of the most oppressive pieces of legislation tabled by a UK government since the second world war*'.[61]

56. Whilst several provisions in the Bill were blocked by the House of Lords on 21 January 2022, their inclusion in the House of Commons Bill reflects the Government's intention to '*broaden the range of circumstances in which the police can impose conditions on protests, including a single person protest, to include where noise may cause a significant impact on those in the vicinity or serious disruption to the running of an organisation*.'.[62]

57. The Government acknowledge in the opening paragraph of their Policy Paper that they intend to expand interference with the rights to expression and assembly:

> *'Protests are an important part of our vibrant and tolerant democracy. Under human rights law, we all have the right to gather and express our views. But these rights are not absolute rights. That fact raises important questions for the police and wider society to consider about how much disruption is tolerable, and how to deal with protesters who break the law. A fair balance should be struck between individual rights and the general interests of the community*.'[63]

58. This undermines the assertion in the Consultation question that the government believes in assigning '*utmost importance'* to Article 10. Article 10 protects '*not only the substance of the ideas and information expressed, but also the form in which they are conveyed*'.[64] Moreover, the ECtHR has held that the right to free expression extends to information or

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[61] Jack Bullet, 'Why you should be worried about the new Policing Bill', (*Greenpeace*, 17 December 2021) <https://www.greenpeace.org.uk/news/why-you-should-be-worried-about-the-new-policing-bill/> accessed 27 February 2022.
[62] UK Home Office: Police, Crime, Sentencing and Courts Bill 2021: protest powers factsheet <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-protest-powers-factsheet> accessed 26 February 2022.
[63] *Ibid.*
[64] *Palomo Sánchez and others v. Spain* App nos. 28955/06, 28957/06, 28959/06, 28964/06 (ECtHR 12 September 2011), [53].

ideas that may '*offend, shock or disturb the State or any sector of the population*'.[65] Public demonstrations '*may cause some disruption to ordinary life*'.[66]

59. The provisions supported by the Government would have included protest-specific, suspicion-less stop-and-search powers. Increasing stop-and-search powers will almost inevitably have a significant negative impact on Black, minority, and migrant communities, who have the most urgent need to protest and resist overbroad police powers. These groups are also disproportionately targeted by police. Black people in the UK are nine times more likely than white people to be stopped and searched by police.[67] In lockdown, the figures were even starker: between March and May 2020, Metropolitan Police officers carried out 21,950 searches on young black men, the equivalent of 30% of all young black males in London. No further action was taken in 80% of these searches.[68]

60. On 1 March 2021, a vigil was held at Clapham Common for Sarah Everard, who was kidnapped, raped and murdered by Metropolitan Police officer PC Wayne Couzens. At this vigil, large numbers of officers pushed their way into a small, enclosed space in the bandstand and relied on pandemic regulations to violently arrest three young women. The officers' behaviour was found to have had a '*materially adverse effect on public confidence in policing*'.[69]

61. If the Government is concerned about providing '*clearer guidance…to the courts about the utmost importance attached to Article 10*', it should refrain from introducing Bills that threaten to criminalise expressions of free speech, and from supporting police action that curtails lawful public protest. As Martha Spurrier of Liberty Human Rights has

[65] *Handyside v UK*, App No. 5493/72, (ECtHR 7 December 1976), [49].
[66] *KudreviČius and Others v. Lithuania* App no. 37553/05 (ECtHR, 26 November 2013), [50].
[67] UK Home Office National Statistics: Police powers and procedures, England and Wales, year ending 31 March 2020 second edition <https://www.gov.uk/government/statistics/police-powers-and-procedures-england-and-wales-year-ending-31-march-2020 > accessed 7 March 2022.
[68] See evidence of Dame Cressida Dick, Home Affairs Select Committee, *Oral evidence: The work of the Commissioner of the Metropolitan Police Service*, HC 560, 8 July 2020, <https://committees.parliament.uk/oralevidence/668/html/> accessed 7 March 2022.
[69] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS): 'The Sarah Everard vigil – An inspection of the Metropolitan Police Service's policing of a vigil held in commemoration of Sarah Everard on Clapham Common on Saturday 13 March 2021', (30 March 2021) <https://www.justiceinspectorates.gov.uk/hmicfrs/publication-html/inspection-metropolitan-police-services-policing-of-vigil-commemorating-sarah-everard-clapham-common/> accessed 7 March 2022.

expressed, '*this plan to reform the Human Rights Act is a blatant, unashamed power grab from a government that wants to put themselves above the law*'.[70]

International Guidance

62. Indeed, if the Government seeks international guidance on protecting freedom of speech, it need look no further than the ECtHR, which has already provided helpful and detailed guidance for signatory countries as to the protection of Article 10.[71] This sets out the '*utmost importance attached to Article 10*' and clarifies the permissibility of limits on its interference, setting out '*the three 'tests': the lawfulness of the interference, its legitimacy, and its necessity in a democratic society*'.[72] Indeed, the ECtHR's most famous ruling on an Article 10 case was that of *Handyside v UK*, (above) in which the Court held that '*freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man*'.[73]

63. There are 47 signatories to the ECHR, yielding a huge amount of helpful case law for the UK to consider if seeking guidance derived from international models. By way of example, the UK may find guidance on restrictions on freedom of expression from ECtHR cases from Switzerland, France and Finland.[74] Similar international guidance on the effective mechanisms for the state to protect journalists' freedom of speech can be found in ECtHR cases from Turkey and Azerbaijan.[75]

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

64. The Consultation gives no indication of what legislative 'protection' for journalists' sources the Government proposes to introduce. Nevertheless, plans to protect

[70] 'Plans to "reform" the Human Rights Act are an unashamed power grab', Liberty Human Rights (14 December 2021) <https://www.libertyhumanrights.org.uk/issue/plans-to-reform-the-human-rights-act-are-an-unashamed-power-grab/> accessed 7 March 2022.
[71] European Court of Human Rights: 'Guide on Article 10 of the European Convention on Human Rights' (as updated 30.04.2021) <https://www.echr.coe.int/documents/guide_art_10_eng.pdf> accessed 7 March 2022.
[72] *Ibid,* p. 19.
[73] *Handyside v UK*, App No. 5493/72, (ECtHR 7 December 1976), [49].
[74] *Stoll v. Switzerland* App no. 69698/01 (ECtHR GC, 10 December 2007), [101]; *Morice v. France* App no. 29369/10 (ECtHR GC, 23 April 2015), [124]; and *Pentikäinen v. Finland* App no. 11882/10 (ECtHR GC, 20 October 2015), [187].
[75] *Dink v. Turkey*, App nos. 2668/07, 6102/08, 30079/08 (ECtHR, 14 September 2010), [137]; and *Khadija Ismayilova v. Azerbaijan* App nos. 65286/13 and 57270/14 (ECtHR, 10 January 2019), [158].

journalists' sources run counter to the proposed Bill to amend the Official Secrets Act, as discussed in response to question 4.

65. Section 10 of the Contempt of Court Act 1981 (CCA) protects journalists from being compelled to disclose their sources:

> *'No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.'*

66. Indeed, s.10 CCA and Article 10 work together to serve a '*common purpose in seeking to enhance the freedom of the press by protecting journalistic sources*'.[76]

67. Nevertheless, there are occasions where the strength of Article 10 has allowed journalists to protect their sources to a greater extent than domestic legislation. In the case of *Interbrew v. Financial Times* [2002], the Court of Appeal held that a focus on the bad intentions and '*malevolent motive'* of the source was sufficient to justify ordering the identity of the source to be revealed '*in the interests of justice'*,[77] an exception to the confidentiality of journalistic sources under s.10 CCA. However, '*interests of justice*' is not an exception under Article 10 ECHR. Therefore, the Financial Times applied to the ECtHR, who held that without significant evidence, the UK court could not assume that the source had acted in '*bad faith'*.[78]

68. It is unclear as to the ways in which this government considers protection of journalists' sources could be further strengthened through a Bill of Rights that would not be better served through normal legislation that is compatible with Article 10.

69. Moreover, as discussed in detail in response to question 4, it is notable that this question is being posed whilst we are currently awaiting the result of the consultation on reform of the Official Secrets Act, in which the Government has equated investigative journalism

[76] *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [38]; also *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101.
[77] *Interbrew SA v. Financial Times Ltd* [2002] EWCA Civ 274.
[78] *Financial Times Ltd v United Kingdom* App no. 821/03 (ECtHR, 15 December 2009).

with spying[79] and under which proposals journalists and their sources risk up to 14 years in prison for '*unauthorised disclosure'*, without the protection of the Law Commission's proposed public interest defence.

70. Indeed, rather than revisit the entire human rights framework in this country, the Government would do better to amend existing legislation which has been used to unlawfully obtain journalistic material and expose journalists' sources. For example, in the case of *Miranda v Secretary of State for the Home Department* [2014],[80] David Miranda, the partner of journalist Glenn Greenwald, was detained under the Terrorism Act 2000 because the UK Security Service believed he was carrying material leaked by Edward Snowden.[81] Miranda appealed to the Court of Appeal, who declared that this power under the Terrorism Act 2000 was incompatible with Article 10 in regards to journalistic material, as it did not provide adequate protection for journalists.[82] Nevertheless, the provision has not been repealed (because, as we set out elsewhere, the HRA balances the roles of Parliament and the courts, and it is ultimately for Parliament to repeal or replace incompatible legislation). Repealing this provision would be a straightforward step towards providing stronger protection for journalists' sources.

71. In the light of the above, we invite the Government to reconsider its rejection of a public interest defence to '*unauthorised disclosure'* in the consultation on reforming the Official Secrets Acts and to reconsider the incompatible provisions in the Terrorism Act 2000. This would uphold the Article 10 rights of journalists and their sources to a greater extent and protect whistle-blowers and the ability to hold those in power to account.

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

72. As discussed in our responses to questions 4-6, a commitment to strengthen freedom of expression is contrary to current government initiatives. The case studies on the Police, Crime, Sentencing and Courts Bill, and Official Secrets Acts, are relevant here.

Case Study: Online Safety Bill

[79] UK Home Office: Consultation on Legislation to counter state threats, as published 13 May 2021 <https://www.gov.uk/government/consultations/legislation-to-counter-state-threats>.
[80] *Miranda v Secretary of State for the Home Department* [2014] EWHC 255.
[81] Terrorism Act 2000, Sch 72(b).
[82] *Miranda v Secretary of State for the Home Department and Commissioner of Police for the Metropolis* [2016] EWCA Civ 6.

73. The Government's draft Online Safety Bill defines a vague and loose new category of '*harmful content'* that means freedom of expression online will be subject to unprecedented forms of regulation, exacerbated by the threat to erode end-to-end encryption, which protects privacy and free expression.[83]

74. Once again, the potential for misuse of this legislation to attack civil liberties is apparent. The Bill proposes to grant the Secretary of State for Digital, Culture, Media, and Sport ('DCMS') the power to make unilateral decisions as to what forms of subjectively harmful content are brought into the scope of the Bill's content moderation requirements.[84]

75. Moreover, the Bill empowers the Secretary of State to direct Ofcom to enforce modified content moderation rules and policies, based on political objectives: '*to ensure that the code of practice reflects government policy'*.[85] This means that Government policy, without Parliamentary oversight, might decide what is considered 'harmful'. As summarised by Heather Burns:

> *'In short, the boundaries around our freedom of speech will be set by an allegedly independent regulator, led by a political appointee, whose role is to carry out the political bidding of another political appointee*.'[86]

76. If the government wishes to protect the freedom of speech of private individuals, journalists and whistle-blowers, it must take steps to ensure the Online Safety Bill does not provide for political intervention in expression.

Conclusion

77. As set out above, PALG does not consider a Bill of Rights is necessary to protect freedom of expression in the UK. If the government is concerned that protection of freedom of expression is insufficient, we encourage them to reconsider other proposals, which are wholly incompatible with the UK's obligations to protect freedom of expression under Article 10, and the historically important right to protest.

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[83] Draft Online Safety Bill, as published 12 May 2021, <https://www.gov.uk/government/publications/draft-online-safety-bill> accessed 7 March 2022.
[84] *Ibid,* s. 33.
[85] *Ibid,* s. 33(1)(a).
[86] Heather Burns, 'Why the online safety bill threatens our civil liberties', (*Politics.co.uk,* 26 May 2021), <https://www.politics.co.uk/comment/2021/05/26/why-the-online-safety-bill-threatens-our-civil-liberties/> accessed 27 February 2022.

II. Restoring a sharper focus on protecting fundamental rights

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

78. PALG considers that there are various reasons why a permission stage for HRA claims should not be introduced: it is unnecessary; it is redundant; it will negatively impact access to justice and the right to a remedy; it reduces legal certainty; it will be ineffective to address the Government's concerns; and it risks disproportionately impacting the most vulnerable in society. We shall address these in turn.

Unnecessary

79. Firstly, a permission stage is unnecessary. A permission stage is suggested in the Consultation partially as a way to reduce the burden on our courts and allowing them to focus on '*genuine and credible human rights claims'*.[87] Simply put – this is not necessary. In the statistics published by the Legal Aid Agency, 'non-family' cases (which will include HRA claims appearing in various causes of action including actions against the police, inquests and judicial reviews) make up only 10% of the civil legal aid certificates.[88] This was only 7,992 cases in the financial year to 2021. Of course, the pandemic may have impacted upon this: in the financial year to 2020, those certificates were 13,224, but that still represented 10% of the civil certificates granted. This is around 1 claim per 8,600 people (1 per around 5,200 people pre-pandemic). Even in pre-pandemic levels, this is not a large number of cases warranting such drastic action.

80. The Consultation suggests mirroring the ECtHR in introducing a permission stage.[89] However, unlike the ECtHR, our courts are not blocked up with unmeritorious cases.[90]

[87] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights. A consultation to reform the Human Rights Act' (CP 588, December 2021), para 220.
[88] Ministry of Justice, 'legal aid statistics England and Wales bulletin Jul to Sep 2021.' <https://www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2021/legal-aid-statistics-england-and-wales-bulletin-jul-to-sep-2021> accessed 7 March 2021.
[89] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 222.
[90] Nikos Vogiatzis, 'The Admissibility Criterion under Article 35(3)(b) ECHR: A 'significant disadvantage' to human rights protection?', (January 2016) ICLQ vol. 65, 185-211.

Despite the fears that a 'claims culture' is developing in the UK,[91] exacerbated by certain sections of the media, there is simply no evidence that this is the case.

81. Moreover, claims under the HRA are rarely brought purely or even primarily for compensation. Damages awarded under the HRA are notoriously low: these claims are brought by Claimants who want the breach to their rights acknowledged. This is reflected in ECtHR case law. In the Council of Europe's Practical Guide on Admissibility Criteria for the ECtHR, it reports a list of 19 cases it deemed to be of 'insignificant financial disadvantage', and which were thence refused permission. The UK does not appear on that list.[92] The assertion that UK citizens are bringing low-value, unmeritorious, claims under the HRA is not borne out by the evidence.

Redundant

82. Second, a permission stage would be redundant. There are already various mechanisms in place which serve to weed out unmeritorious cases, and a permission stage will create more work for the courts such that the costs of the introduction of a permission stage will outweigh any benefits.

83. The vast majority of HRA claims are brought using Legal Aid. Many of the cases referred to in the Government's proposals refer to claims by prisoners, for instance, who often do not have access to sufficient personal funds to bring claims without the assistance of Legal Aid. As such, they must instruct solicitors who can apply for Legal Aid on their behalf. All practitioners know that applying for Legal Aid is by no means an easy process. The application includes a stringent merits test, where the solicitor must persuade the Legal Aid Agency that the case is sufficiently meritorious to warrant funding, including undertaking a cost-benefit analysis.[93] Practitioners do not take on cases which do not have sufficient merit to proceed – Legal Aid work simply does not pay well enough to do so. As such, the huge majority of cases – and perhaps all of those which have public funding – which reach the courts are those which demonstrate an arguable case.

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[91] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 125.
[92] Council of Europe's Practical Guide on Admissibility Criteria, (1 August 2021), para 323 <https://www.echr.coe.int/documents/admissibility_guide_eng.pdf> accessed 7 March 2022.
[93] See: Lord Chancellor's Guidance under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012, available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/330878/legal-aid-LAA-lord-chancellors-guidance.pdf> accessed 7 March 2022.

84. If a case is issued, the courts have the power to strike out unmeritorious cases, either on an application by the Defendant or of their own accord.[94] The Consultation ignores the fact that strike-out applications may well have been made by the defendants in cases it raises as problematic,[95] but the courts decided that they had enough merit to warrant being heard.[96]

85. One reason for strike out may be that the Claimant does not meet the requirement of being a 'victim' – necessary for a claim under the HRA. This limitation is built into the HRA to help prevent unmeritorious cases.[97] And of course the burden is on the Claimant to prove their case: evidence must be gathered, legal issues identified and the case carefully constructed – not a task one would embark on unless there were strong merits.

Access to Justice

86. Third, to introduce a permission stage would impact access to justice. Access to justice is partly about being able to secure vested rights through the use of courts and tribunals.[98] It is also about the outcome of the court procedure being just and equitable,[99] and helping to realise material justice.[100] In the absence of procedural safeguards, it is not certain that access to substantive justice can be guaranteed.[101] Granting rights without *'mechanisms for … effective vindication'* is worthless.[102]

87. By introducing a permission stage with a high bar of 'significant disadvantage', the right of access to justice is threatened. A permission stage requiring 'significant disadvantage' would admit that there are cases in which human rights were violated, but would exclude those cases from protection. An individual would be prevented access to justice to secure remedy for the breach to their rights.

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[94] Civil Procedure Rules, r. 3.4.
[95] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 126.
[96] Nicholas Langen, 'A distorted vision of human rights', (*The Justice Gap,* 19 December 2021) <https://www.thejusticegap.com/a-distorted-vision-of-human-rights/> accessed 7 March 2022.
[97] Human Rights Act 1998, s. 7.
[98] Jeremy McBride, 'Access to Justice for Migrants and Asylum-seekers in Europe', CDCJ (2009) 2, 6. See also Patricia Hughes, 'Law Commissions and Access to Justice: What Justice Should We be Talking About?' (2009) 46 OHLJ 773, 778.
[99] Jeremy McBride, 'Access to Justice for Migrants and Asylum-seekers in Europe', CDCJ (2009) 2, para 9.
[100] Antônio A C Trindade, 'Some Reflections on Access to Justice in Its Wide Dimension', in Rüdiger Wolfrum, Maja Seršić and Trpimir M Šošić (eds), Contemporary Developments in International Law; Essays in Honour of Budislav Vukas (Brill Nijhoff 2015), 464.
[101] Wojciech Sadurski, Giving Desert Its Due: Social Justice and Legal Theory (Springer 1985), 52; Antônio A C Trindade, The Access of Individuals to International Justice (OUP 2011) 75; Francioni (n 11), 12-13.
[102] R Moorhead and P Pleasence, 'Access to Justice after Universalism: An Introduction' 30 Journal of Law and Society (2003) 1.

88. International law requires States to *'exercise due diligence to prevent'* violations of certain rights, but also to offer remedies.[103] A permission stage would arguably contravene the UK's obligation under Article 1 ECHR to *'secure to everyone within their jurisdiction the rights and freedoms'* defined in the Convention.[104] If certain categories of cases, or certain categories of applicants, are barred from bringing a claim owing to the permission stage, the UK risks failing to meet this obligation.

89. The ECtHR has been very critical of States hindering individuals' access to the Convention machinery.[105] In *Golder v UK* [1975], the ECtHR clarified that the right of access to court constitutes 'an element which is inherent in the right stated by Article 6' ECHR. Article 6 *'secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal'*.[106]

90. As above, Article 13 ECHR requires the availability of an effective remedy at the national level to enforce the substance of the Convention rights.[107] The UK has therefore undertaken to provide anyone whose rights have been violated with '*an effective remedy'* for a breach of a Convention right.[108] An *effective* remedy must be accessible.[109]

91. The very introduction of the HRA into UK law was to make access to justice easier for UK citizens by allowing the rights enshrined within the ECHR to be enforced by our courts. By chipping away at those rights which can be enforced by the courts, we risk developing a culture of impunity as authorities will know that some actions will not be met with any repercussions.

Legal Certainty

92. Introducing a permission stage based on the hurdle of 'significant disadvantage' will reduce legal certainty. 'Significant disadvantage' is undefined in the consultation. It begs

[103] JA Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' 36 NYUJIntL&Pol (2004) 265, 275.
[104] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 1.
[105] Scheinin (n 37) 146–7, with reference to *Kurt v Turkey*, App No 24276/94, (ECtHR, 25 May 1998), 165; *Petra v Romania*, App No 27273/95, (ECtHR, 23 September 1998).
[106] Golder v. the United Kingdom App no. 4451/70 (ECtHR ,21 February 1975), [36]; Markovic and Others v Italy App no. 1398/03 (ECtHR GC, 14 December 2006), [92].
[107] ECHR (n 101), art 13
[108] Joint Committee on Human Rights; The Government's Independent Review of the Human Rights Act; Third Report of Session 2021–22, Chapter 5, para 143.
[109] Ibid at para 148.

a whole raft of questions that the courts will spend time and money trying to answer: What does 'significant disadvantage' mean? Is the test objective or subjective, or an objective consideration of the subjective impact? Is the consideration primarily whether significant financial disadvantage has been suffered? What degree of financial impact is 'significant'? What about other types of disadvantage that cannot be financially quantified, such as distress caused to the individual?

93. On the one hand, losing one's home is likely to be assessed by all as a significant disadvantage. On the other hand, some might consider that there is no significant disadvantage to being prevented from wearing a Christian cross at work. However, that very issue led to the seminal ECtHR judgment of *Eweida & Others v UK* [2013].[110]

94. More recently, over 30 members of the UK branch of the Nation of Islam successfully brought a claim against the Metropolitan Police and Lambeth Council for breach of their Article 10 rights. The Defendants had unlawfully prevented them from hearing a live-streamed speech by their leader, Louis Farrakhan, which had been planned for the Africa International Day of Action held in Kennington Park in 2018. The topic of the speech was the possibility of reparations for slavery. The Claimants may not appear to have suffered a 'significant disadvantage' in this case (as the Claimants could listen to the broadcast at home), however the claim's success is testament to the importance of the right to share ideas, concepts, values and beliefs protected by Article 10.[111] This is one of the many cases which may be prevented from continuing under the proposed Bill of Rights.

95. A further category of case could be those where persons are unlawfully detained for longer than their prison sentence. There have been innumerable cases where a prisoner is due for release on a Friday, but owing to slow paperwork or other administrative errors, has not been released until the Monday. This is a clear breach of Article 5, and such claims are almost always successful. However, under the guise of 'significant disadvantage' the Government would require the court to assess whether an extra 2 days onto a – say – 10-year sentence, was a 'significant disadvantage'.

96. A significant disadvantage criterion therefore risks inconsistent permission decisions being made. The ECtHR has emphasised with reference to Article 13 that *'sufficient*

[110] *Eweida and Others v UK,* App Nos. 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

procedural safeguards against arbitrariness' must be in place.[112] The Council of Europe's own explanatory report recognises that the *'new criterion may lead to certain cases being declared inadmissible which might have resulted in a judgment without it'*.[113] Introducing a permission stage risks introducing arbitrariness in which claims proceed.

97. A factor that the permission stage does not take into consideration is the inequality of arms between the parties, particularly in relation to the possession of information pertinent to the claim. Usually, the vast majority of the information which would prove a breach is in the public authority's possession. It is often the case that this information is not disclosed to the victim of a human rights abuse until the formal disclosure stage of a civil claim – some way into the court's involvement in a case. Requiring the victim to demonstrate significant disadvantage may result in meritorious cases being denied permission purely on the basis that the authority holds the evidence that it has not yet been legally obliged to share.[114]

Burden on the Courts

98. In order to make a permission decision which is not arbitrary, the judge will need to consider the case as a whole, including – presumably – the nature of the right in question; the seriousness of the violation; the consequences for the subjective position of the applicant; and the outcome of any complaints procedures, amongst other factors. It will take a substantial amount of time for a judge to carry out a sufficiently thorough exercise of whether someone has suffered a significant disadvantage. The introduction of a permission stage increases the burden on the courts: it does not reduce it.

99. Another consequence of a permission stage will be that there will be no incentive for authorities to settle claims before they reach the courts. We see this in the permission stage for judicial reviews already – authorities will try their luck, hoping that the case does not get permission to proceed (there is, regrettably, no costs disincentive to them doing so). If permission is granted, authorities are often quick to concede, often following criticisms expressed in the judge's reasons at permission. In 2009, 59% of judicial review claims granted permission to proceed were settled in the Claimant's favour prior to a final hearing. The vast majority of these might have been settled pre-permission, but the

[112] *Maskhadova and Others v Russia*, App no 18071/05 (ECtHR, 6 June 2013), [245].
[113] Explanatory Report to Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 13th May 2004, para 79. <https://rm.coe.int/16800d380f>.
[114] Martha Spurrier quoted by Ella Braidwood, 'Government Plan To Overhaul Human Rights Act Explained' (*Each Other,* 21 December 2021), at: <https://eachother.org.uk/government-plan-to-overhaul-human-rights-act-explained/> accessed 7 March 2022.

authorities only agreed once they had *'seen the writing on the wall'*.[115] A permission stage for HRA claims could cause the same to occur in those cases and therefore increase the work of the courts – not decrease it.

Leapfrogging

100. One of the stated aims of the Bill of Rights is to reduce the involvement of Strasbourg's judgments in the UK.[116] In fact, by introducing a permission stage to the bringing of HRA claims in the UK, the Government risks increasing the number of cases which proceed to the ECtHR from the UK. At present, very few cases reach the ECtHR as our national system is so effective at providing remedies to those whose rights have been breached.

101. By making access to an effective remedy harder, more cases could leapfrog the UK court system and go straight to the ECtHR, in a manner similar to the years prior to the HRA. By refusing to hear cases in the UK, Claimants will have the right to apply to the ECtHR on the basis of a violation of Article 13: that the UK is not complying with the right to an effective remedy for a breach of human rights.[117] Contrary to the Government's stated aim, this change would therefore increase UK citizens' reliance on the Strasbourg jurisprudence case law.

Vulnerable Groups

102. The fact that certain court decisions, quoted in the Consultation, have been politically unpopular is not compelling.[118] Human rights law will always generate occasional decisions which attract political and media hostility. After all, its entire purpose is to protect individual rights against state authorities. Many ECHR and HRA decisions attract little or no negative commentary, especially when they protect the rights of all citizens.[119]

103. We should not develop a culture that would consider a class or category of claims or persons who are undeserving – as would be the result of a 'significant disadvantage'

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[115] Tom Hickman and Maurice Sunkin, 'The true statistics behind judicial review's success rates', (UK Human Rights Blog 23 March 2015), <https://ukhumanrightsblog.com/2015/03/23/the-true-statistics-behind-judicial-reviews-success-rates/> accessed 7 March 2022.
[116] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 109.
[117] Joint Committee on Human Rights; The Government's Independent Review of the Human Rights Act; Third Report of Session 2021–22, Chapter 5, para 153.
[118] Human Rights Act Reform: A Modern Bill of Rights, December 2021, at e.g. para 100 – 108; 126 – 130.
[119] Colm O'Cinneide, 'Human Rights and the UK Constitution', (The British Academy, 2012), p.26. <https://www.thebritishacademy.ac.uk/documents/262/Human-rights-and-the-UK-constitution.pdf> accessed 7 March 2022.

permission stage. Such a development would give credence to the idea that human rights are only for those who are considered 'deserving', rather than all human beings.[120]

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.

104. We do not consider that there should be a permission stage for the reasons outlined in response to Question 8. ***If*** a permission stage is introduced based on 'significant disadvantage', then there must be safeguards. A 'second limb' as suggested is one way of introducing safeguards.

105. The ECtHR introduced its permission stage in 2010 in response to its backlog of cases.[121] It contains the following safeguard in Article 35(3)(b) ECHR: *'…unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits'*. Essentially, permission will be granted by the ECtHR if there is *some other compelling reason* to hear the case.

106. The ECtHR's safeguard has been applied in cases where: cases deserve special attention;[122] if the case deals with important matters of principle;[123] if it contains new human rights issues that are also at stake in other cases;[124] if it concerns core aspects of human rights;[125] or if it is desirable to assess the case from the broader perspective of Convention law.[126]

107. If a permission stage is introduced, it should be flexible. In considering permission, the court should take the '*realities of each case...into account in order to avoid the mechanical application of domestic law to a particular situation*'.[127] Permission decisions

[120] Schona Jolly QC giving evidence to the Joint Committee on Human Rights, (*Each Other,* February 2022. <https://eachother.org.uk/security-services-and-civil-liberties-groups-both-criticise-human-rights-act-overhaul/> accessed 7 March 2022.
[121] Council of Europe's Practical Guide on Admissibility Criteria, 1st August 2021, paragraph 311. <https://www.echr.coe.int/documents/admissibility_guide_eng.pdf> accessed 7 March 2022.
[122] *Turturica and Casian v Moldova and Russia* App nos 28648/06 and 18832/07 (ECtHR, 30 August 2016), [43].
[123] *Berladir and Others v Russia* App no 34202/06 (ECtHR, 10 July 2012), [34]; *Karelin v Russia,* App. No. 926/08 (ECtHR 20 September 2016), [41].
[124] *Mikhaylova v Russia*, App. No. 46998/08 (ECtHR, 19 November 2015), [49].
[125] *Rosiianu v Romania*, App. No. 27329/06 (ECtHR, 24 June 2014), [56].
[126] Explanatory Report to Protocol 14 (CETS no 194, 13 May 2004), para 77.
[127] Nada v Switzerland App no 10593/08 (ECtHR, 12 September 2012), [182].

must be made on a case-by-case basis, with their entire circumstances considered. A case should never be excluded owing purely to its category. The courts must '*look behind appearances and investigate the realities of the situation complained of*'.[128]

108. '*Some other compelling reason'*, it is suggested, would act as a safeguard, as it provides guidance to the judges considering permission whilst retaining flexibility.

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

109. Inherent in the concept of 'genuine' human rights abuses is the idea that there are also 'bogus' human rights abuses. The Consultation cites prisoners and foreign nationals making '*flimsy*' human rights claims despite '*themselves show[ing] a flagrant disregard for the rights of others*'.[129] However, although the outcomes of particular cases might be unpopular, this does not invalidate their right to be heard.

110. The issue with the concept of 'genuine' (and by implication, 'bogus') human rights abuses, is that '*rights are meant to be universal goods which are effectively non-meritorious and are designed to protect all individuals equally*'.[130] Article 1 ECHR states that the Convention rights of an individual must be protected if they are in the jurisdiction of a Member State. The HRA has universal application therefore, meaning that the protections conferred extend to ***all*** humans. This does not mean, however, that the protections are absolute, and this is reflected in the qualified status of some rights, such as Articles 8, 9, 10 and 11. The expression of qualified rights, in its very nature, can be limited if there is a legitimate aim and the limitation is proportionate, meaning that they cannot simply be used as a 'trump card' by prisoners and foreign offenders, as the Consultation suggests (or by anyone else for that matter). Courts engage in balancing exercises and can and do regularly limit individuals' human rights on grounds such as national security, public safety and prevention of crime.

111. The consultation cites *Hirst v United Kingdom (No 2)* [2005], a case regarding prisoners' rights to vote, in which the ECtHR ruled that a blanket ban on all prisoners voting was unlawful. The UK subsequently refused to enforce the judgment, and this was used as

[128] *Broniowski v Poland,* App. No. 31443/96 (ECtHR 28 September 2005), [151].
[129] Human Rights Act Reform: A Modern Bill of Rights, December 2021, paras 26 and 27.
[130] Frederick Cowell 'Undeserving rights holders and the problem of who should have rights under a bill of rights.' (Conference Speech Draft) 2018, p.18.
<http://hartworkshop2018.com/Frederick%20Cowell.pdf> Accessed 2 March 2022.

a precedent by other Convention States who also did not want to enforce critical judgments.[131] In 2017, a compromise was reached in which a very small category of prisoners – those on temporary release and at home under curfew – would be given to the right to vote. This amounted to approximately 100 people.[132]

112. The issue was blown into a media storm however, with then-Prime Minister David Cameron declaring the idea of giving any prisoners the right to vote made him physically ill.[133] His rhetoric is an example of how negative public perceptions of the HRA have been used by politicians to shore up support for repealing or amending the Act. Research reflects this, with 42% of people surveyed reporting that the '*only people to benefit from human rights in the UK are criminals and terrorists'*.[134] Notably, however, 84% also supported having human rights law in the UK; suggesting that public opinion is based on portrayals of controversial cases, rather than a belief that the HRA has gone 'too far'.[135]

113. The dangers of legislating in thrall to popular opinion are well documented. The 'hostile environment' (now known as the 'compliant environment') was predicated on the principle that some people are not deserving of rights to basic necessities such as shelter, healthcare or access to welfare benefits. This paradigm of genuine and undeserving rights holders (humans) can (and did) lead to the creation of a class of rights-less individuals,[136] many of whose lives were ruined by a government policy created to satisfy a popular narrative on immigration. Many of them are still waiting for acknowledgement and financial recompense from the Windrush Compensation Scheme.

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?

[131] Owen Bowcott, 'Council of Europe accepts UK compromise on prisoner voting *rights' The Guardian* (London, 7 December 2017), https://www.theguardian.com/politics/2017/dec/07/council-of-europe-accepts-uk-compromise-on-prisoner-voting-rights accessed on 2 March 2022.
[132] *Ibid*.
[133] Patrick Harris, 'Should voting prisoners make you sick: Developing the legal through the theoretical to find the cure for Europe's ailing right to vote.' (2014), Global Campus Europe EMA, 2.
[134] Equality and Human Rights Commission *'Human Rights inquiry executive summary'* (June 2009).
[135] Human Rights Act Reform: A Modern Bill of Rights, December 2021, at 115.
[136] Frederick Cowell 'Undeserving rights holders and the problem of who should have rights under a bill of rights.' (Conference Speech Draft) 2018, p.10.

114. As police action lawyers, we see how crucial positive obligations are for clients whose lives have been gravely impacted by their contact with the police. We think particularly of the families of those who have lost their lives to police violence and those who the police have failed to protect despite knowing of risk to their lives.

115. Article 2 ECHR requires the State both to refrain from intentionally and unlawfully taking life, and to take appropriate steps to safeguard the lives of those in its jurisdiction. This encompasses a broader general or systemic duty to have in place systems which protect life, and a more specific operational duty to safeguard life in situations where authorities know (or ought to know) of a real and immediate risk to an individual's life.

116. Article 3 ECHR requires the State not only to refrain from ill treatment, but also to take positive steps to protect those in its jurisdiction from grave harm or suffering. Contained within both Articles is a procedural obligation to effectively investigate arguable violations of positive obligations, to give practical effect to the Articles' protections.

117. It is these aspects which the Consultation identifies as (disproportionately) imposing and expanding duties on our public service providers, including the police. We do not think it controversial to assert that, considering the gravity of the harm necessarily involved in a breach of these Articles, positive State protection from these consequences should unequivocally be expected (and welcomed) in any democracy, and any failure of that protection legitimately challenged in the public interest.

Case Study: *DSD* and *Osman*

118. We turn first to an alternative analysis of some key case law which underpins the positive obligations falling on the police.

DSD & Anor v The Commissioner of Police for the Metropolis [2018]

119. DSD and NBV were victims at (roughly) the beginning and the end of John Worboys' offending. DSD was attacked in early 2003, whereas NBV was one of Worboys' last victims and was attacked in 2007.[137] The legal case concerned the failures by police in their investigation. At first instance, Mr Justice Green concluded:

> *'…that there is, according to well established case law, a duty imposed upon the police to conduct investigations into particularly severe violent acts perpetrated by*

[137] *Commissioner of Police of the Metropolis v DSD & Anor (Rev 1)* [2018] UKSC 11.

private parties in a timely and efficient manner. I should emphasise, however, that the conditions laid down in law pursuant to which the police may be liable are relatively stringent. It is not the case that every act or omission by the police which may be categorised as a failing will give rise to damages nor is it the case that every failure to adhere to the police's own operating standards and procedures triggers liability. A series of exacting hurdles must be overcome before liability may be imposed.'

120. Mr Justice Green found that the Metropolitan Police Service had breached both the systemic and operational limbs of the positive duty under Article 3 due to a litany of failings. Systemic breaches included a failure to properly provide training, to supervise and manage, to use available intelligence sources, to have in place proper systems to ensure victim confidence, and to allocate adequate resources.[138] The failure to train officers appropriately in how to identify and investigate Drug Facilitated Sexual Assault was such a serious and systemic omission that Mr Justice Green found a causative link between this and the assault perpetrated on NBV, saying the failures in training '*explain[ed] why NBV was assaulted at all'*.[139]

121. Crimes of sexual violence remain woefully under-investigated and under-prosecuted. They represent a significant group of cases in which the police fail to investigate serious allegations sufficiently, or in fact investigate them at all. Recent figures confirm that prosecution and conviction rates for rape have dropped sharply, with only 1.3% of cases now being prosecuted.[140] The argument for enforceable rights which guarantee a minimum standard of efficient investigation are therefore far from academic; they are a vital lifeline. It is a cause for national concern then, that sexual assault survivors are still routinely faced with the same indifference and ineptitude that the MPS showed to DSD. This is not a disproportionate '*highlight[ing of] compelling cases'*[141] in order to provide a skewed picture of the uses of positive obligations, as the Consultation suggests. In light of recent CPS data, it affects hundreds, if not thousands of victims of serious crime.

122. It is realistic to acknowledge that additional obligations will by definition demand more from those on whom they are placed. The reality which the Consultation fails to truly consider, or perhaps deliberately does not consider, is that the protections provided to

[138] *DSD & NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB), [245].
[139] *Ibid*, [247].
[140] The Guardian, '*1000 days between rape offence and case completion in UK, data shows*'. <https://www.theguardian.com/society/2022/jan/31/1000-days-between-offence-and-case-completion-in-uk-data-shows> accessed 26 February 2022.
[141] Human Rights Act Reform: A Modern Bill of Rights, December 2021, at para 142.

vulnerable victims of crime through these additional obligations significantly outweigh the burdens, and are in fact often the only recourse open to victims to seek justice.

123. The Supreme Court's judgment in *DSD* and *NBV* paves the way for this essential safeguard, but also sets a high threshold for establishing liability and reaffirms the public policy interest in preventing the burden on police becoming too onerous.

124. It is also notable that the standards the police are expected to meet in conducting investigations into a claim of treatment contrary to Article 3 ECHR are *not* high. For there to be a breach of the Article 3 investigative duty, failures must be '*egregious and significant*' or '*conspicuous or substantial'*.[142]

125. Indeed, it is our professional experience that the courts are sympathetic to the police in this regard; if they have taken basic steps to open an investigation and make some form of inquiry (which is the minimum that victims of serious crime can expect) then it is likely they will be found to have discharged their positive obligations, even if no-one is apprehended or convicted. Isolated errors or omissions do not give rise to an Article 3 violation: the investigation must be seriously defective.[143] Notably, the adequacy of the investigation is '*one of means, not result'*,[144] which means a police investigation will not be deemed inadequate simply because the victim does not agree with the outcome.

126. The need for police accountability could not be more pressing given the current crisis of confidence in the culture of policing, and the growing body of evidence that the police do not fulfil their basic responsibilities to victims of crime. In translating law into operational police actions, officers '*rely upon high levels of discretion and, as a result, law is enforced in selective, uneven, discriminatory and sometimes corrupt ways'*.[145] This is because the day-to-day enforcement of the law is significantly determined by the '*police cultures'* in which it operates and the '*working personalities'* of the police officers.[146]

127. This is starkly echoed by the recent revelations about officers in the case of murdered sisters Nicola Smallman and Bibaa Henry, who shared selfies taken with the women's

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[142] *DSD & NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB), [29].
[143] *Skelton, R (On the Application Of) v Senior Coroner For West Sussex* [2020] EWHC 2813 (Admin) (23 October 2020), [56].
[144] *DSD & NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB), [33].
[145] Karen Bullock and Paul Johnson. 'The Impact of the Human Rights Act 1998 on Policing in England and Wales.' (*The British Journal of Criminology*, vol. 52, no. 3, Oxford University Press, 2012), 632.
[146] *Ibid*, at 632.

bodies with the caption '*dead birds with stab wounds'*,[147] and the discovery of WhatsApp groups where serving officers had shared jokes amongst themselves about hitting and raping women and killing Black children.[148] Arguments that these officers are anomalies rather than symptomatic of a systemic problem are simply not borne out in the evidence. Three years before he raped and murdered Sarah Everard, Wayne Couzens was nicknamed 'the rapist' by his police colleagues.[149]

128. In the shadow of these appalling revelations, the Consultation's assertion that the safeguards of Articles 2 and 3 have become burdensome to public authorities, and that we should instead rely on the '*common sense* and *professional judgment'*[150] of our police officers is not only seriously misjudged, but offensive to the memory of Sarah, Nicola, Bibaa and the many women who have reported sexual violence to the police yet never see their attackers brought to justice.

129. Home Secretary Priti Patel clearly stated that the eradication of violence against women and girls was one of the Government's top priorities in her policy paper of 18 November 2021.[151] It is clear that the police can and must be held accountable for their failures to investigate these particularly abhorrent crimes through the use of positive obligations. If anything, this framework should be strengthened, not diluted.

Osman v UK [1998]

130. The Consultation provides a brief summary of the facts in *Osman* which we will not repeat. As stated, the case failed on the facts, but the positive operational duty under Article 2 was set out. The Consultation contends that the judgment has effectively '[*turned*] *common sense guidance into a human right that must be universally applied*'.[152] This is a stark misrepresentation. The *Osman* duty is not simply a blanket duty which must be applied at any cost with no consideration of other factors.

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[147] BBC News, 'Bibaa Henry and Nicole Smallman: Met PCs sacked over 'dead birds' messages' (London, 24 November 2021) <https://www.bbc.co.uk/news/uk-england-london-59389906> accessed 7 March 2022.
[148] Operation Hotton, Learning Report, Independent Office for Police Conduct (IOPC), January 2022.
[149] Leading Britain's Conversations, 'Met chief faces calls to quit over how cop nicknamed 'The Rapist' slipped through the net.' (30 September 2021) < https://www.lbc.co.uk/news/sarah-everard-cressida-dick-wayne-couzens-rapist/> accessed 27 February 2022.
[150] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 142.
[151] The Home Office, 'Tackling violence against women and girls *strategy'* (18 November 2021) <https://www.gov.uk/government/publications/tackling-violence-against-women-and-girls-strategy/tackling-violence-against-women-and-girls-strategy> accessed 7 March 2022
[152] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 144.

131. Firstly, the duty is narrowed by a condition of proximity, namely that police intervention is only required when there is '*a real and immediate risk to life*', which the police knew or ought to have known about. Moreover, the steps the police must take are those which are reasonably available. There is no unconditional or absolute duty to mitigate risk.

132. Secondly, the judgment imposes a further qualification by mandating that '*such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'*.[153] ECtHR case law does not deny the practical difficulties facing national authorities such as availability of resources, budgetary constraints or operational choices.[154]

133. For police lawyers, assessing which investigatory steps should have been taken and how extensive they should be is a difficult task. Contending that police action was so inadequate as to have breached Article 2 is a risky and uncertain step. There are many examples in practice where, simply by having taken *some* steps, the police are found to have complied with their positive duties. This is coupled with the fact that, despite recognising the principle of positive obligations, the courts have generally been cautious in finding breaches, and have taken care to respect the margin of appreciation.[155] It is clear on reading *Osman* and other judgments that at the very heart of the case law is a rigorous and specific examination of the relevant facts of each case, and a careful balancing act of competing priorities. They do not reveal an '*overly prescriptive'* doctrine imposing a '*straitjacket approach'*, as claimed in the Consultation.[156]

134. Thirdly, the Consultation's assertion that a key part of challenges which turn on positive obligations is that courts '*retrospectively second-guess [the police's] professional judgement exercised under considerable pressure'* is simply incorrect. One of the State's arguments in *Osman* was that the family sought to encourage the court to judge '*police action from the standpoint of hindsight*' in order to impute knowledge that the police could not reasonably have had at the time. The ECtHR rejected this approach. After *Osman*, the Court of Appeal has confirmed that potential breaches of Article 2 should not be

[153] *Osman v. United Kingdom*, App. No. 23452/94 (ECtHR, 28 October 1998), [116]
[154] Stoyanova, V. 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights' [2020] *Leiden Journal of International Law, 33*(3), 601-620.
[155] Bernhard Hofstötter, European Court of Human Rights: Positive obligations in *E. and others v. United Kingdom*, *International Journal of Constitutional Law*, Volume 2, Issue 3, July 2004, 525–560.
[156] Human Rights Act Reform: A Modern Bill of Rights, December 2021, at para 149.

determined with the benefit of hindsight, but only from '*the point of view of what was known to the authorities at the relevant time*'.[157]

135. The Consultation's focus on *Osman* warnings disproportionately being used to protect those involved in gang violence, and any burden this imposes on public resources, misses the point. Fundamental human rights are not privileges which can be invalidated by the state if the individual is not a model citizen. This is particularly the case with the right to life and the right to be free of torture.

136. As police action lawyers, our clients have contact with the authorities and are often detained by the State. Those who have repeated contact with the criminal justice system, those with enduring mental health problems, children who have been in the care of the State and those who have suffered abuse, are often those in most need of protection.

Case Studies from Practice

137. We have above offered an evidence-based analysis of some relevant case law in this area, however, this is of greater use if understood in the day-to-day reality of our work as police lawyers. We reiterate that these are not extreme cases as the Consultation posits, but rather the essential work that makes up our everyday practice.

B and G

138. B, a woman in her late 60s, died in 2020, apparently by suicide. B had been married to G for nearly 20 years. G began to subject B to domestic abuse and coercive control from very early on in their relationship. Over the course of their relationship, G gained control over every aspect of B's life, dictating where she went, who she spoke to, her contact with family and friends and her finances. He prevented her from working, and from attending her church. G was also physically abusive, assaulting B numerous times leaving her with various injuries. He routinely threatened to kill her. B disclosed the abuse to her GP and her therapist over the course of many years and the negative impact it had on her mental health.

139. A few years prior to her death B had attempted suicide by way of overdose, but G obstructed paramedics from treating her. The ambulance crew made a safeguarding referral and she was seen in A&E. The assessing nurse reported that B was a victim of

[157] European Court of Human Rights: Guide on Article 2 of the European Convention on Human Rights, (December 2021), at 10.

domestic abuse and that the abuse had a very negative impact on her mental health. B's mental health deteriorated further and she became an inpatient at a crisis house, and referrals were made to adult social care and domestic abuse services. She disclosed in a therapy appointment that G had encouraged her to kill herself, and said that he would buy medication for her to do this. Due to difficulties accessing alternative housing B returned to the marital home. On the night she died, B called her friend in distress to report that G had been verbally abusive to her. She was found by G the next day. On arrival of paramedics, B was pronounced dead.

140. Despite the extensive evidence of the serious domestic abuse of B by G, and the possibility that his abuse may have played a role in her death, the local police force repeatedly refused to open a criminal investigation into G's behaviour. B's family and friends provided witness evidence and asked the police to collect medical and other documentary evidence of the abuse, to no avail. The only method by which the family could compel the police to properly and effectively investigate B's death was to use the positive investigative and systemic obligations contained in Articles 2 and 3 of the ECHR. Specifically, they referenced the failure on the part of the police to treat the case as suspicious from the outset or to secure the scene, despite them being on notice of previous significant domestic abuse in the family home. They also raised their concern that these apparent failures could belie a similar systemic failure by the police to properly investigate domestic abuse that takes place prior to sudden deaths or suicide, meaning that perpetrators are rarely effectively investigated or prosecuted.

141. In 2021, the local police force notified the family that following a review of the representations from the family they had reopened the criminal investigation, and would be fully investigating the circumstances of B's death. The use of the positive obligations in the HRA in this family's attempts to seek justice for B was neither an imposition on the police, nor an attempt to expand their duties beyond their remit.

Bijan Ebrahimi

142. Bijan Ebrahimi came to the UK from Iran as a refugee in 2000. In 2005-2007, Bijan was the victim of racist hate crime in his flat complex in Bristol, which culminated in his flat being set on fire in August 2007. He was relocated a short distance away, and from 2007 to 2013 he reported numerous racially motivated hate crimes by his neighbours. Bijan reported at least 73 crimes, but his local police force disbelieved his allegations and labelled him a troublemaker and a liar, even going so far as to apply for an anti-social

behaviour order against him. A report by the Independent Police Complaints Commission (IPCC, now the IOPC) found this view of Bijan was due to racial prejudice.

143. On 11 July 2013, Bijan reported to the police he had been the victim of a racially motivated assault by Lee James. A Community Support Officer spoke to James, who described Bijan as 'foreign' and 'looking at his kids'. A neighbourhood policing officer advised officers who had been dispatched to Bijan's address that Bijan was 'known for lying and making things up and using the race card'. Officers confirmed that Bijan was not filming James' children, but rather James' anti-social behaviour. However, in the face of mounting aggression from James, they arrested Bijan, purportedly for his own safety and to prevent a breach of the peace. Bijan was handcuffed to the cheers of a mob of his neighbours. Despite being advised not to go back to his address, Bijan was released and driven back to his flat.

144. Over the next two days, Bijan called the police a further 18 times, to report that his life was in danger and that there was a mob outside his flat, shouting and calling him a paedophile. Officers declined to speak to him, calling him a 'perpetual liar' and a 'pest'. Shortly after his last call at 12.12am on 14 July 2013, Bijan was murdered by Lee James, who punched and kicked him to death. James and another man dragged Bijan's body to a nearby avenue and set his body alight using white spirit.[158]

145. The family entered into mediation with Avon and Somerset Constabulary on behalf of both Bijan's estate and themselves, on the basis that both parties had strong claims under the HRA specifically for the police's egregious breaches of their positive duties towards Bijan by failing to protect him from torture and death, the risk of which they were on notice. In 2015, the police formally admitted that they failed to protect Bijan's life, and in doing so had violated both his and his family's Article 2 rights.

146. The police's deliberate refusal to take seriously Bijan's multiple calls for help breached their positive operational duty to take reasonable steps in response to a real and immediate risk: (i) to Bijan's life; (ii) of cruel inhuman and degrading treatment; and (iii) of treatment infringing Bijan's right to physical and mental integrity, pursuant to Articles 2, 3 and 8 ECHR. It was clear that a real risk of serious harm to Bijan, crossing the Article 3 threshold, existed and was known to police officers three days before Bijan's death. Specifically, the police knew of the baseless belief circulating Bijan's local

[158] The facts of Bijan Ebrahimi's death have been transposed from various sources.

neighbourhood that he was a paedophile, and that he had experienced not just generalised hostility from other residents, but explicit threats to kill from James.

147. Notably, the police's failure to act on their positive obligations (later found by the IPCC to be motivated by racial discrimination) and their apathy towards his pleas for their help resulted in James feeling a sense of impunity and feeling encouraged in his actions.[159]

148. The Consultation's concerns that public protection is being put at risk by positive obligations could not be further from the truth. In Bijan's case and countless others, the positive duties imposed by the HRA are the only mechanism through which some of the most vulnerable members of our society can access the basic protections owed to them. Far from the contention that the HRA is contributing to confusion and risk aversion on the frontline, in practice it is often the only way for our clients to compel the police to act to protect them, or to hold them to account for their failures to do so. In Bijan's case, two officers were ultimately convicted of gross misconduct and jailed, and two others were dismissed from the force.[160]

149. An IPCC report produced in 2017 found that the force as a whole had systemically treated Bijan with contempt, labelled him as a nuisance and troublemaker, and shown '*racial bias'* in its interactions with him.[161] The most devastating failures to act by the police – refusing to answer Bijan's calls for assistance or take steps to protect him – were perpetrated when they were under a HRA positive obligation to act. This highlights how a rights-based approach does not cripple the police, as the Consultation contends, but merely requires them to protect and serve the public as, is their responsibility. The broader failure of the positive 'systems duty' to protect Bijan from harm provided the framework through which Bijan's family could demand accountability.

Case Study: Article 2 in Inquests

150. Although the Consultation does not address the role of Article 2 in inquest proceedings, it is important to highlight the significant effect of the procedural duty on inquests, and the inevitable losses that would follow a curtailing of positive obligations. The procedural

[159] Independent Police Complaints Commission: 'Investigation into police contact and response to calls for assistance by Mr Bijan Ebrahimi between Thursday 11 July 2013 and Sunday 14 July 2013', 107
[160] The Guardian, 'Police officers jailed over Bijan Ebrahimi murder case' (London, 9 February 2016) < https://www.theguardian.com/uk-news/2016/feb/09/bijan-ebrahimi-murder-bristol-police-sentenced> accessed 26 February 2022.
[161] Independent Police Complaints Commission: 'Investigation into police contact and response to calls for assistance by Mr Bijan Ebrahimi between Thursday 11 July 2013 and Sunday 14 July 2013.' p107

duty to investigate arises in circumstances including when it is arguable that there has been a breach of one of the substantive duties, or where an individual has been killed as a result of force by state agents or died a self-inflicted death in state detention.

151. We frequently represent the families of those who have died after significant contact with the police, sometimes involving the use of force and restraint tactics. What matters most to those families is that there is accountability for the death of their loved one, and the institutional learning so that another family does not have to suffer.

152. Before the HRA, the system was stacked against the families of those who had died. The circumstances of the death were usually known only by state authorities. Thus, without the right to full disclosure, the families would have to hope that sufficient evidence was provided at the discretion of the Coroner and the police. Furthermore, the scope of inquests was narrow, with Coroners required to decide 'by what means' i.e. physical means the deceased came by their death.[162]

153. With the introduction of the HRA and the subsequent case law, things improved significantly. Article 2-compliant inquests are more thorough and rigorous; families must have effective participation, and the Coroner can order the parties to disclose documents and direct that key witnesses must be made available.[163] In *Middleton* [2004], the House of Lords found that, in order to comply with Article 2, the inquest must explore both by what means *and* in what circumstances the deceased came by their death.[164] This can lead to a broader inquiry into individual actions, as well as the planning and management of an operation, and supervision and training of officers. In complex cases a Coroner, or jury, can set out a narrative conclusion that captures their findings.

154. A Coroner's investigation of policy or procedure is limited to those elements relating directly to the individual's death, so inquests do not become forums for public policy debates. Coroners may, however, make reports on the prevention of future deaths, if something of concern arises. A recent example of this was the inquest touching the death of teenage refugee Osman Ahmed-Nur, in which the Coroner directed the London

[162] Adam Straw QC and Professor Leslie Thomas QC, 'Human Rights Act 1998: levelling the playing field in inquests' (May 2021) < https://www.lag.org.uk/article/210826/human-rights-act-1998--levelling-the-playing-field-in-inquests> accessed 27 February 2022.
[163] David Baker, 'Deaths after Police Contact in England and Wales: the Effects of Article 2 of the European Convention on Human Rights on Coronial Practice' (2016), 12 International Journal of Law in Context 162.
[164] *Middleton, R (on the application of) v Coroner for the Western District of Somerset* [2004] UKHL 10 (11 March 2004), [35].

Borough of Camden – where he took his own life – to urgently write to every local authority in the country alerting them to the increased risk of suicide affecting young unaccompanied Eritrean asylum seekers.[165]

155. Article 2 has transformed inquest proceedings, and created the genuine possibility that individual deaths may provide the catalyst for systemic change to save lives in future. The case of Olaseni Lewis, who died after being restrained by police officers during a mental health crisis, highlights the role of Article 2 inquests. The IPCC conducted two investigations over 5 years, but failed to present sufficient evidence to the CPS for any of the officers to be charged. An inquest in 2017 returned damning findings that were highly critical of the police, causing the Coroner to write to the MPS demanding action regarding inadequate restraint training.[166] The evidence uncovered at the inquest became the basis for the Seni's Law campaign, which advocated against the use of excessive force against mental health patients and became law in November 2018.[167]

156. The protections guaranteed by the positive obligations under Articles 2 and 3 stand as an essential cornerstone of justice, safeguarding the right to life and freedom from inhumane and degrading treatment and torture in a way the common law does not. Limiting or removing their reach in any new Bill of Rights would be a regressive step, leaving individuals and families with no recourse to justice.

[165] INQUEST: 'Inquest concludes failure of NHS Trust contributed to death of Eritrean refugee Osman Ahmednur', (14 November 2019) <https://www.inquest.org.uk/osman-ahmednur-inqest> accessed 7 March 2022.
[166] Inquest touching the death of Olaseni Lewis: Report to Prevent Future Deaths, 28 June 2017, <https://www.judiciary.uk/wp-content/uploads/2017/07/Olaseni-Lewis-2017-0205.pdf> accessed 7 March 2022.
[167] Justice for Seni: The Olaseni Lewis Campaign for Justice and Change. <https://www.justiceforseni.com/senis-law/> accessed 27 February 2022.

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

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

- **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.**

157. Paragraph 116 of the Consultation provides:

> *'…the Human Rights Act requires the courts* ***to alter the meaning*** *of primary legislation in order to make it compatible with the Convention rights, whenever it is possible to do so (section 3). It is one thing for the UK courts to declare legislation incompatible with human rights, but quite another for them to be* ***required to revise that legislation****, in material respects, in order to ensure compatibility without there being any direct or meaningful Parliamentary oversight*'. (emphasis added)

158. We strongly disagree with the assertions in paragraph 116 as to the purpose and effect of s.3 HRA and therefore with the premise underlying the proposed options for its repeal or amendment. It would seem that the IHRAR agreed:

> '*The absence of parliamentary action in response to section 3 interpretations and its acceptance of the need to take remedial action where a declaration of incompatibility is made might suggest that there is no real problem, and that suggestions that the HRA has upset the constitutional balance are ill-founded*.'[168]

159. Section 3 does not require the courts to alter the meaning of primary legislation, nor does it require them to revise legislation to ensure compatibility. Indeed, the wording of s.3 expressly provides that the courts are only obliged to read legislation compatibly with Convention rights, so far as it is possible to do so. The section also confirms that it does not affect the validity of legislation. Far from empowering or requiring courts to revise

[168] The Independent Human Rights Act Review (2021), p. 225, at 115.

legislation, therefore, s.3 only applies where a consistent interpretation will not alter the meaning of legislation. Should the interpretation risk altering the meaning of the legislation the courts are required to make a declaration under s.4, and the incompatibility is then for Parliament to resolve as it sees fit.

160. Nor does the evidence suggest that the courts have in fact interpreted primary legislation in the way claimed in the Consultation. IHRAR set out in some detail the absence of evidence of misuse of s.3 as described by the Consultation:[169]

> '*as the evidence submitted by the Law Society of Northern Ireland bears out and the recent Court of Appeal in England and Wales' decision in WB v W DC (2018)*[170] *illustrates, there is little to no evidence to support the position that UK Courts are misusing section 3'.*[171]

161. The Consultation cites *R v A (Complainant's Sexual History)*[172] as a case in which s.3 has '*given rise to a significant constitutional shift in the balance between Parliament, the executive and the judiciary – diverting the courts from their normal function in the interpretation of legislation into straightforward judicial amendment'*.[173] However, IHRAR explained that the courts' '*early and arguably over-zealous approach*' seen in *R v A* has since been subject to recalibration. The case '*was handed down in 2001, the year after the HRA came into force. That is twenty years ago now. If the UK Courts had routinely, or even sporadically, been misusing section 3, R v A would not now be viewed as the high-water mark of misuse. That it is still viewed that way is very strongly suggestive that section 3 has not been used improperly.'*[174] IHRAR set out how the approach in *R v A* was revised in three subsequent House of Lords decisions: *Re S & Re W (Care Orders)*[175], *R (Anderson) v Secretary of State for the Home Department*[176] and *Bellinger v Bellinger*.[177] Each of these cases set limitations on the use of the s.3 interpretative duty and confirmed that:

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[169] The Independent Human Rights Act Review (2021), Chapter 5, paras 34 to 80.
[170] WB v W *District Council* [2018] EWCA Civ 928 | [2019] QB 625. As noted by the Equality and Human Rights Commission, Submission to the Independent Review of the Human Rights Act Call for Evidence at [54], as evidence of the post *Ghaidan* cautious approach to the use of section 3.
[171] The Independent Human Rights Act Review (2021), p. 212, para 79.
[172] *R v A (Complainant's Sexual History)* [2001] UKHL 25; [2002] 1 AC 45.
[173] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 117.
[174] The Independent Human Rights Act Review (2021), p. 198, para 47.
[175] *Re S & Re W (Care Orders)* [2002] UKHL 10; [2002] 2 AC 291.
[176] *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837.
[177] *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467.

'*Interpretations under section 3 were not possible where they involved the Courts engaging in matters properly within the institutional competence and responsibility of Parliament'.*[178]

162. These developments on the appropriate use of s.3 culminated in the leading decision of *Ghaidan v Godin-Mendoza,*[179] in which (as is common) the Government urged the court to interpret the legislation compatibly with the Convention under s.3, rather than to make a declaration under s.4 HRA.[180] The Consultation refers to *Ghaidan* as a case in which s.3 was used even though there was no ambiguity in the legislation,[181] as further illustration of the alleged constitutional shift caused by s.3. *Ghaidan* concerned the interpretation of the Rent Act 1977 and the right of a same-sex partner to succeed to a statutory tenancy as a 'spouse' following the death of their partner. The House of Lords had previously ruled, prior to the HRA coming into force, that a person living with a tenant in a stable and monogamous same-sex relationship was not a 'surviving spouse' entitled to succeed to a statutory tenancy.[182] However, in *Ghaidan* it was held that, through s.3, Parliament had intended to impose a duty on the courts to do everything possible to achieve compatibility through interpretation. Therefore, the court could use s.3 to read and give effect to the 1977 Act in a manner which would remove the discrimination against same-sex couples and ensure compatibility with Article 14 ECHR.

163. In coming to this decision, the Court imposed two limits on the use of s.3. First, compatible interpretation will not be possible where it would be inconsistent with a fundamental feature of the legislation in question. Second, compatible interpretation will not be possible where it would have wide ramifications that raise policy issues that are not suitable for determination by the courts.[183] In other words, courts cannot use s.3 to impose an ECHR-compatible interpretation where to do so would be inconsistent with the clear intention of Parliament or would draw the courts unduly into questions of policy.

164. The limits on s.3 confirmed in *Ghaidan* follow the reasoning of the House of Lords in *R (Simms) v Secretary of State for the Home Department*,[184] which was decided before the HRA came into force: Parliament may enact legislation that is incompatible with

[178] The Independent Human Rights Act Review (2021), p. 202, para 55.
[179] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
[180] The Independent Human Rights Act Review (2021), p. 204, para 60.
[181] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 121.
[182] *Fitzpatrick v Sterling Housing Association LTD* [2001] 1 AC 27.
[183] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [572].
[184] *R (Simms) v Secretary of State for the Home Department* [1999] UKHL 33

fundamental rights, however if it is to do so, it must do so explicitly. Where Parliament's intention is not explicit, the courts must presume that the law was intended to be compliant with human rights. However, where Parliament has made its intentions explicit, the courts cannot interfere, even if those intentions are not rights-compatible.

165. *WB v W District Council*[185] is an example of the Court of Appeal refusing to interpret legislation compatibly with ECHR rights where to do so would be in conflict with the clear intentions of Parliament. The case concerned the right of a woman lacking capacity due to mental illness to apply for priority housing under the Housing Act 1996 ('the 1996 Act'). The Claimant argued that the 1996 Act should be read and given effect to in a manner compatible with ECHR rights, namely Article 14 and Article 8.

166. The Court of Appeal held that although there is an obligation to interpret legislation compatibly with ECHR rights, it had no power to interpret statutes against the *'grain of…legislation'.*[186] The *Barras*[187] principle of legislative interpretation presumes that where a term has been interpreted by the courts and Parliament has made further legislation using the same term, Parliament had intended for the same meaning to apply. Following the *Barras* principle, the court in *WB* held that s.3 could not be used where a *'Convention-compliant interpretation has been rejected by Parliament by express words or other inconsistent legislative action'.*[188] Parliament had retained and built on the concept of '*priority need*' in later legislation such as the Homelessness Act 2002 and the Homelessness Reduction Act 2017 and had not opted to make amendments to include provision for individuals who lacked mental capacity.

167. Although the HRA specifies that s.3 should be used so far as possible, the court in *WB* held that '*it is not the function of section 3 to require the courts to apply a Convention-compliant interpretation if other principles of interpretation prevent it from doing so'*.[189] It follows that, where the intention of Parliament is clear from its express words or action, courts are under no obligation to read and give effect to legislation in a manner compatible with ECHR rights if to do so would be inconsistent with Parliament's clear intention. The court acknowledged that this approach is in accordance with the '*general scheme of the HRA, namely that it should not diminish Parliamentary sovereignty*'.[190]

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[185] *WB v W District Council* [2018] EWCA Civ 928 | [2019] QB 625.
[186] *Ibid,* [640], quoting *Gaidan*.
[187] *Barras v Aberdeen Steam Trawling & Fishing Co Ltd* [1933] UKHL 3.
[188] *WB v W District Council* [2018] EWCA Civ 928 | [2019] QB 625, [643].
[189] *Ibid,* [644].
[190] *Ibid.*

168. It is evident from these examples that the courts have remained consistently cautious of the risks inherent in the use of s.3 interpretation and have established safeguards setting out when it is, and is not, appropriate to impose an ECHR compatible interpretation on legislation. We consider that the courts have struck a balance which has successfully prevented them from becoming unduly drawn into questions of policy. Consequently, we do not consider there to be any reason to amend or repeal s.3 of the HRA.

169. This is consistent with IHRAR's finding that:

> '*That early approach [seen in R v A] was, however, replaced by the more considered guidance on the use of section 3 set out in Ghaidan. Since that case was decided in 2004, and certainly since Sheldrake, decided in the same year, there has been no real evidence to suggest the UK Courts have adopted an approach that arguably misuses section 3 and the intention underpinning it. On the contrary, judicial restraint could properly be said have been exercised …*'.[191]

170. The Panel concluded that: '…*notwithstanding the degree of feeling sometimes injected into the debate, there is no substantive case that UK Courts have misused section 3 or 4, certainly once there had been an opportunity for the application of the HRA to settle down in practice. There is a telling gulf between the extent of the mischief suggested by some and the reality of the application of sections 3 and 4'.*[192]

171. Despite the Government's claim that this consultation is informed by the work of the IHRAR, the proposals in respect of s.3 and the premises underlying them are wholly inconsistent with the evidence and IHRAR's findings and recommendations.

172. As to the assertion that s.3 operates without Parliamentary oversight, the Consultation refers to the IHRAR Panel's recommendation to create a judgments database to increase transparency in the application of section 3.[193] Such a database would cure the lack of oversight identified in the Consultation simply and effectively. There is therefore no need to repeal or amend section 3 on the grounds that there is a lack of Parliamentary oversight.

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[191] The Independent Human Rights Act Review (2021), p. 213, para 81.
[192] *Ibid*, p. 249, para 182.
[193] Human Rights Act Reform: A Modern Bill of Rights, December 2021, at para 244.

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

173. The Consultation recognises that the IHRAR Panel did not support a repeal of s.3.[194] However, it maintains that:

> *'If section 3 were repealed, the common law presumption that Parliament does not intend to act in breach of international law, including treaty obligations, would apply. Where legislation was ambiguous, and a meaning that could reasonably be attributed to it was compatible with the Convention and other meanings were not, the compatible meaning would be preferred. This is a settled principle of existing law and would emphasise the need to rely on familiar principles of statutory interpretation in this field.'*[195]

174. However, the Consultation does not engage with IHRAR's reasons for rejecting this proposition. In particular, IHRAR explained:

a. The proposal '*is premised on a misconception, that the HRA has in some way removed from Parliament its primary role in rights protection. The HRA has patently not done so. It is careful to retain Parliamentary Sovereignty. Parliament continues to have the power, and the responsibility, to make or unmake any law it chooses.'*;
b. s.3 does not provide the courts with a power to amend primary legislation through secondary legislation, as asserted by one submission: '*UK Courts are not effecting amendment under section 3. They are giving effect to Parliament's will and doing so by determining, as they do in all cases, the legal meaning of legislation'*;
c. The evidence before IHRAR supported the view that the courts have not, contrary to one submission (and the Consultation's assertion), misused section 3 to misconceive Parliament's intention in enacting legislation;
d. Repeal would significantly weaken the overall scheme of the HRA by removing one of the key means by which Convention rights are given their full effect in UK domestic law. It would achieve the opposite of Parliament's stated aim when it enacted the HRA, to 'bring rights home';[196] and
e. Such a repeal would raise real concern as to adversely affecting devolution and the Northern Ireland Peace Agreement.[197]

[194] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 239.
[195] Mirroring the Police Exchange submission to the IHRAR Call for Evidence.
[196] See: Rights Brought Home: The Human Rights Bill (1997) (cm 3782), para 2.7.
[197] The Independent Human Rights Act Review (2021), p. 234-5, paras 123 to 129.

175. It is plain that s.3 should not be repealed for the reasons set out by the IHRAR Panel. It is surprising that this is included as an option in the Consultation.

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.

176. Both Options 2A and 2B would amend the s.3 requirement so that it would only take effect where the interpretation is consistent with the ordinary meaning of the words in the legislation. This would remove the means by which s.3 makes Convention rights effective. It would necessitate costly and time-consuming applications to Strasbourg to enforce Convention rights and/or increased use of s.4 declarations, imposing an additional burden on Parliament.

177. The IHRAR described the '*broad and strongly argued view from the evidence that there was no basis on which to amend section 3 … of the HRA*'.[198] In particular, the majority rejected the proposed option to amend s.3 so that it only applied where legislation is ambiguous.[199]

178. IHRAR did recommend amending s.3 to clarify the order of priority of interpretation.[200] The Consultation does not propose those recommendations; we would nevertheless support them. IHRAR explained:

> '*These options reflect the conclusions of the majority of the Panel that: notwithstanding the unusual rule of interpretation contained in section 3, there is no substantive case for its repeal or amendment other than by way of clarification or for altering either the balance between sections 3 and 4 achieved by the HRA or the standing (locus standi) requirements for either section 3 or section 4; that any damaging perceptions as to the operation of section 3 are best dispelled by increased data as to its usage; and that, as a matter both of perception and reality, Parliament could and should take a more robust role in rights protection, a role which could sensibly be reinforced via an enhanced role for the JCHR. Further options reflect the*

[198] *Ibid*, p. 227, para 118.
[199] *Ibid*, p. 238-9, paras 141-143.
[200] *Ibid*, p. 180, para 6.

conclusions of the entire Panel: first, that there is a need to clarify, by way of amendment to section 3 the order of priority in which UK Courts apply the normal principles of interpretation and then the particular interpretative principle set out in section 3; secondly, the desirability of introducing a discretion to make ex gratia payments where a declaration of incompatibility is made.'[201]

179. Were *Ghaidan* to be decided with Option 2A or 2B in force, the case would have resulted in a s.4 declaration, as the Court would be bound to interpret 'spouse' according to its ordinary meaning at the time; that is, by reference to heterosexual couples only, giving rise to an obvious incompatibility with Article 14 ECHR. This would also likely result in an application to Strasbourg. As with repealing s.3 altogether, the effect would be directly counter to Parliament's aim of bringing rights home.

180. As noted above, the Government strongly supported the application of s.3 in *Ghaidan*. IHRAR point out that reliance on s.3 by the Government is not unusual[202] and quote Lady Hale's evidence to the Joint Committee on Human Rights:

*'Could I say something else about [*Ghaidan*], and indeed about most of the other interpretive cases? That was a case in which the Government intervened to argue very strongly that that was what we should do. We have three choices. Usually 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. The Government's first line was always, 'It's compatible' but if they lost on that they would then argue either for using the interpretive obligation or for a declaration, and we would usually do what the Government asked for in that respect.'*[203]

181. It is not possible to reconcile the proposals in the Consultation to amend s.3 with the Government's position in *Ghaidan* and *'most of the other interpretive cases'.* The Government actively proposes and encourages the application of s.3 in court, while asserting in the Consultation that the section has compelled the courts to displace the role of Parliament in determining difficult questions of public policy.

[201] The Independent Human Rights Act Review (2021), p. 181, para 7.
[202] The Independent Human Rights Act Review (2021), p. 204, para 61.
[203] Joint Committee on Human Rights 'Oral evidence: The Government's Independent Human Rights Act Review, HC 1161' Baroness Hale of Richmond, (3 February 2021), Q27.

182. It is difficult to escape the conclusion that the Consultation is disingenuous: it does not build on IHRAR's work because it ignores and misrepresents IHRAR's findings and recommendations. It does not seek to reform HRA flaws because the reforms it proposes have been rejected by IHRAR and, in any event, IHRAR has established that there is no substantive case for reform. What is required is efforts to be made to dispel the negative public perception of the HRA. The Consultation's proposed amendments would destabilise the workings of the HRA, which have been developed carefully over 20 years. They are irresponsible and dangerous.

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

183. PALG does not consider there to be any need for Parliament's role in engaging with, and scrutinising, section 3 judgements to be enhanced as the current remedial framework established by the HRA works effectively and strikes the right constitutional balance.

184. What is clear from considering the Consultation is that there is a disparity between the Government's perception of the HRA and reality. This was acknowledged by IHRAR.[204] In this regard, we note that IHRAR strongly recommended increased public or civil education concerning the HRA and rights more generally, both in terms of their content and the role they play in society, including mandatory human rights training for public officials.[205] We agree.

185. PALG also agree that IHRAR's recommendation to establish a database monitoring the use of s.3 is sensible.[206] Such a database would enable Parliament to monitor the use of s.3 and take any remedial action it considers necessary. Any disparity between perceptions of the use of s.3 and the reality may also be reduced.

186. Moreover, the suggestion that *'consideration is given by Parliament as to how the JCHR's terms of reference may be expanded to enhance its scrutiny role of section 3 judgements'*[207] would assist in correcting the mistaken perception that s.3 undermines Parliamentary Sovereignty. As such we endorse this suggestion.

[204] The Independent Human Rights Act Review (2021), p. 254, para 195.
[205] *Ibid*, pp.18-20, paras 52-56.
[206] *Ibid*, pp.251-4, paras 187-193.
[207] The Independent Human Rights Act Review (2021), p. 255, para 200.

187. Likewise, PALG support the recommendation that the Government *'take a more robust approach to the scrutiny of section 3 judgement, perhaps through the introduction of an arrangement analogous to that which currently operates in respect of the remedial order-making process'*.[208]

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

188. As we have stated in our response to Question 13, PALG endorse IHRAR's recommendation to create a database regarding section 3 judgments.

189. Rather than enact amendments to ss. 3 and 4, the creation of a database would *'put Parliament in the best possible position to scrutinise judgments that involve section 3 interpretations and section 4 declarations of incompatibility and determine whether, and if so how, it may need to legislate in light of those decisions'.*[209] This would further enable the legal framework to give expression to parliamentary sovereignty, while addressing any concerns regarding the operation of that framework.

190. It would not be right for any amendment or repeal of section 3 be pursued until evidence has been gathered by this means. There is currently no evidence to support such action.

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

191. The Consultation seeks to explore whether there is a case for providing that declarations of incompatibility are the only remedy available to courts in relation to certain secondary legislation.

192. The proposals to promote the increased use of declarations of incompatibility are in direct conflict with IHRAR's findings. As regards subordinate legislation, IHRAR summarised that courts '*have rarely quashed subordinate legislation on the basis that it is not compatible with Convention rights. They will not quash such legislation unless it is incompatible with nearly all cases where it applies*'.[210] IHRAR specifically considered the

[208] *Ibid*, para 201.
[209] *Ibid*, p. 226, para 117.
[210] The Independent Human Rights Act Review (2021), p. 313, para 41.

proposal put forward in this question. The amendments that would be required were emphatically rejected. IHRAR also considered in detail the principles on which the amendments are based and strongly rejected each of them.[211] The presence of this proposal in the Consultation is surprising and there is no basis to support it.

193. The ability to rely on Convention rights in domestic courts is of central importance to the work PALG undertakes on behalf of our clients. To ensure Convention rights are effective, courts must continue to read and give effect to legislation in way that is compatible with Convention rights, so far as it is possible to do so, and only make a declaration of incompatibility where it is not possible to do so. A declaration of incompatibility does not resolve the matter before the court and does not afford the individual concerned a remedy for any breach of their Convention rights. Therefore, to ensure the effectiveness of Convention rights, courts should only make a declaration of incompatibility in rare circumstances, as was emphasised by the court in *Ghaidan*.[212]

194. The rare use of declarations of incompatibility respects the constitutional roles of Parliament, the Executive and the Courts. As noted by Lord Bingham:

> *'The function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself…. The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.'*[213]

195. Paragraph 157 of the Consultation refers to the case of *Daly/Carmichael* [2016].[214] That case related to the discriminatory effect of the housing benefit cap introduced by the Secretary of State under Regulation B13 of the Housing Benefit Regulations 2006,[215] also known as the 'bedroom tax'. The Supreme Court confirmed that the normal test in

[211] *Ibid*, pp.322-4, paras 55-64.
[212] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [577].
[213] *A v Secretary of State for the Home Department* [2004] UKHL 56, [29], [42].
[214] *R (Carmichael and others) v Secretary of State for Work and Pensions* [2016] UKSC 58.
[215] (SI 2006/2013).

cases involving questions of economic and social policy is whether the discrimination is *'manifestly without reasonable foundation'*. That is a high threshold which respects the principle that finely balances cases involving economic and social policy should generally be left to elected lawmakers. The reason the Supreme Court considered it necessary to rule against the legislation challenged in that case was that decisions made under that legislation were found to be manifestly without reason.[216]

196. In the 2019 'bedroom tax' case of *RR v Secretary of State for Work and Pensions*,[217] the Supreme Court developed further the constitutional question of incompatible subordinate provisions, reconsidering *Daly*/*Carmichael*. The Supreme Court held that a public authority, as well as a court or tribunal, can disapply a provision of subordinate legislation if to follow it would result in the body acting incompatibly. Lady Hale, giving the judgment of the Court, found that 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.'*[218]

197. This emphasises the extent to which the courts work to ensure that the will of Parliament in enacting primary legislation such as the HRA is not subverted by incompatible subordinate legislation. Moreover, in this case, the wider remedial action to rewrite the legislation in a compatible way was left to the Secretary of State and Parliament. This indicates that courts will intervene only to the limited extent of disapplying or quashing incompatible subordinate legislation. They do not enter into law-making.

198. The current approach rightly safeguards against inadvertent breaches of Convention rights through secondary legislation, which has not had the benefit of full parliamentary scrutiny. The supervisory jurisdiction of the High Court is an established safeguard in the secondary legislation process. By quashing secondary legislation that has been found to be *ultra vires*, courts are upholding Parliament's sovereignty by giving effect to the will of Parliament as expressed in the Act under which the secondary legislation was made. If the courts were to simply make a declaration of incompatibility in those circumstances, they would not be giving effect to the will of Parliament.

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[216] *R (Carmichael and others) v Secretary of State for Work and Pensions* [2016] UKSC 58, [46 – 49].
[217] *RR v Secretary of State for Work and Pensions* [2019] UKSC 52.
[218] *Ibid*, [27].

199. Moreover, declarations of incompatibility do not impose any obligation on Parliament for the incompatibility to be remedied, and therefore provide no indication as to when incompatible legislation will be remedied. We consider that increased use of declarations of incompatibility would act as a deterrent to those who seek to vindicate their human rights. PALG clients are already faced with sometimes insurmountable hurdles before they can access civil proceedings in order to enforce their Convention rights. Actions against the police and other public authorities often involve people who are severely traumatised and usually require complex applications for funding and difficulties obtaining key evidence. Weakening the remedy available would deter vulnerable people and further restrict access to justice for those who need it most.

200. Moreover, there are often significant delays before rights can be enforced by the court. Civil proceedings often take years before reaching a trial, with clients having to re-live traumatic experiences, and being unable to move on and heal. It is therefore crucial that courts are able to provide an effective remedy once a trial is eventually reached. Further delays should be avoided wherever possible and, therefore, the use of declarations of incompatibility should not be expanded.

Case Study: Child Prisoners in the Pandemic

201. During the Covid-19 pandemic, the Government enforced 'lockdowns' on the UK public by enacting the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, using powers delegated by the Public Health (Control of Disease) Act 1984. The JCHR review of the government's response to Covid-19 and human rights acknowledged that the Regulations may interfere with several Convention rights.[219]

202. On 28 September 2020, the Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020, introduced using powers under the Prosecution of Offences Act 1985, came into force, extending the standard custody time limit in the Crown Court by 56 days (8 weeks) to 238 days. This extension to the period without automatic judicial oversight made no distinction between children and adult prisoners awaiting trial.

[219]Joint Committee on Human Rights, ' The Government's response to COVID-19: human rights implications' (21 September 2020), See: <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/265/26506.htm> accessed 7 March 2022

203. Following a legal challenge from Just for Kids Law,[220] based on incompatibility with Article 5 and Article 14 ECHR, the Government capitulated and announced that children would be exempt from the extension. The case did not reach court as the claim was stayed when the Ministry of Justice agreed to consult with the Children's Commissioner. On 14 January 2021, the government introduced a new statutory instrument to exclude children from the extended custody time limit. Whilst this came about without litigation, the concession was no doubt a recognition of the incompatible aspect of this subordinate legislation which could have been struck down. Had the courts not had the power to strike down this incompatibility, it is likely that costly litigation would have taken place and unnecessary rights violations continued. It is clear from this example that the ability of courts to strike down incompatible secondary legislation reduces delays in the enforcement of rights and improves administrative decisions.

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.

204. The introduction of suspended and prospective-only quashing orders would be detrimental. Such orders would risk denying individuals a remedy following an unlawful act by the State, even when this has been confirmed to be unlawful by a court. Therefore, we do not consider that the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill should be extended. The HRA is operating effectively to ensure Convention rights can be realised in our courts and there is no basis to argue it should be amended or replaced.

205. As was established by IHRAR, based on extensive evidence, and as referred to in our answer to Question 15, the courts rarely quash subordinate legislation on the basis that it is not compatible with Convention rights. The effect of making a suspended or prospective quashing order regarding secondary legislation which results in breaches of Convention rights would be that the courts would have sanctioned those breaches and denied individuals an effective remedy. That would be incompatible with the purpose of the HRA and would significantly weaken rights protection in the UK.

[220] 'Just for Kids Law welcomes Government U-turn to exempt children from extended custody time limits' (14 January 2021). <https://justforkidslaw.org/news/just-kids-law-welcomes-government-u-turn-exempt-children-extended-custody-time-limits> accessed 7 March 2022.

206. In our role as police action lawyers, we regularly engage with individuals and communities who have lost confidence in public authorities. Legislating to allow courts to sanction breaches of Convention rights by other public authorities would further damage public confidence. In our experience, it is often over-policed communities that disproportionately experience the negative impact of rights-incompatible secondary legislation. Therefore, the introduction of suspended and/or prospective-only quashing orders is also likely to disproportionately impact those communities. PALG strongly opposes any change that has this effect and consider that the Government's focus should be on improving rights protection for over-policed communities.

207. The proposals put forward by the Judicial Review and Courts Bill followed the report of the Independent Review of Administrative Law ('IRAL') panel. However, although the IRAL panel recommended the introduction of suspended quashing orders in judicial review proceedings, it made no such recommendation in relation to prospective-only quashing orders. Furthermore, the HRA was outside the scope of the IRAL.

208. Although IHRAR recommended both suspended and prospective-only quashing orders, the report does not contain any analysis of the impact of providing a statutory basis for such powers. IHRAR does not include any analysis of the reasons why prospective-only quashing orders were not recommended by the IRAL panel. Notably, IHRAR also does not engage with the fact that the proposals in the Judicial Review and Courts Bill seek to limit the court's discretion, and potentially *require* the use of suspended or prospective quashing orders in certain circumstances. These proposals should not be automatically applicable to HRA challenges merely because consistency with judicial review proceedings is desirable, which appears to be the only factor considered by IHRAR.

209. We note that the Supreme Court has already considered its ability to make suspended quashing orders in *Ahmed (No2)* [2010],[221] taking the view that this action was not properly open to it as unlawful administrative acts and secondary legislation have no effect in law.[222] The majority of the court indicated that such an approach would serve to *'obfuscate the effect of its judgement'*.[223] The introduction of suspended quashing orders would complicate matters. Not only would this increase the length and costs of litigation concerning incompatible secondary legislation, but it would also likely lead to increased post-judgement litigation regarding the appropriate use of such orders.

[221] *Ahmed (No2)* [2010] UKSC 5.
[222] *Ibid,* [4].
[223] *Ibid,* [8].

210. The IRAL Panel's recommendation for suspended quashing orders relies heavily on the use of such orders in Scotland. We note that Liberty provided a response to the Ministry of Justice on this point as follows:

> *'…section 102 of the Scotland Act operates within a very specific context and should not be replicated indiscriminately across the whole spectrum of judicial review, Not only is the section concerned exclusively with issues of competence, it is also a necessary consequence of the carefully balanced and constantly evolving relationship between Scotland and Westminster. For example, the provision that the minister or Parliament should be given time to allow the defect to be corrected reflects the ongoing dialogue in respect of the limits of Scotland's law-making capabilities as a devolved power.*[224]*It is not based on considerations of efficacy and, more importantly, the idea of applying this approach to every unlawful decision of a public authority is clearly incompatible with the rule of law as well as being administratively unworkable. Furthermore, the impact of devolved matters is relatively limited when compared to a reserved matter such as immigration, which will always involve fundamental rights. Any delay to remedies in this context would be unfortunate and therefore reform in this area must be very careful not to mistakenly extrapolate seemingly similar concepts into disparate areas of review.'*[225]

211. We agree with Liberty's submissions that care must be taken not to mistakenly extrapolate seemingly similar concepts into disparate areas of review. This argument has even more weight when the disparate area is that of Convention rights. It is evident from IHRAR's report that no meaningful analysis has been undertaken into the impact of introducing suspended and/or prospective quashing orders in this specific field. To introduce these powers without that analysis would be extremely reckless.

212. Even more concerning is the proposed use of prospective-only quashing orders when subordinate legislation is incompatible with Convention rights. While suspended quashing orders would delay any effective remedy being provided to victims of violations, prospective-only quashing orders would deny them that remedy entirely. On the face of it this would be a clear breach of Article 13 ECHR and would lead to increased

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[224] McCorkindale, McHarg and Scott, 'The courts, devolution and constitutional review', 36 U. Queensland L.J. 289 (2017),10.

[225] Liberty, Liberty's written evidence to the Ministry of Justice (Judicial Review Reform), (April 2021), para 13. <https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-written-evidence-to-the-Ministry-of-Justice-Judicial-Review-Reform-April-2021.pdf> accessed 7 March 2022.

applications to Strasbourg, causing significant delay to remedies and unnecessarily increasing costs for both victims and the Government.

213. Prospective-only quashing orders also raise important constitutional questions. Not only would these orders bring into question the principle of a government under law, but they would also require courts to effectively make law rather than apply it. The Government would face reduced consequences following the introduction of unlawful secondary legislation and may therefore take greater risks in law-making. The denial of justice would also be inherently arbitrary, as an individual's ability to enforce their rights would be entirely dependent on which case reached court first.

214. Notwithstanding our objection in principle to the use of suspended and/or prospective-only quashing orders in this field, we consider that the proposals put forward by the Judicial Review and Courts Bill are especially problematic due to the restrictions on the court's discretion and the suggestion that courts may be required to make such orders in certain circumstances. PALG would strongly oppose the introduction of any such limits on the court's discretion, or any requirements to make suspended and/or prospective quashing orders, should these proposals be introduced for litigation concerning subordinate legislation that is found to be incompatible with Convention rights.

215. It is extremely concerning that the Government is considering introducing powers that would allow it to effectively act in breach of the law with no repercussions, especially in the context of breaches of Convention rights. In the current political climate, with the Government being heavily criticised for failing to act in accordance with the law, the proposals are wholly inappropriate.

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?**

216. Between 2 October 2000 and 31 July 2020, only 8 remedial orders were issued to deal with declarations of incompatibility made by the courts. There is a fine balance between

the role of Parliament, the Executive and the Courts and we do not consider that it requires alteration. There is no evidence to suggest that the current system is flawed.

217. However, we support the JCHR recommendation that all statutory instruments which have a significant human rights implication, including draft remedial orders, should be drawn to its attention for scrutiny to ensure that Parliament receives its advice.

218. Ensuring that there are adequate powers to bring rights violations to an end (or to prevent them) as quickly as possible is crucial to effective rights. As we have set out in our answer to Question 15 above, a declaration of incompatibility does not provide individuals with any remedy. Therefore, it is of the utmost importance that any legislative incompatibilities identified by the courts can be dealt with as soon as possible to ensure that the breach does not continue, and no further breaches occur.

219. Section 10 HRA provides Ministers with an avenue to amend incompatible legislation without the usual legislative process, thereby avoiding considerable delays. Although this means such orders will be subject to less Parliamentary scrutiny, s.10 includes safeguards such as approval by both Houses of Parliament.

220. We note the concern that the remedial order process is of limited practical benefit as the procedure for making non-urgent remedial orders still takes around one to two years. We share the Government's concern regarding significant delays in remedying legislation that has been found by the courts to be incompatible with Convention rights. However, we do not consider that abolishing the non-urgent process would be an appropriate response. Any amendment to the remedial order process should focus on reducing the time it takes for incompatibilities to be remedied through the non-urgent process, rather than limiting the ways in which those incompatibilities can be remedied.

221. Furthermore, we do not consider there to be any basis for arguing that any restriction on using s.10 to amend the HRA itself, or any similar restriction incorporated into a Bill or Rights, should be introduced. The only example of the remedial order process being used to amend the HRA is The Human Rights Act (Remedial) Order 2020. That order amended s.9 of the HRA following the finding of the ECtHR in *Hammerton v UK* [2016].[226] The ECtHR held that the applicant had been denied an effective remedy for breaches of his Convention rights and, therefore, there had been a violation of Article

[226] *Hammerton v UK* [2016] App. No.6287/10, (ECtHR, 17 March 2016).

13. The facts of *Hammerton* were exceptional in that it was possible for the ECtHR to rely on findings of the High Court in establishing that the claimant would have received a significantly shorter custodial sentence had his Article 6 rights not been breached.

222. The effect of *Hammerton* and the subsequent remedial order was to rectify the long-standing incompatibility of s.9 with ECHR jurisprudence, which has been consistent on this issue.[227] Therefore, the use of the remedial order process following *Hammerton* led to an improvement in rights protection. If Parliament was opposed in principle to the use of the remedial order process to amend the HRA, it would have been able to withhold its approval. In light of this, we do not consider there to be any basis for arguing that a restriction on the use of s.10 to amend the HRA should be introduced.

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

223. The requirement for a Minister to issue a statement in regard to compatibility with Convention rights is beneficial as it assists parliamentary scrutiny of Bills and requires Ministers to consider compatibility with Convention rights at an early stage.

224. In circumstances where a Minister does not consider it possible to make a statement of compatibility, they are required to issue a statement to this effect and that they wish for the Bill to be passed anyway. If a Minister considers that they cannot make a statement of compatibility for any reason, but in principle considers the Bill to be compatible and that any challenge to that view would be unsuccessful, they can set this out in the Explanatory Memorandum. This information will then assist Parliament in scrutinising the Bill and ensure that any questions of incompatibility with Convention rights are afforded greater scrutiny. As such, s.19 does not restrict the policies that Ministers can propose but only requires them to make clear their position in regard to the compatibility of those policies with Convention rights. Therefore, it is not clear how s.19 can be considered to restrict Ministers from proposing innovative policies.

225. IHRAR concluded that there would be no additional benefit to amending s.19 to include a requirement for a statement of compatibility when statutory instruments are introduced

[227] See *inter alia*; *Benham v United Kingdom* App no. 19380/92 (ECtHR, 8 Feb 1995); *Ezeh and Connors v The United Kingdom* App nos. 29665/98 & 40086/98 (ECtHR GC 15 July 2002); *Perks and Ors v The United Kingdom* App nos. 25277/94 and others (ECtHR, 12 October 1999); and, *Whitfield and Others v The United Kingdom* App nos. 46387/99, 48906/99, 57410/00 and 57419/00, (ECtHR 12 April 2005).

by Ministers because the current *Government Legal Profession SI Drafting Guidance* already provides for such a statement to be made.[228] IHRAR also concluded that there was no need for amendment to the binary nature of the test required by s.19, given that additional information can be set out by the Minister within the Explanatory Note.[229]

226. PALG see no basis for arguing that there is any case for changing or replacing s.19 as it is operating effectively and strikes the right constitutional balance between the Executive and Parliament.

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?

227. The majority of PALG's members operate in the legal system of England and Wales. We note, though, that the broader constitutional landscape is a complex one in light of asymmetrical devolution arrangements for Scotland and Northern Ireland in particular. For example:

    a. In Scotland it is *ultra vires* for the devolved institutions to act contrary to the ECHR. This is in contrast to the UK Parliament (whether legislating for the UK only, or for England and Wales, or for England alone) which could do so by clear and explicit language. If there were to be a UK-wide Bill of Rights then consideration would have to be given to the legal force that the rights would have in Scotland and whether that would be equivalent to that given to the ECHR.
    b. In Northern Ireland, the Good Friday (Belfast) Agreement anticipates a Bill of Rights for Northern Ireland which would include the ECHR and '*additional rights to the principles of mutual respect for the identity and ethos of both communities and parity of esteem*'.[230] There are considerations of human rights in that jurisdiction which do not arise, or at least do not arise in the same way, in Britain – including the position of the Irish language, parades, and flags. It is not clear whether these questions have been considered in the context of a British Bill of Rights.

228. If a Bill of Rights was to genuinely serve as a foundational text for the UK it would need to address both structural questions (the legal force to be given to the Bill in different

[228] The Independent Human Rights Act Review (2021), p. 325-6, para 69.
[229] *Ibid*, p. 243, paras 157-158.
[230] The Good Friday (Belfast) Agreement, p. 17 para 4.

legal systems) and questions of cultures and traditions. The Consultation doesn't offer any proposals in this respect and there is significant work to do if the proposals were to be taken forward.

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.

229. PALG agrees that the '*range of bodies and functions to which the obligations under the HRA currently apply is broadly right'*.[231] There is no need for amendment here and, for that matter, any attempt at amendment may be counterproductive.

230. Section 6(3)(b) HRA states that a public authority includes '*any person certain of whose functions are functions of a public nature*', except that, according to section 6(3)(d), '*[i]n relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private'*.

231. As a result, if a private entity exercises public functions it must also comply with the Convention. For example, G4S, a private service provider, has been held to be a public authority:

    a. *G4S v Luke* [2019]:[232] G4S was the operator of a prison. It was '*not in dispute for these purposes G4S is a public authority which, in appropriate circumstances, owes those in its custody this positive operational duty* [*under the HRA*]'.[233]

    b. *Watling v Chief Constable of Suffolk* [2019]:[234] G4S was the provider of healthcare services to the Chief Constable. It was held to be a hybrid public authority, its acts in question were not of a private nature, and it was therefore subject to duties under Articles 3 and 8 ECHR.[235]

232. In circumstances where a wide range of public functions are carried out by private entities under contract with local authorities and government departments the current approach is essential to ensure that there is not an accountability gap.

[231] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 266.
[232] *G4S v Luke* [2019] EWHC 1648 (QB).
[233] *Ibid*, [7].
[234] *Watling v Chief Constable of Suffolk* [2019] EWHC 2342 (QB).
[235] *Ibid*, [62-70].

233. In the case of *LW v Sodexo and Secretary of State for Justice* [2019], to which the Consultation refers, the court held that the Secretary of State had failed to ensure adequate and effective oversight of Sodexo, which was carrying out unlawful strip-searches of women in prison.[236] The case is not an example of uncertainty, but rather one which demonstrates the need to ensure that human rights are upheld both in the operation of institutions such as prisons, and in the regulation and oversight of such institutions.

234. PALG does not therefore consider there is any need to alter the existing definition of public authorities or the functions which are covered by the HRA.

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 cannot be deemed to be acting unlawfully.**
- **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.**

235. PALG welcomes the Consultation's statement that any Bill of Rights will continue to hold it unlawful for a public authority to act in a manner which is incompatible with rights. Question 21 is said to relate to a concern as to the confidence which public authorities have in carrying out their functions in accordance with the '*clear and specific mandate*' given to them by Parliament and the devolved legislatures. Of course, when a public authority carries out its functions in accordance with the HRA it is doing exactly that, giving effect to the clear and specific mandate which Parliament gave in the HRA. Thus, so long as the courts are operating within the scope of the HRA, they cannot '*compel the public authority to act in a way that is contrary to the clear will of Parliament'*. Rather, the courts' function, when there is lack of clarity about the law, is to determine what legal rules apply in the situations that come before them.

236. Moreover, the courts have already made clear that, under the law as it operates at present, '*broad public policy decisions are a matter for Parliament'*. See, for example, the comments of Lord Reed, President of the UK Supreme Court, in the recent decision

[236] *LW and others v Sodexo and Secretary of State for Justice* [2019] EWHC 367 (Admin).

of *SC* [2021].[237] There is therefore no problem with the current legal framework for the two options set out under this question to solve. In addition, the options would have a detrimental impact on that legal framework and the rights it protects.

Option 1: provide that wherever public authorities are clearly giving effect to primary legislation, then they cannot be deemed to be acting unlawfully.

237. This option would be a regressive step which would vitiate much of the protection that the HRA provides to the public. Many functions carried out by public authorities are '*clearly giving effect to primary legislation*'. Indeed, as set out above, giving effect to the HRA itself is to give effect to primary legislation.

238. Whenever a public authority exercises a public function, it is possible that it will do so in a way that is not compatible with ECHR rights. If there is a legal challenge, the court must consider if the authority could have acted in a way that is compatible with the HRA. If there is, then the court can, in accordance with the HRA, interpret the law in a compatible manner, and require the public authority to act in that way. The courts therefore give effect to Parliament's will.

239. The Consultation suggests that Option 1 '*would not remove all accountability'*. That the Government even considers it necessary to make this assertion is remarkable. Wider public law principles would still apply but these are largely procedural safeguards. The impact of Option 1 would be to remove, entirely or at the very least almost entirely, the requirement to comply with HRA rights. It would only be where there was not a clear statutory basis for the function that compliance would be necessary. For many public authorities most of their powers have a statutory (rather than a common law) basis and would be all but exempt from HRA requirements. There is no case for such a drastic step, not least as the Government's concern is limited to the '*confidence*' that public authorities have in their own decision-making.

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.

240. PALG has set out, at length, the ways in which the proposed changes to section 3 are based on a misunderstanding of how that provision works. We do not consider there is

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

any need to change s.3 or that there is any need to pursue Option 2 – for the same reasons as those set out in relation to s.3.

241. If public authorities require greater confidence in their performance of functions in compliance with human rights law there are other ways this could be done. For example, we support the IHRAR recommendation for more education on the HRA and how it operates. As we approach the 25th anniversary of the enactment, it is time for a renewal of awareness of the HRA and the obligations it imposes on public authorities.

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.

242. PALG does not agree that there is an issue with the extraterritorial application of the ECHR via the HRA, and agrees with the Consultation, and IHRAR for that matter, that any attempt change the current position via '*unilateral domestic legislative*' action would be ineffective and '*give rise to significant issues*'.[238] It would inevitably reduce the UK's powerful voice on human rights issues, diminish the operation of the Convention here, and increase applications to the ECtHR and judgments against the UK.

243. Though maligned in the Consultation as an unwelcome expansion to the application of human rights under the Convention, it is worth remembering the facts in *Al-Skeini and Others v. the United Kingdom* [2011], which are conspicuously absent from the Consultation.[239] The case concerned the killing of six Iraqi *civilians* by British soldiers in Iraq, including the violent death of Baha Mousa, a hotel receptionist, who died in British custody in Basra following sustained and serious abuse.

244. A public inquiry into Baha Mousa's death revealed that British soldiers had been involved in torture, unlawful killing and the use of prohibited interrogation on detainees within their control. The Inquiry heard that Mousa was hooded for almost 24 hours during his 36 hours of custody and that he suffered at least 93 injuries prior to his death. The Inquiry identified '*corporate failure'* by the British Army to prevent the use of prohibited

[238] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 280.
[239] *Al-Skeini and Others v. the United Kingdom*, App No. 55721/07 (ECtHR 7 July 2022).

interrogation techniques and made several important recommendations, which can only improve army practices and its reputation abroad.[240]

245. The ECtHR held, correctly, that as a matter of both legal and practical reality, '*the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq*' and therefore had jurisdiction for the purposes of the Convention. The UK was therefore required to carry out an investigation into the deaths of those individuals.

246. As established in *Smith and others v Ministry of Defence* [2013],[241] via the HRA, the same protection applies to British soldiers overseas as well under Article 2 ECHR. Therefore, when our armed forces are engaged in military operations overseas there will be instances where they are both bound by and protected by the ECHR and the HRA.

No Change is Necessary, or Desirable

247. Criticisms of the extraterritorial application of the Convention via the HRA, such as that in the Consultation, have often been grounded in the assertion that our troops and the wider armed forces require protection from an 'industry' of 'vexatious' claims, at significant public cost, and that the judiciary have interpreted the HRA to extend its application beyond the remit intended by Parliament.[242] PALG's view, to the contrary, is that litigation arising from the application of the HRA has been, and remains, essential to ensuring that the UK military is not permitted to act with impunity and disregard for the lives of both foreign nationals and UK service personnel.

248. At the same time, the judiciary is alive to the important line to be drawn in such cases and construes the position narrowly. Delivering their ruling in *Smith*, the Supreme Court made clear that the utmost regard should be had for the effectiveness of military operations overseas, and the application of human rights standards should not be applied in such a way as to hinder the State's efficacy.[243] Lord Hope set clear parameters of areas the court was and was not able to consider. High level political and military tactical decisions will not be interfered with. The judiciary does not trespass into the realms of politics or policy and decisions taken on the ground by commanders are given the widest possible margin. It is only in middle ground cases, usually involving decisions

[240] Baha Mousa Inquiry and the Rt Hon Sir William Gage (Chairman), 'The report of the Baha Mousa Inquiry', vol.1, HC 1452-1.
[241] *Smith and others v Ministry of Defence* [2013] UKSC 41.
[242] The Ministry of Defence, 'Overseas Operations (Service Personnel and Veterans Bill, European convention on Human Rights, Memorandum by the Ministry of Defence'.
[243] *Smith and others v Ministry of Defence* [2013] UKSC 41.

prior to deployment such as the suitability of equipment to be used, that the courts will have a proper place in deciding whether reasonable steps were taken to prevent avoidable harm to armed forces personnel.[244]

Damages claims

249. The HRA allows both civilians and service personnel to obtain justice where there has been a breach of their Convention rights by the State, including for injury, abuse, torture, mistreatment and death. Victims can enforce their rights where tortious claims would not, though damages under the HRA are generally very low.[245] Compensation will only be awarded to victims, be they civilians, soldiers, or foreign nationals, where they are able to show that the state violated their fundamental human rights. As victims, they deserve to have that violation remedied. Successful cases are a mechanism to ensure accountability and a deterrent against the commission of further wrongs.

Article 2/3 investigations

250. The ECtHR makes clear that investigations by the State into allegations concerning ill-treatment, torture and wrongful deaths must be effective. Investigations are critical to identify any systemic failures so that lessons can be learned and changes implemented. In *Smith*,[246] the inquest into the death of a soldier of heat injury on a base in Iraq was concluded within three hours and held not to be Article 2 compliant. It did not examine whether soldiers were being provided with unsafe and inadequate equipment. Had an Article 2 compliant investigation been held, the opportunity to uncover systemic failings of this nature could have been realised much earlier, the family would not have had to litigate, and the findings would have helped to prevent needless loss of life.

251. As the Consultation acknowledges, in the Overseas Operations (Service Personnel and Veterans) Act 2021, Parliament has already made it more difficult for certain claims under the HRA to be brought. Further change to the territorial as well as temporal application of the Convention is unnecessary and risks contravening the UK's obligations under the ECHR and other international legal instruments.

252. As a matter of moral principle, the value of all lives should be equal, irrespective of profession or locality. The rule of law requires equal treatment of all before the law. We consider the HRA and its current reach legitimate and appropriate to protect the rights

[244] *Smith and others v Ministry of Defence* [2013] UKSC 41, [100].
[245] *Kamil Najim Abdullah Alseran and Others v Ministry of Defence* [2017] EWHC 3289 (QB).
[246] *Smith and others v Ministry of Defence* [2013] UKSC 41, [100].

of service personnel, and foreign nationals who face injustice. It is imperative that the State should not be able to act with impunity beyond its own borders. There must be appropriate mechanisms for ensuring transparency and accountability of actions and decisions implemented by public authorities overseas.

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.

253. PALG do not consider that the principle of proportionality has given rise to problems in practice under the HRA, or that any legislative instruction to the courts on how to balance qualified rights is required. The now comprehensive body of human rights case-law provides sufficient guidance as to how to balance qualified and limited rights.

254. Though qualified rights, Articles 8, 9, 10, and 11 ECHR constitute fundamental rights which are central to the functioning of a free and open democracy. These rights did not arrive with the introduction of the HRA. As recognised by Lord Hoffman, *'much of the Convention reflects the common law'*.[247] The rights contained in these provisions protect the public from unfettered surveillance by state bodies, ensure that same sex couples

[247] *R (Simms) v Secretary of State for the Home Department* [1999] UKHL 33.

can enjoy rights on the same basis as other couples, and uphold the rights of persons with disabilities to physical and psychological integrity.[248]

255. When courts consider human rights in the context of actions or omissions by state bodies or those exercising public functions, it is inevitable that they will have to consider the government policy behind those acts or omissions if they are to give effect to an individual's rights.[249] The notion of 'necessary in a democratic society' means that any interference with a qualified right must correspond to a pressing social need and be proportionate to the legitimate aim pursued. This undeniably requires courts to consider the expressed view of Parliament, as courts do when interpreting legislation, and case-law demonstrates that the courts will give Parliament a 'wide margin of appreciation' when it comes to, for example, decisions of social and economic policy.[250]

256. The Supreme Court judgment in *Ziegler* [2021],[251] decried in the Consultation as an example of proportionality enabling '*a group of protesters to disrupt the rights and freedoms of the majority*', is a salient example of courts conducting just such a balancing exercise. The case concerned a group of protesters charged with obstructing the highway during a protest at an arms fair in December 2017. The protesters, strongly opposed to the arms trade,[252] were acquitted at trial on the grounds that the prosecution had failed to prove that any obstruction of the highway was unreasonable. In considering whether their rights to freedom of expression and peaceful assembly constituted such a lawful excuse for obstruction of the highway, the Supreme Court emphasised that whilst there should be a certain degree of tolerance to disruption to ordinary life caused by the exercise of the right to freedom of expression or peaceful assembly, both disruption and whether that disruption is intentional were relevant factors in an evaluation of proportionality of protests.[253] The Supreme Court found that:

a. The intention and outcome of the protest were peaceful;
b. The actions of the appellants did not give rise to any form of disorder;
c. The protest was on an approach road where there was a sizeable police presence without any risk of clashes with counter demonstrators; and

[248] *Bernard, R (on the application of) v London Borough of Enfield* [2002] EWHC 2282 (Admin).
[249] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
[250] *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327, [107]-[109]; *In re Recovery of Medical Costs of Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [54].
[251] *Director of Public Prosecutions v Ziegler and others* [2021] UKSC 23.
[252] *Ibid*, [86].
[253] *Ibid*, [7].

d. There were no clashes with the police.[254]

257. The Supreme Court upheld the decision of the trial judge in the magistrates' court that the prosecution had failed to adduce sufficient evidence that any obstruction caused was unreasonable. The protest took place an on approach road to the arms fair. There was very limited evidence of vehicles actually being obstructed, and, in any event, access could be gained by another route. Further, the actions were carefully targeted and were aimed only at obstructing vehicles headed to the arms fair.[255] The assessment of the significance of the obstruction was a fact-sensitive mater for the district judge to make based on evidence called at trial. Contrary to the suggestion in the Consultation, the protest did not unnecessarily disrupt the rights and freedoms of the '*majority*'. Even if arms sellers and purchasers could be said to constitute the '*majority*', their rights and freedoms were not significantly disrupted. As a matter of principle, moreover, it would be a strange, and undemocratic, position if only views held by the 'majority' were capable of free expression and/or protest.

258. The recent case of *Kate Wilson* [2021] provides another example of the crucial role courts play in upholding individuals' qualified rights.[256] The case concerned whether Ms Wilson's rights under Articles 3, 8, 10, 11 and 14 ECHR had been violated by an undercover policing operation to collect intelligence about public disorder by political activists. An undercover officer, Mark Kennedy, had entered into a long-term sexual relationship with her and subjected her to covert intelligence whilst his superiors either knew of the relationship, turned a blind eye, or did not maintain proper oversight. Ms Wilson had also been subjected to covert surveillance by at least five other undercover officers over a period of more than 10 years. The information regarding her political activities were gathered, recorded, stored and transmitted.

259. The police accepted that Ms Wilson's rights to freedom from degrading treatment (Article 3), right to respect for her private and family life (Article 8) and freedom of expression (Article 10) had been violated but argued that the interference with Ms Wilson's Article 8 rights, in particular, was proportionate. However, the Tribunal disagreed and found that the police had violated Ms Wilson's rights under Articles 3, 8, 10, 11 and 14 ECHR, noting that the evidence of a pressing social need was thin and that authorisations for

[254] *Ibid*, [81].
[255] *Director of Public Prosecutions v Ziegler and others* [2021] UKSC 23, [83].
[256] *Kate Wilson v (1) Commissioner of Police of the Metropolis (2) National Police Chief's Council* [2021] UKIPTrib IPT_167_H.

the undercover operations failed to distinguish between domestic extremism (potentially involving serious criminality) and activism. It was therefore neither necessary nor proportionate.[257] The fact that such covert operations were allowed to continue for decades, and that some pre-dated the HRA, evidences both the need for independent scrutiny to ensure accountability and the effectiveness of the HRA in ensuring it.

260. Against this background, it is clear that the HRA in its current form, and the case law which has developed on the issue of proportionality is sufficiently flexible to respond to the facts of a given situation, striking an appropriate balance between qualified and competing considerations and rights – and between the important principles of Parliamentary Sovereignty and the separation of powers.

The Proposed Guidance on Interpreting Qualified Rights

261. By comparison the proposals in Options 1 and 2 at page 100 of the Consultation are unnecessary and could undermine the separation of powers. They would conflate Parliament's legislative role with the Courts' role in interpreting and applying legislation to the facts of given cases, including when considering potentially unlawful acts by state bodies. Given the importance of qualified rights to the functioning of democracy, we consider that Parliament specifying which factors courts should give weight to, in effect putting a 'thumb on the scale', would defeat the very purpose of the exercise.

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 courts from substituting their view for that of the Secretary of State.**

[257] *Ibid*, [277-290].

262. On 24 February 2022, the Home Office published figures on how many foreign national offenders (FNOs) appeal against the making of a Deportation Order against them, and the number of these appeals which succeed on human rights grounds *only* (i.e. not under the Refugee Convention). To our knowledge, this is the first time this data has been published. In the absence of explanatory notes, we must assume that '*human rights grounds*' signifies where the appeal has succeeded under Articles 2, 3 or 8 ECHR.

263. Articles 2 and 3 are absolute rights, which afford no discretion, whereas Article 8 is a qualified right. The percentage of appeals which succeeded on one of these three grounds, in the last five years, was 12% (16-17), 14% (17-18), 13% (18-19), 14% (19-20) and less than 8% (20-21).[258] On average the chance of success is 12%, so the proportion of appeals succeeding solely under Article 8, which receives particular attention in the consultation, will necessarily be lower.

264. This starkly contradicts an assertion by Dominic Raab MP in January 2014 that Article 8 challenges accounted for 89% (9 out of 10) of all successful human rights appeals against deportations by FNOs.[259] There are two possibilities: either those figures were inaccurate, or the success of Article 8-based appeals has decreased by 87%. It poses an interesting question as to why the Consultation places so much weight on this point.

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.

265. FNOs have long been able to be deported in the public interest, even where they raise valid arguments against this based on the right to family life. Section 32 of the UK Borders Act 2007 makes explicit provision for this, stating that FNOs must automatically be deported if they meet certain criteria.[260] The Consultation's suggestion of introducing a provision that certain human rights cannot prevent the deportation of some individuals would have two consequences. Firstly, it would deprive the judiciary of the task they are best qualified to do: conduct a careful, fact-specific analysis of the merits of each individual case. Evidence from immigration lawyers suggests that judges are highly sceptical when a FNO asserts a close relationship with their family. Strong evidence is

[258] Home Office, 'Data on Foreign National Offenders (FNO) appeals lodged', 24 February 2022.
[259] HC Deb | 30 January 2014 | col 1063.
[260] UK Borders Act 2007, s.32.

needed to prove this, and any applicant must establish not only genuine and subsisting family life, but also that genuine harm to the family would be caused by their deportation.[261] Secondly, the proposal would almost certainly lead to more applications to the ECtHR, incurring further costs for the public purse and increasing delay.[262] We do not support this option.

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.

266. Regarding the second suggestion, it is worth addressing the Consultation's emphasis on Parliamentary Sovereignty. It is Parliament that is sovereign, not the Government. The Government is bound by statute, made by Parliament and interpreted by the Courts.[263] The reference to '*where provided for in a legislative scheme'* presumably refers to the Government's ability to create secondary legislation by way of statutory instruments, which crucially do not have to be approved by Parliament. Moreover, statutory instruments are almost never debated in the House of Commons, and less than 0.001% of statutory instruments have ever been voted down by Parliament.[264]

267. The Consultation proposes to elevate the Government above judicial scrutiny by using secondary legislation to provide that certain human rights cannot be taken into account when considering an appeal against deportation unless explicitly mandated by the Government. This suggestion not only violates Parliamentary Sovereignty but shows a flagrant disregard for the checks and balances provided by the separation of powers. If the Government misuses the powers delegated to it by Parliament to create laws which infringe human rights, then Parliament has mandated that the courts address this through the HRA.[265] This is to prevent arbitrary or excessive uses of power and preserve the crucial balance between the Executive, Legislature and Judiciary. The Government

[261] Free Movement, 'Does the Human Rights Act prevent us deporting serious criminals?' 26 May 2015 <https://www.freemovement.org.uk/does-the-human-rights-act-prevent-us-deporting-serious-criminals/> accessed 2 March 2022.
[262] The Law Society, 'Reason, not rhetoric, must underpin review of human rights rules.' 17 December 2021 <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/reason-not-rhetoric-must-underpin-review-of-human-rights-rules> accessed 2 March 2022.
[263] ILPA: Response to the Independent Human Rights Act Review (IHRAR) 3 March 2021, at 5.
[264] Public Law Project: What is a Statutory Instrument? <https://publiclawproject.org.uk/what-is-a-statutory-instrument/> accessed 2 March 2022.
[265] ILPA: Response to the Independent Human Rights Act Review (IHRAR) 3 March 2021, at 9.

ought not be empowered to vitiate the court's obligation to apply the law simply because it does not like the court's decisions. We do not support this option.

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

268. On the same premise as above, this is an attempt to elevate ministerial decision-making to the same level as laws made by Parliament. To prevent courts from overturning ministerial decisions, with no discretion given to judges, would be a flagrant misuse of executive power. We do not support this option.

Effects on Children

269. Absent from all these suggestions is any consideration of how the loss of a parent affects children resident in the UK, whether they are British nationals or not. The Government presumes that removing FNOs is in the public interest, but this must be carefully balanced with the best interests of children of the family, as *per* the United Nations Convention on the Rights of the Child 1989. There is also a strong public interest in children growing up with access to both their parents in a stable family unit. Deportation of a parent is akin to bereavement, but is potentially harder for the child to understand and come to terms with because the parent is alive but has been exiled by law rather than choice.[266] These children are punished and irrevocably harmed.

270. Children with parents who are appealing within the deportation process also suffer significant harm. A BID (Bail for Immigration Detainees) report found that parents reported their children developing anxiety; crying constantly; being unable to let their parent out of their sight; withdrawing from everything; suffering loss of appetite; having difficulty sleeping; having nightmares; and in one particularly serious case self-harm and attempted suicide.[267] The Consultation gives insufficient consideration to this element.

271. It is true that the ECHR prevents the UK from introducing mandatory deportation without regard to the impact of the individual concerned or their family. This is not an inherently negative legal position, however, as these cases need careful deliberation on the facts,

[266] Free Movement, 'Does the Human Rights Act prevent us deporting serious criminals?' 26 May 2015 <https://www.freemovement.org.uk/does-the-human-rights-act-prevent-us-deporting-serious-criminals/> accessed 2 March 2022.
[267] Bail for Immigration Detainees: 'Excessively cruel: detention, deportation and separated families.' June 2021, at 14.

undertaken capably by specialist judges. A law without exceptions has no safeguards, and as seen with the Windrush scandal, extensive potential for harm.

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 HRA to tackling the challenges posed by illegal and irregular migration?

272. This a self-defeating question, as there are no legally sound answers which will achieve the objective that the question presents. To frame the Convention and the HRA as impediments to tackling migration challenges is fundamentally at odds with our international obligations. There is no visa that asylum seekers can apply for which will enable them to reach the UK safely and make their claim for protection. They therefore have to get to the UK by whichever means possible, and the Refugee Convention specifically protects individuals from prosecution on these grounds.[268] The Home Secretary's plans to 'push back' asylum seekers crossing the Channel in small boats is unlawful under the Refugee Convention and in maritime law.[269] It appears the government is fully aware of this and litigation which will undoubtedly follow.

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.

[268] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 31.

[269] The Guardian, 'Priti Patel faces three legal challenges over refugee pushback plans.' (London, 25 November 2021) <https://www.theguardian.com/uk-news/2021/nov/25/priti-patel-faces-three-legal-challenges-refugee-pushback-plans> accessed 2 March 2022.

273. PALG do not consider that any legislative guidance to the courts in considering damages for unlawful violations of individuals' fundamental rights by the State bodies is justified.

274. Firstly, any such proposal is redundant, since the extent of the breach is already part of the Courts' consideration of what constitutes 'just satisfaction' when awarding damages (or not) under the HRA.[270] As observed by Lord Hoffman in *Greenfield v SSHD* [2005][271] *'…the focus of the Convention is on the protection of Human Rights and not the award of compensation*'[272] and *'the 1998 Act is not a tort statute. Its objects are different and broader'.*[273] Damages are awarded only where a non-financial remedy is insufficient to afford a victim 'just satisfaction'. As set out by Green LJ in in *DSD & Anor*,[274] the question that the courts will ask is '*whether the violation is of a type which should be reflected in a pecuniary award?*' as part of protecting human rights.[275]

275. Second, the proposed factors for consideration are either already factors considered by the Courts in conducting this exercise (e.g. the extent of the breach), or would set dangerous precedents and allow abuses of power by the State. The effect of the proposal set out in Question 26 is that victims of human rights violations would be prevented from being awarded an effective remedy, and compensation, in circumstances where the HRA is the only way they can obtain redress and restitution.

276. Simply put, consideration of the 'impact on the provision of public services' (26a), or whether public bodies were 'trying', when breaching the victim's human rights, to comply with (other) legislation (26b and 26d), amount to efforts to reduce the 'cost' to public authorities of violating individuals' rights. This would stand in clear breach of the State's obligations to secure Convention rights (Article 1 ECHR) and to ensure effective remedy for breaches of those rights (Article 13 ECHR), and by extension its obligations under the Good Friday (Belfast) Agreement and EU Withdrawal Agreements.

277. The HRA has been crucial in providing victims of unlawful acts by police and other state bodies, including our clients, with redress. Damages in such cases are almost always modest and represent a tiny cost to the State but lifechanging redress for victims. By way of example, in cases where families have lost their loved ones unlawfully at the

[270] *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 at [68].
[271] *Greenfield v Secretary of State for the Home Department* [2005] UKHL 14.
[272] *Ibid*, [9].
[273] *Ibid*, [19].
[274] *DSD & Anor v Commissioner of Police for the Metropolis* [2014] EWHC 2493 (QB) (23 July 2014).
[275] *Ibid*, [18]; *Alsersan and other v Ministry of Defence* [2018] 3 WLR 95, [912].

hands of the state in breach of Article 2 ECHR, a bereaved family member, who might not otherwise be able to recover under the Law Reform (Miscellaneous Provisions) Act 1934 or Fatal Accidents Act 1976, is usually awarded only around £10,000 for their suffering.[276]

278. In *DSD*, where the police were held liable to victims of the 'black cab' serial rapist, John Worboys, the High Court awarded DSD £20,000 in non-pecuniary damages on the basis that she suffered long-term psychiatric harm directly attributable to the police failings, and £17,000 to the other claimant, NBV, for the post-assault psychological harm arising from their failings. Green J held that damages were required because there was clear evidence that the failures caused the claimants psychological harm, noting that:

> *'The ineffective police investigation left her [DSD] with feelings of low self-worth; she carried with her the belief that the police considered her to be a liar and promiscuous or a drug addict or all these things. She questioned her own sanity. She developed negative cognitions about herself. It was only when Worboys was arrested that she felt relief and a confirmation that she had not 'made it up'. She felt responsibility for the other victims because she had not been able to persuade the police of her version of events.*'[277]

279. We reject the premise that damages could be limited with reference to the factors listed, which appears to be based on the idea that individual claims have a negative impact on public authorities and their resources. The HRA does not prevent public authorities from performing their functions, but instead seeks to ensure better and fairer practices which will have a positive effect on the community as a whole.

280. If the Government is concerned about the cost of litigation, we do not consider limiting already modest damages to be an appropriate response. As we have already set out: victims deserve remedies, successful cases ensure accountability, and deter against future wrongdoing. Indeed, if the State wishes to reduce the costs of litigation against it then the obvious way to do so would be to improve systems, training and procedures so as to reduce unlawful actions by state actors, and to own-up when things do go wrong.

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[276] *Savage v South Essex Partnership NHS Foundation Trust* [2010] EWHC 865 (QB) [96]-[97]*; Van Colle v Chief Constable of the Hertfordshire Police* [2007] EWCA Civ 325, at [127]; *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2.
[277] *DSD and another v Commissioner of Police* [2018] UKSC 11, [122].

Instead, there remains an issue with equality of arms between the state and victims of state abuses.[278]

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.**

281. PALG rejects the premise upon which this question is framed, and the reference in the Consultation to 'undeserving claimants'. In our view, this proposal undermines the universality of human rights, founded on the inherent dignity and equality of all human beings and the inalienability of their rights. Any proposal which seeks to qualify this principle sets a dangerous precedent. It would also be in flagrant breach of the UK's obligations under the Convention and its wider international and international human rights law obligations, as well as damaging the UK's international reputation.

282. At a time when states across the globe are united in opposition to Russia's unlawful invasion of the Ukraine, and the UK and others have referred atrocities in Ukraine to the International Criminal Court,[279] suggestions in the Consultation that certain individuals are somehow undeserving of redress when their human rights are breached should be considered unworthy of our national legal system and international legal order.[280] PALG does not consider that the HRA or any proposed Bill of Rights should include mention of responsibilities and/or the conduct of claimants. Nor should the remedies system be used in this respect. We strongly oppose the options contemplated.

[278] For example, in the context of inquests, Freedom of Information requests submitted to the 53 mental health NHS trusts in England, has revealed that they had spent over £4 million on legal representation at inquests in the financial year 2017/18 (of the half that responded). It is reported that just £118,000 was made available to bereaved families in legal aid. BBC File on 4: '*Families versus the state: An unfair fight?'* https://www.bbc.co.uk/programmes/m0008y55 (at 14:00), accessed 7 March 2022.
[279] 'UK leads call for ICC to investigate Russia's war crimes', <https://www.gov.uk/government/news/uk-leads-call-for-icc-to-investigate-russias-war-crimes> accessed 7 March 2022.
[280] Human Rights Act Reform: A Modern Bill of Rights, December 2021, para 126.

283. One of the most fundamental principles underpinning our judicial system is that justice should be done for all people. This principle does not derive from the HRA or ECtHR case law. It is deeply embedded in common law tradition and underpins the rule of law. In the words of Edward Pepperal QC in *Abdulrahim Mohammed* [2017]:[281]

> *'66. Some reading this judgment might well question why a foreign citizen who has so thoroughly abused the hospitality of this country by the commission of serious criminal offences is entitled to any compensation. There are, perhaps, three answers to such sceptic:*
>
> *66.1 First, there are few principles more important in a civilised society than that no one should be deprived of their liberty without lawful authority.*
>
> *66.2 Secondly, it is essential that where a person is unlawfully imprisoned by the state that an independent judiciary should hold the executive to account.*
>
> *66.3 Thirdly, justice should be done to all people […].'*

284. Second, as noted by the Consultation, the courts will already consider the wider circumstances, including the conduct of the victim, when considering remedies for breaches under the HRA, or indeed at common law. Section 8 HRA and Article 41 ECHR already ensure that courts award damages only when '*necessary*' and '*just*' in the circumstances.[282] In deciding what, if any, award is necessary, the courts take into account the '*overall context'* in which the breach of a Convention right occurred.[283] As referenced in the Consultation, in *McCann & Others v United Kingdom*,[284] which concerned IRA gunmen killed by military forces in Gibraltar, the ECtHR dismissed the claim for compensation stating that*: '…having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award under this head*'.[285]

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[281] *Mohammed v The Home Office* [2017] EWHC 2809 (QB) (8 November 2017).
[282] *Alsersan and other v Ministry of Defence* [2018] 3 WLR 95, [912], [907]; European Court of Human Rights, Practice Direction: Just Satisfaction Claims [2] <https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf> accessed 21 February 2022.
[283] *Alsersan and other v Ministry of Defence* [2018] 3 WLR 95, [914].
[284] *McCann & Others v United Kingdom,* App. No. 18984/91 (ECtHR, 27 September 1995).
[285] *Ibid,* [219].

285. In PALG's experience, the criminal justice system in the UK is a key staging ground in the realisation of the rights in the UK. For many of our clients – often from marginalised, over-policed and vulnerable communities – litigation is already a stressful and difficult experience, which often includes them having to recount traumatic memories. Although a financial remedy is often not the primary motivation for our clients, having to explain and recount their past, unrelated to the events which give rise to their claim, as well as justify why they are deserving of compensation, may result in important challenges not being brought and dangerously undermine accountability, to the detriment of us all.

286. The Government must urgently rethink these proposals.

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

287. We do not believe that any amendment to the current procedure for responding to adverse Strasbourg judgments is required.

288. First, the number of adverse judgments against the UK is very low. According to the Ministry of Justice's own figures, from 1959 to 2020, just 556 judgments were issued in UK cases, of which 322 found that the UK was in violation of the Convention. Since 2011, there have been no more than 10 judgments against the UK per year, and since 2017, no more than 5.[286] In 2020, cases against the UK accounted for just 0.29% of the ECtHR's pending caseload.[287] Indeed, as noted by a Government review in 2006,[288] and by IHRAR in 2021,[289] any decrease in applications to, and adverse findings by, the ECtHR is in large part down to the HRA.

289. Second, as set out in answer to questions 1 and 2 above regarding s.2 HRA and the obligation to '*take into account'* ECtHR case law, where the UK and Strasbourg courts

[286] Ministry of Justice, *Responding to human rights judgments*, December 2021, page 13. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038220/human-rights-judgments-response-2021.pdf.>.
[287] *Ibid.*
[288] Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, p.4, 35.
[289] The Independent Human Rights Act Review (2021), p. 45, at 52.

do disagree, a judicial dialogue often takes place and in many cases analysis by UK courts wins out, forming the basis of Strasbourg's decisions.[290] Additionally, contrary to the suggestion in the Consultation, under Article 46 ECHR, ECtHR judgments are not prescriptive, but are '*essentially declaratory'* in nature.[291] Hence IHRAR's emphasis that '*…the ECtHR does not regard itself as bound by its own previous decisions'*.[292]

290. Nor do ECtHR judgments set down *how* any breaches of the Convention should be remedied. Instead, the ECtHR recognises that a certain amount of adaptation may be necessary to give effect to decisions at the national level. A State is free to implement those decisions in accordance with its own legal system. In *Animal Defenders International v United Kingdom* [2013], the ECtHR held that the national authorities were '*best placed'* to determine what should be regarded as a *'country specific and complex assessment'* of the balance to be struck.[293]

291. The obligation under Article 46 exemplifies the subsidiary nature of the ECHR system, dictating that the '*task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the contracting states rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task'*.[294] As stated in *Handyside* [1976], '*the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights'*.[295]

292. Third, when there are adverse judgments, the remedial action required is often relatively limited. Out of the 15 adverse judgments against the UK handed down since August 2016, only 3 resulted in amendments to legislation, whilst another 2 are under consideration to see if amendments are necessary. The remaining 10 were closed with only individual, rather than general, measures being taken.[296]

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[290] Bratza (n 5) . See also Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, p.4, 35.
[291] D.J. Harris, M. O'Boyle, and C. Warbrick, Law of the European Convention of Human Rights (Butterworths London 1995), p. 26.
[292] The Independent Human Rights Act Review (2021), p. 33, at 26.
[293] *Animal Defenders International V UK*, App no. 48876/08 (ECtHR 22 April 2013), [111].
[294] Jurisconsult of the European Court of Human Rights, *Interlaken Follow-up: Principle of Subsidiarity*, 8th July 2010. <http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf> accessed 7 March 2022.
[295] *Handyside v UK, Application No. 5493/72*, [48].
[296] Ministry of Justice, *Responding to human rights judgments,* December 2017 - December 2021. <https://www.gov.uk/government/collections/human-rights-the-governments-response-to-human-rights-judgments>

293. The prisoner voting saga in *Hirst v United Kingdom (No. 2)* [2005][297] provides a clear example. Though frequently portrayed as having *required* the UK government to afford convicted prisoners the right to vote in elections,[298] in fact the Court found only that a *blanket* ban on prisoner voting breached Article 3 of Protocol No. 1 ECHR and noted the '*wide margin of appreciation'* to be granted on the issue,[299] emphasising:

> *'There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.'*[300]

294. Again, in *Greens and MT v United Kingdom* [2010], the ECtHR was emphatic in noting that whilst the UK remained under an obligation to remedy the breach in relation to prisoner voting, it would be inappropriate for the ECtHR to dictate '*the content of future legislative proposals'.*[301] The end result was that from 2018, some 13 years after *Hirst,* the UK permitted prisoners on temporary licence (i.e. not currently imprisoned) to vote. Despite this being the bare minimum the UK could do to implement the judgment, the Council of Europe welcomed the proposal and considered it an *'acceptable compromise'* to address the *Hirst (No 2)* judgment.[302]

295. Fourth, as a matter of practicality, any difficulty in the current system of responding to adverse judgments on the rare occasion they appear is wildly overstated. Though the Consultation alludes to a conflict between the Government and Parliament in the current approach, this is on the one hand illusory, and on the other hand Parliament doing its job of scrutinising the Government and legislating where required.[303]

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[297] *Hirst v United Kingdom* (No.2), App No. 74025/01 (ECtHR, 6 October 2005).
[298] W. Steavenson, '*Jonathan Sumption: The Brain of Britain*', The Guardian (London, 6 August 2015) <https://www.theguardian.com/law/2015/aug/06/jonathan-sumption-brain-of-britain> accessed 7 March 2022.
[299] *Hirst v United Kingdom* (No.2), App No. 74025/01 (ECtHR, 6 October 2005), [41].
[300] *Ibid*, [61].
[301] *Greens and MT v UK*, App. Nos. 60041/08 and 60054/08, (ECtHR 23 November 2010), [115].
[302] Prisoners' voting rights: developments since May 2015, 19th November 2020, House of Commons Library. <https://commonslibrary.parliament.uk/research-briefings/cbp-7461/> accessed 7 March 2022. See also the recent example of *Unuane v UK,* App *No. 80343/17* (ECtHR 24 February 2021).
[303] '[the HRA and judicial dialogue with the ECtHR]…*accounts for the significant reduction in a number of adverse decisions against the UK Government by the European Court of Human Rights since the Human Rights Act came into effect*'. Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006), p.3 – 4 as cited in Roger Masterman, *Supreme, Submissive or Symbiotic? United Kingdom Courts and the European Court Of Human Rights,* October 2015, The Constitution Unit, University College London.

Proposed Clause on Parliament's Consideration of Strasbourg Judgments

296. Although the proposed clause at Appendix 2 is couched as a defence of Parliamentary Sovereignty, in reality, it is an unnecessary attack on it. The recitation of Parliamentary Sovereignty at s.1 of the proposed clause is redundant since: (i) as set out in answer to Question 2 above, UK courts are not bound by ECtHR decisions; and (ii) the present system does nothing to undermine Parliamentary Sovereignty. If the Government does not bring necessary remedial action in response to an issue, can take whatever action carries support. As a practical matter, Parliament legislating to say that Parliament is sovereign is patently gratuitous.

297. The proposed defence of Parliamentary Sovereignty is also disingenuous, as it provides that that Ministers '*may*' table a motion in the House to remedy the adjudged breach of the Convention.

298. Finally, the proposed 'notification period' for the Government to alert the House to an adverse judgment is unaffected by whether Parliament is, in fact, sitting and able to take back the reins which the Consultation purports they are presently being deprived.

No Change Needed

299. In this background, it is clear that no change to the system for responding to adverse Strasbourg judgments is necessary, or desirable. Any change would not alter the UK's obligations as a signatory to the ECHR, including under Article 46 and Article 13 (right to remedy), nor the financial and reputational damage of failing to comply with its international obligations, or of upholding fundamental rights which it itself helped shape. It would merely prolong the period in which rights violations continue – and thereby result in further human rights abuses.

Question 29: Potential Impacts of the Proposed Bill of Rights

300. Please see conclusion below.

Conclusion

301. The Bill of Rights proposed in the Consultation would be the first Bill of Rights to *diminish* rather than to *enhance* people's fundamental rights.

302. The majority of the proposed changes to the human rights framework in the UK and to the HRA are simply unnecessary. They ignore the effective operation of the HRA, which is an instrument that has functioned remarkably well since its commencement. The proposals would undermine fundamental tenets of our constitutional arrangements, and in litigation to address human rights abuses, would stack the deck in favour of the Government.

303. Some of the proposed changes are quite simply offensive to the UK's '*tradition of upholding human rights*' vaunted by the Consultation.[304] These are, most notably, the proposals: to adopt an isolationist and literalist interpretation of Convention rights set in the 1950s (proposed changes to s.2); to create additional procedural hurdles in the way of individuals' accessing their rights (proposed 'permission stage'); and to reduce the remedies available to those whose fundamental human rights have been unlawfully violated by the State (proposed efforts to reduce the positive obligations on public bodies, to redefine those bodies obliged to uphold Convention rights, and to insert a '*good behaviour'* test before victims can gain effective remedy).

304. A significant number of the proposed changes appear to be in direct contravention of the UK's obligations to secure Convention rights in the UK (Article 1 ECHR), to ensure an effective remedy for breaches of Convention rights (Article 13 ECHR), and to abide by judgments of the ECtHR (Article 46 ECHR). By extension they violate obligations under the Good Friday and EU Withdrawal Agreements to uphold and protect Convention rights.

305. The ECHR is a laudable and effective instrument for protecting human rights. Cases enforcing Convention rights in the UK have secured fundamental freedoms and held the State to account when it does wrong. The Convention has: held the British army to account for inhuman and degrading treatment (forcing detainees to remain in stress positions, hooding, subjection to noise, sleep deprivation and withholding food and

[304] Foreword to 'Human Rights Act Reform: A Modern Bill of Rights' (2021), at p3.

drink);[305] defended freedom of expression;[306] led to the decriminalisation of homosexuality in the UK (and other ECHR jurisdictions) and paved the way for equality on grounds of sexual orientation;[307] upheld the rights of transgender persons;[308] prevented the use of illegal strip and intimate searches on families visiting their relatives in prison;[309] protected individuals from illegal mass surveillance;[310] and protected victims of abuses of police power.[311]

306. Since its inception the HRA has, as acknowledged by the Consultation, significantly improved access to these rights in the UK. It is a considered and effective instrument, balancing international human rights obligations with Parliamentary Sovereignty.

307. In comparison, the proposals contained in this Consultation would undermine fundamental freedoms and seriously impact the ability of marginalised and vulnerable groups to access their human rights in this country. These rights and freedoms are fundamental: not only for individual human beings but also for the UK's reputation on the world stage. They would mark a drastic regression from the UK's '*tradition of human rights leadership*',[312] and turn the UK towards the company of countries whose commitment to the ECHR, and to human rights, is in name only.

308. The HRA was enacted for '***practical*** *and* ***principled*** *reason*s'.[313] By contrast, the proposed changes are **impractical** and **unprincipled**. The Government must think again.

[305] *Ireland v UK*, App. No. 5310/71 (ECtHR, 18 January 1978).
[306] *Sunday Times v UK*, App. no. 6538/74 (ECtHR, 26 April 1979).
[307] *Dudgeon v UK,* App *no. 7525/76* (ECtHR, 10 October 1980) and *B.B. v UK,* App no. 53760/00 (ECtHR, 10 February 2004).
[308] *Grant v UK*, App. no. 32570/03 (ECtHR, 23 May 2006).
[309] *Wainwright v UK*, App no. 12350/04 (ECtHR 26 September 2006).
[310] *Big Brother Watch & ors v UK,* App Nos. 58170/13, 62322/14, 24960/15, (ECtHR, Grand Chamber, 25 May 2021).
[311] *Catt v UK*, App. no. 43514/15 (ECtHR, 24 January 2019).
[312] Human Rights Act Reform: A Modern Bill of Rights, December 2021, Foreword, at page 3.
[313] The Independent Human Rights Act Review (2021), p. 8, para 22 (emphasis original).