ILPA's Response to the Ministry of Justice's 'Human Rights Act Reform: A Modern Bill of Rights' consultation to reform the Human Rights Act 1998

Background

The Immigration Law Practitioners' Association ('ILPA') is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

Introduction

This is a response to the Ministry of Justice's consultation, running from 14 December 2021 to 8 March 2022.

We do not support any of the proposed changes to the Human Rights Act 1998, or the creation of a new UK 'Bill of Rights'. We urge the Government to abandon these plans.

At the outset, we must express that we consider this consultation exercise to lack a reasoned foundation and an evidential basis to support the need for the proposed changes. The Human Rights Act 1998 ('HRA') is an important constitutional document that provides individuals with the ability to enforce their rights and challenge unlawful policies. We cannot see a need for a new Bill of Rights to replace it. The 123-page consultation paper fails to justify why the Government has ignored or rejected recommendations of the Independent Human Rights Act Review Panel ('IHRAR'), which produced a thorough 580-page report after careful consideration.[1] ILPA provided feedback to the IHRAR's call for evidence, but this consultation goes beyond the questions addressed by the IHRAR.[2]

[1] The Independent Human Rights Act Review (CP 586, 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf> accessed 7 March 2022 (hereinafter 'IHRAR').

[2] ILPA, *ILPA's response to the Independent Human Rights Act Review (IHRAR)* (3 March 2021) <https://ilpa.org.uk/wp-content/uploads/2021/03/2021-03-03-ILPA-response-to-IHRAR.pdf> accessed 3 March 2022.

We cannot support the weakening or watering down of human rights. We cannot support the impediments the Government wishes to place on access to justice. With a Government that wishes to contract out duties to private bodies to carry out public functions, and to extensively use secondary legislation, we cannot support proposals that would reduce accountability.

We believe that the Government should focus its energies on protecting existing rights within the HRA, furthering the culture of respect for human rights, and educating the public to ensure there is understanding and ownership of these rights. For example, Article 8 is not only an important right in our sphere of the law, but it is also an important right for every British citizen in ensuring that public bodies and others respect their privacy. British citizens would be impacted if these consultation proposals became law, but these proposals would affect to a greater degree certain targeted groups of vulnerable individuals, who our members represent, and their British children and partners.

Notwithstanding that we have provided responses to all the questions posed, please note that the length of response to any specific question should not be taken as support by ILPA for any of the proposals.

Lack of Meaningful Consultation

Publication of Responses

The Ministry of Justice has stated that a 'paper summarising the responses to this consultation will be published in due course. The response paper will be available on-line at https://consult.justice.gov.uk/.'[3]

This proposed publication of responses is contrary to the Government's 2018 Consultation Principles:

> ***'I. Consultation should facilitate scrutiny***
>
> *Publish any response on the same page on gov.uk as the original consultation, and ensure it is clear when the government has responded to the consultation. Explain the responses that have been received from consultees and how these have informed the policy. State how many responses have been received."*[4]

[3] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights - consultation document* (CP 588, 2021) 116 <https://consult.justice.gov.uk/human-rights/human-rights-act-reform/supporting_documents/humanrightsreformconsultation.pdf> accessed 3 March 2022 (hereinafter 'Consultation Paper').

[4] Cabinet Office, 'Consultation Principles' (19 March 2018) <https://www.gov.uk/government/publications/consultation-principles-guidance> accessed 27 January 2022.

It is not clear that each response will be published on the consultation website and thus inform scrutiny of this process. We expect to see the publication of all responses, an explanation of how these have informed the policy, and confirmation of the number of responses received. A paper merely summarising the responses is insufficient.

In particular, it should be explained how the responses that have been 'received and considered'[5] have impacted the legislative proposals you intend to put forward to Parliament.

A similar exercise was conducted by the IHRAR, which acknowledged that the 'vast majority of submissions received by IHRAR spoke strongly in support of the HRA. They pointed to its impact in improving public administration for individuals, through developing a human rights culture. Thus, the HRA was not, or not just, to be viewed through the prism of a few high-profile cases or indeed with a focus on litigation at all.'[6]

The Report that culminated from that review does not support the proposals from the Government.

Further Breaches of Consultation Principles

The Consultation additionally has breached the Government's 2018 Consultation Principles A, D and G. It is not 'clear and concise' or in 'plain English'. The questions are not 'easy to understand'. The only process of engagement offered publicly is to respond via the consultation document or the survey, with which, as set out above, it is difficult to engage. We are concerned that many are alienated by these factors, although 'Consultations should take account of the groups that are being consulted'.

We joined Liberty and a coalition of disability and human rights groups alongside opposition parties in calling on the Government to extend the deadline due to their failure to provide accessible materials in order to enable people to engage with the process.[7] On 24 February 2022, very near to the end of the consultation period, the Ministry of Justice published a 'word-only Easy Read accessible version' of the consultation document, which is itself insufficient, and did not provide an audio version.[8] On 7 March

[5] Consultation Paper [12].
[6] IHRAR, page 16, para 46.
[7] Liberty, 'Disabled people excluded from human rights review, MPs and campaigners warn' (1 March 2022) <https://www.libertyhumanrights.org.uk/issue/disabled-people-excluded-from-human-rights-review-mps-andcampaigners-warn/> accessed 3 March 2022.
[8] A note on the consultation webpage from 24 February 2022 states, 'We are publishing a word-only Easy Read accessible version for those who need a version to respond to the consultation. We apologise that it is a text-only version and are working with suppliers to update this'. <https://www.gov.uk/government/consultations/human-rights-act-reform-amodern-bill-of-rights> accessed 3 March 2022.

2022, the day before the deadline for responding, the Ministry of Justice published an Easy Read version and audio version, extending the deadline until 19 April for those who would be assisted by these versions. Whilst we welcome the provision of accessible versions and corresponding extension to the deadline, we are disappointed that the extension only provides six weeks for those who need an Easy Read or audio version to respond, whereas the Ministry of Justice had considered 12 weeks the suitable length for this consultation period, and we must register our objection to the failure to publish accessible versions at the outset.

The Foundation for this Consultation

We would query the foundation for this consultation, as the Government has failed to make a clear case for reforming the Human Rights Act 1998:

- The consultation does not reflect the expert recommendations of the IHRAR;
- The evidence upon which the consultation relies is inadequate;
- The consultation does not adequately consider the current approach of the courts, and refers to outdated case law, such as Article 8 in deportation cases prior to the Immigration Act 2014, or prior rather than current jurisprudence in respect of section 3 of the Human Rights Act 1998;
- Despite wishing to retain its international obligations under the ECHR, the consultation fails to consider whether the proposals would be compatible with that Convention, and whether they would displace consideration of rights to the European Court of Human Right;
- The consultation fails to adequately consider how its proposals would affect the devolved administrations (in relation to which there is only one question).

The Human Rights Act reform, and these proposals for a "Modern Bill of Rights", must be seen in the context of the other Bills passing through Parliament, and the wider proposals of this Government to fundamentally alter the relationship of citizens and residents to the State in this democracy:

- Mandatory voter identification in the Elections Bill;
- Criminalising protestors in the Police, Crime, Sentencing and Courts Bill;
- Criminalising persons seeking asylum and those who help them to safety in the Nationality and Borders Bill;
- Tying the hands of judges in the Judicial Review and Courts Bill;
- Ousting the jurisdiction of higher courts in immigration, asylum and nationality law in both the Judicial Review and Courts Bill and the Nationality and Borders Bill; and
- Stripping citizens of their citizenship in secret in the Nationality and Borders Bill.

The European Court of Human Rights has developed some rights, progressively, but cautiously, looking for consensus across different states.

If the public do not trust the Human Rights Act 1998, it is because they do not know or understand the rights that they have. This is due to lack of education and information, or misinformation.

There are a significant number of examples where the HRA has been used to successfully protect the universality of rights, not just for migrants, refugees, or those deemed by this Government as 'unworthy' of rights.

The rights contained within the HRA are crucial to protect vulnerable groups, tackle violence against women, for which the Government has made a firm commitment,[9] and to ensure the rights of British citizen children are protected.

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

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

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

The proposed draft clauses reveal that the true intention of the Government is to weaken the link between the European Court of Human Rights (ECtHR) and the UK.

There is no justification for this change. The HRA preserves the independence of domestic courts, which must only take into account, but are not bound by, decisions of the ECtHR under section 2 HRA even if there is a clear and constant line of decisions by the ECtHR. Our courts have shown a flexible approach to Strasbourg's case law. They do not treat themselves as bound by it when there are reasons for a differing approach, such as if '(i) it is inconsistent with some fundamental substantive or procedural aspect of our law or (ii) its reasoning appears to overlook or misunderstand some argument or point of principle'.[10] They have not ceded authority over domestic law to the ECtHR. In fact, the Supreme Court has considered that to follow every decision of the ECtHR would destroy the Court's ability to engage in a constructive dialogue on the ECHR's development.[11]

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[9] HM Government, Tackling Violence against Women and Girls (July 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005630/Tackling_Violence_Against_Women_and_Girls_Strategy-July_2021-FINAL.pdf> accessed 15 February 2022.

[10] *R v Abdurahman* [2019] EWCA Crim 2239 [110].

[11] *Pinnock v Manchester City Council* [2010] UKSC 45 [48].

It has taken considerable time for our courts to develop a nuanced and settled approach to section 2. To alter the approach in a new Bill of Rights would be to undermine that achievement, and to create uncertainty at a constitutional level for years to come and until the Supreme Court establishes the meaning and application of the new proposals.

Furthermore, neither of the options proposed are the more modest suggestion of the IHRAR to require domestic courts to take into account domestic legislation and case law, before taking into account Strasbourg jurisprudence:

- **Option 1** would decouple the rights in the new Bill of Rights from the ECHR by allowing the rights to carry different meanings.
- **Option 2** provides that the Supreme Court has ultimate responsibility for interpreting rights under the new Bill of Rights, and requires domestic courts to have particular regard to the text of the right, and may have regard to the *travaux préparatoires* of the Convention, which will allow diverging interpretations of rights.

These options proposed by the consultation paper to amend section 2 of the HRA would represent a radical change to the current position and would lead to increased uncertainty and increased litigation, including to the ECtHR. This would defeat the purpose of the HRA, which was to bring Convention rights home, to ensure that persons could seek redress before domestic courts who could adjudicate on human rights, in the vast majority of cases avoiding the time and costs of applying to the ECtHR.

The HRA not only provided a new cause of action but also provided for the interpretation of domestic legislation and the common law in accordance with convention rights (section 7 HRA). Parliament provided the means by which domestic law could be aligned with Convention law, where our courts considered this necessary, and where it was in keeping with the protection of rights in the UK.

To decouple domestic rights from Convention rights would undermine the purpose of the HRA. The proposals would result in the UK becoming out of step with the protection of other members of the Council of Europe.

Unlike the HRA, the proposed British Bill of Rights would no longer be premised on providing a domestic remedy for breach of Convention rights, and would no longer seek to align domestic law with Convention law. However, the UK intends to remain a member of the European Convention on Human Rights, and thus individuals would retain their right of petition. If they could not obtain a domestic remedy for breach of their Convention rights, they could apply to Strasbourg. Those who could not afford the cost of taking a case to Strasbourg to seek a remedy would be denied access to justice. We cannot support any threat to access to justice. We do not support amendment of section 2 HRA.

In relation to Option 2, the travaux préparatoires of the ECHR are vague and such an originalist approach is unlikely to be of assistance to a "Modern" Bill of Rights.

In relation to Option 1, including in primary legislation consideration of any law outside the UK, which will include sources of law other than Strasbourg jurisprudence, would lead to several issues:

- Drawing on interpretations of rights outside of the ECtHR and the UK to interpret and apply rights in the UK may be problematic due to the lack of consistency on the meaning and content of rights in other jurisdictions with different legal systems, cultures, economies and public interests.
- For legal certainty, the Supreme Court will have a slow and difficult task of developing the hierarchy of sources of law through case law.
- Rather than result in clarity and certainty, cases and litigation will be lengthier with more cases and complex arguments regarding the relevance and reasons for relying on certain sources.
- Reliance by domestic courts on foreign jurisprudence may be problematic if that foreign jurisprudence is developed or overturned. It will be unclear whether our courts should still rely on it.

While our courts currently consider and take into account decisions from other jurisdictions where domestic law is uncertain, it is not common, particularly in the lower courts. It tends to be at the level of the Supreme Court that foreign case law is drawn upon. However, the proposals are not restricted to the Supreme Court.

Proposals that our courts be bound to follow case law prior to the HRA coming into force causes further uncertainty as to the status of post-HRA case law. If matters must be litigated under a new Bill of Rights, this litigation would be a waste of judicial resources and create uncertainty for individuals, public bodies, and practitioners. Individuals are likely to challenge apparent conflicts between UK law and the ECHR to Strasbourg. These proposals do not advance the objective of increasing legal certainty, but are likely to increase litigation.

The proposals would not strengthen the UK's ability to have control over the content and the development of rights domestically, and have the potential to have the opposite effect. They would undermine the dialogue and ability of the domestic court to influence the development of rights at the Strasbourg level, where the UK Government can intervene in cases, and a UK judge can sit on the ECtHR.

The position of the Supreme Court

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

There is no need for change. The UK Supreme Court is *already* the "ultimate judicial arbiter" of our laws. Section 2 of the HRA ensures this. Domestic authorities are only required to "take into account" Strasbourg case law when making determinations in human rights cases.

It is sensible for the Supreme Court to consider how Strasbourg has decided matters, as it is the ultimate interpretive authority of the ECHR. It is plainly useful to consider relevant jurisprudence where Convention rights have been considered, where they exist and may assist the courts. However, we must stress that domestic courts, including the Supreme Court, are not bound by its view.

The consultation paper refers to the *Ullah* mirror principle. Whilst in the early years of the HRA, national courts may have only departed in certain narrow circumstances from Strasbourg case law, such as when there was some crucial misunderstanding of domestic matters, or its application would interfere with some fundamental aspect of our law, this is no longer the case.

The Supreme Court has departed from Strasbourg case law when its application would lead to negative or absurd consequences, or when it considers a Strasbourg decision is wrong, such as on:

- The use of hearsay evidence on the fairness of criminal trials, in which the Supreme Court considered Strasbourg had not sufficiently appreciated or accommodated particular aspects of the UK trial process in *R v Horncastle* [2009] UKSC 14;

- The ability of the UK government to extradite criminals to face a life sentence in the USA, in which the High Court considered that the Strasbourg ruling was out of step with previous decisions, and would make it more difficult to bring criminals to justice in *R* (*Harkins) v Home Department* [2014] EWHC 3609 (Admin) [120]: 'We are obliged by the terms of section 2(1) of the HRA to take account of that decision. But we are not obliged to follow it.' A similar decision was made in *Hafeez v Government of the United States of America* [2020] EWHC 155 (Admin) at [57]: the High Court considered the Strasbourg case of *Trabelsi v Belgium* (2015) 60 EHRR 21 to be 'without any or any proper reasoning' and the judges found they 'prefer the rationale as set out in *Harkins v UK'*;

- The interpretation of a right to a fair trial in Article 6, adopted by Strasbourg in *Ali v United Kingdom* (2016) 63 EHRR 20 in relation to the definition of a 'civil right' in the context of homelessness in *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36. The Supreme Court found 'this is a case in which, without disrespect to the Chamber, we should not regard its decision as a sufficient reason to depart from the fully considered and unanimous conclusion' of its own decision in *Ali v Birmingham City Council* [2010] 2 AC 39;

- The right, of an individual suspected of a terrorism offence, to a lawyer, in *R v Abdurahman* [2019] EWCA Crim 2239 in which the Criminal Division of the Court of Appeal chose not to follow a Strasbourg decision: 'In reaching our view on those issues, we have paid close attention to the conclusions reached by the Grand Chamber. We are not, however, bound to accept those conclusions' at [114].

Each of these cases exemplifies that domestic courts can, and do, depart from Strasbourg authority.

Despite its phrasing, it is clear that the true target of this question is whether the Bill should clarify 'in statute matters that fall outside the institutional competence of UK courts'.[12] We share the view of the IHRAR that the domestic courts are guided by judicial deference and restraint on matters falling within the margin of appreciation, including social and economic policy, and respect the institutional roles of parliament and the executive.[13]

Accordingly, no codification or change in the role of the Supreme Court is required.

Trial by Jury

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

The proposals appear to suggest that it 'could apply insofar as trial by jury is prescribed by law in each jurisdiction'.[14] If the right is intended to provide no additional protection to existing law, it will be purely decorative and merely replicate existing criminal procedure and practice. The consultation paper has not adequately explained how the HRA infringes upon this right and why it must be reformed on this basis.

We do not understand what the Government means by introducing it as a 'qualified right', and are wary that the proposal may weaken rather than strengthen this right. We are of the view that the Government must engage in dialogue with the relevant jurisdictions in the UK in the development of the right. We would encourage the Government to consider and address the threats currently facing the right to trial by jury.

Freedom of Expression

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

We do not consider the current level of protection for publication under section 12 of the HRA to be in need of reform.

We have not seen evidence to support the Government's proposal that the threshold for restraining publication before trial in section 12(3) should be elevated, as the test for an interim injunction is sufficiently high in asking whether a person is likely to succeed at trial. Raising the test would make it more difficult to secure an interim order even where the consequences of failing to secure one, such as breach of confidentiality of privacy, may be serious.

[12] Consultation Paper page 60, para 201.
[13] IHRAR page 120, para 33.
[14] Consultation Paper page 61, para 203.

The consultation fails to provide any evidence that section 12(4), which requires courts to have particular regard to the freedom of expression, has 'not had any real effect', and it ignores recent evidence to the contrary.[15] We reject any underlying assertion that Article 10 should be given priority over Article 8 in every case. Where the two are in conflict, the courts are well-placed and well-equipped to conduct a careful balancing exercise focusing on specific rights of each party.

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?

We do not consider that the courts need clearer guidance about the importance of Article 10 ECHR, as its important role in our democratic society is well-established in the jurisprudence of our courts,[16] but it is not a 'trump card'. Therefore, we are concerned by the 'utmost importance' rhetoric in the Government's proposals.

We object to any attempt by the Government to intervene by altering the weight to be attached in this careful balancing exercise in legislation.

Furthermore, we are concerned by the scope of interference by the Government with Article 10, as the consultation paper argues that the courts should give 'great weight' to the public interest and exercise of public function as expressed by Parliament.[17] While neither Article 8 nor Article 10 is a trump card, we are wary of any attempt to render 'public interest' a trump card for interference.

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

As argued above, there has been no evidence to suggest the HRA is failing to protect the sources of journalists, and thus no justification for its reform. The ECtHR has upheld the protection of journalists in multiple cases.[18]

Article 10 ECHR works in conjunction with section 10 of the Contempt of Court Act 1981, section 9 of the Police and Criminal Evidence Act 1984, and various provisions of the Investigatory Powers Act 2016 to protect journalists' sources. These together offer robust protection under the ECHR and domestic law.

[15] *Griffiths v Tickle* [2021] EWCA Civ 1882; *Bloomberg v ZXC* [2022] UKSC 5.
[16] *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33; *Reynolds v Times Newspapers Ltd* [1999] UKHL 45; *R (On the Application Of Miller) v The College of Policing & Anor* [2020] EWHC 225.
[17] Consultation Paper, page 63, para 216.
[18] *Goodwin v the United Kingdom* (Application no. 17488/90); *Financial Times Ltd & others v the United Kingdom* (Application No. 821/03).

The consultation has not provided evidence that this framework is failing to protect journalists' sources. If there is indeed a legitimate evidenced-backed concern, we would argue that relevant improvements should be made to targeted pieces of domestic legislation rather than by altering the language of Article 10 ECHR in any new Bill of Rights.

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

In summary of our answers above, we do not believe that the Government needs to take further steps to protect freedom of expression, and our view is that no compelling case for doing so has been made. We simply do not support an alteration of Article 10 ECHR within our human rights framework.

In fact, we are concerned that other legislation pushed forward by the Government, such as The Police, Crime, Sentencing and Courts Bill which seeks to expand police powers to impose noise-based restrictions on the right to protest, will actually reduce freedom of expression.

II. Restoring a sharper focus on protecting fundamental rights

A permission stage for human rights claims

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

We do not consider the implementation of 'significant disadvantage' to bring a human rights claim would be an effective suggestion to screen 'genuineness', and strongly oppose it and the introduction of any 'permission stage'.

We oppose the foundation of Question 8, and the reference by the Government to 'genuine human rights matters'.

The consultation proposes to erect a false dichotomy between 'genuine' and non-genuine human rights matters. We are concerned that this will indicate to public authorities that less severe human rights violations can be tolerated. We are firmly of the view that any human rights violation is worthy of a cause of action and is a 'genuine' human rights matter. The test should not be how much harm is caused, but whether harm is caused. Therefore, we reject the suggestion that 'significant disadvantage' must have been suffered.

We are also concerned that 'significant disadvantage' is not defined in this consultation, and would be the subject of litigation as to its definition. Depending on how the test is interpreted by the courts, it

could result in a higher rejection of human rights claims, where there have in fact been breaches. Furthermore, no justification for this uniquely high threshold has been provided.

The consultation fails to explain how such a mechanism would work in practice. We are deeply concerned that it will inhibit access to justice and the pursuit of 'genuine' claims, by placing an onerous barrier between claimants and their ability to enforce their rights. Many claimants, for whom there is already an asymmetry of power against the State, will be disadvantaged by bearing the burden of proving this higher threshold is met. The procedural barrier will make it more difficult and more time consuming for them to access justice. This could result in potential breaches of Article 13 ECHR.

In immigration and asylum law, there is already a permission stage for an appeal to the Upper Tribunal. To erect a permission stage for an appeal to the First-tier Tribunal would be to create a significant procedural barrier on the resources of the court and parties, which will result in inefficiency and delay.

Our domestic courts have already developed robust mechanisms for ensuring that spurious claims do not proceed. There is a mandatory permission stage for judicial review proceedings to filter out trivial or unmeritorious judicial review claims, and this proposal would further complicate the Pre-Action Protocol for Judicial Review. For human rights claims, there is a victimhood test for standing, as required by Article 34 ECHR, incorporated by section 7(1) of the HRA. Requiring a person to be a victim of an unlawful act is already much higher than the test for standing in judicial review of a 'sufficient interest' in the matter.[19]

This proposal may result in the opposite of bringing rights home. Litigants who could not satisfy the stringent 'significant disadvantage' test, and could not seek redress in the UK, could apply to the ECtHR in Strasbourg to hear their claim. Strasbourg could then decide these cases, without any perspective from domestic courts.

If claimants were prevented from bringing a claim in Strasbourg, due to the associated costs, access to justice would be denied if their claim failed at a permission stage when it could succeed in Strasbourg.

Insofar as this is an attempt to mirror the admissibility criteria in Article 35 ECHR, it is misplaced. First, there is no comparison between the role of the ECtHR and the Administrative Court. The ECtHR is of a fundamentally different character in that it conducts a supranational review of a limited number of decisions by courts of contracting states, and has a different role to that of national courts that decide human rights cases in the first instance. Second, the ECtHR does not apply this stringent threshold to Articles 2, 3 and 5 of the ECHR.[20]

We strongly oppose any proposal to include a permission stage in a human rights claim.

[19] Senior Courts Act 1981, section 31.

[20] *Makuchyan v Azerbaijan* (Application no. 17247/13); *Y v Latvia* (Application No 27853/09), *Zelcs v Latvia* (Appliction no. 65367/16).

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.

Furthermore, we oppose the introduction of the test of 'overriding public importance' for 'exceptional cases' that fail to meet the 'significant disadvantage' threshold. The test should be whether there is a breach of rights, even of an individual or minority, even where there is no wider public impact.

For the same reasons as provided in relation to Question 8, we consider that this proposal would be a serious barrier to access to justice.

Judicial Remedies: section 8 of the Human Rights Act

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

As with Question 8, we oppose the foundation of this question. The reference to 'genuine' human rights abuses relies on a preconception that some abuses are unworthy of court time. However, the Government has not provided any examples of a successful human rights claim in which a person's breach of human rights was too trivial to have been litigated.

We are concerned that this false dichotomy is likely to result in a hierarchy of abuses, with those of a certain gender, race, minority group, or with other characteristics, deemed not genuine or unworthy. The Nationality and Borders Bill has already shown the ways in which the Government deem certain persons seeking asylum to be unworthy of landing on British soil, unworthy of having their claims processed in the UK, and unworthy of appeal to the higher courts. Throughout the passage of that Bill in Parliament, the Government has referred to its commitments under the HRA; however, how can the HRA prevent human rights abuses if it is to be weakened and reformed?

We strongly oppose the Government's proposal to 'strengthen the rule in section 8(3) of the Human Rights Act requiring other claims to be considered when awarding damages' and 'require applicants to pursue any other claims they may have first, either so that rights-based claims would not generally be available where other claims can be made, or in advance of any rights argument being considered'[21] on the basis that '[h]uman rights should not be misused to provide a fall-back route to compensation on top of other private law remedies'.[22] Section 8(3) already ensures that damages under the HRA are only awarded where 'the court is satisfied that the award is necessary to afford just satisfaction', taking into account 'any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court)'.[23]

[21] Consultation Paper, page 66, para 226.
[22] ibid, para 225.
[23] Human Rights Act, section 8(3).

If the Government's true aim is to reduce the number of human rights claims brought, the best way for the Government to tackle this issue is by ensuring that public bodies comply with their legal obligations. For example, there is ample evidence that points towards a long-standing culture of disbelief in Home Office decision-making.[24] The Government must engender a culture of 'belief' and consideration of the 'face behind the case', educating caseworkers of human rights, to improve decision making and ensure that its decisions do not violate or propose to violate or disproportionately interfere with the human rights of individuals.

However, not only is there disbelief, there are incorrect decisions, and there must be legal redress.

For example, 48% of appeals against the Home Office's decisions to the First-tier Tribunal (Immigration and Asylum Chamber) are successful.[25] 32% of judicial reviews are settled or decided in favour of claimants.[26] Moreover, the appeal success rate has been steadily increasing over the last decade (up from 29% in 2010).[27] If there were better decision making, there would be fewer appeals and judicial reviews.

The Government could also focus on access to justice to ensure that relevant human rights abuses were challenged in the courts in an early and prepared manner to provide for greater efficiency. On numerous occasions, ILPA has commented to the Ministry of Justice on the ways in which the lack of legal aid advice, and inadequacy of the legal aid fee regime, impede access to justice. Most recently, we responded to the Ministry of Justice Call for Evidence on Immigration Legal Aid Fees and the Online System 2 December 2021.[28] The sparsity of practitioners specialising in immigration and asylum law, resulting in 'droughts and deserts' in legal aid provision, has been well documented.[29] Those without the

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[24] Wendy Williams, 'Windrush Lessons Learned Review' (March 2020) <https://www.gov.uk/government/publications/windrush-lessons-learned-review> accessed 11 February 2022.

[25] Ministry of Justice, 'Tribunal Statistics Quarterly: July to September 2021', Table FIA_3 First-tier Tribunal (Immigration and Asylum Chamber) Number of appeals determined at hearing or on paper (9 December 2021) <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021> accessed 11 February 2022.

[26] Summary of Government Submissions to the Independent Review of Administrative Law at [57] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976219/summary-of-government-submissions-to-the-IRAL.pdf> accessed 11 February 2022.

[27] Refugee Council, 'Top facts from the latest statistics on refugees and people seeking asylum' <https://www.refugeecouncil.org.uk/information/refugee-asylum-facts/top-10-facts-about-refugees-and-people-seeking-asylum/> accessed 11 February 2022.

[28] ILPA, 'ILPA's Response to the Ministry of Justice's Call for Evidence on Immigration Legal Aid Fees and the Online System' (2 December 2021) <https://ilpa.org.uk/ilpas-response-to-moj-call-for-evidence-immigration-legal-aid-fees-and-the-online-system-2-december-2021/> accessed 7 March 2021.

[29] Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) <https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf> (accessed 27 November 2021); J. Wilding, M. Mguni, T. Van Isacker, *A Huge Gulf: Demand and Supply for Immigration Legal Advice in London* (2021) <https://www.phf.org.uk/publications/a-huge-gulf-demand-and-supply-forimmigration-legal-advice-in-london/> (accessed 27 November 2021).

financial means to pay for private legal advice are likely to be unable to enforce their rights, or challenge what the Government would call 'genuine human rights abuses' in court. If the Government truly wishes to facilitate access to justice for human rights litigation, it should consider reform of the legal aid system to ensure equality of access. Furthermore, those whose claim is unmeritorious will be advised of this by their legal representative, but this can only occur if they have access to that legal advice. We firmly maintain our position that the best way to ensure an efficient system is through facilitating high quality preparation and representation, which must be adequately remunerated, from the outset.

Positive obligations

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

The obligations on public bodies to take positive steps to protect rights is an established and important part of the protection of rights under the ECHR. There are a large number of contexts in which positive obligations have been important, such as appropriate detention conditions for children,[30] failures to investigate violence against women and girls,[31] and protecting victims of modern slavery[32].

The IHRAR recognised that a 'practical consequence of giving effect to Convention rights in UK law was anticipated to be the creation, and then further development of, a 'rights culture' within the UK (and particularly the Executive); one which was explicitly based on the introduction of positive rights that went beyond the traditional negative rights/civil liberties'.[33]

At paragraph 150, the Consultation Paper states:

> *'The expansion of human rights law by courts, imposing overly prescriptive 'positive obligations' police forces, and other frontline public services across the UK, risk skewing operational priorities and requiring public services to allocate scarce resources to contest and mitigate legal liability – when public money would be better spent on protecting the public. We take a principled view that decisions on the allocation of resources should be determined by elected law-makers, and by operational professionals in possession of the full facts, and who are answerable to the public.'*

[30] *R (On the Application of the Howard League for Penal Reform) v The Secretary of State for the Home Department v Department of Health* [2002] EWHC 2497 (Admin).
[31] *DSD and NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436.
[32] *VCL and AN v UK* (Applications nos. 77587/12 and 74603/12).
[33] IHRAR page 9, para 23, citing J. Straw MP, HC Deb, 16 February 1998, vol 307, col 769 in J. Cooper & A. Marshall-Williams at 3, 'Nothing in this Bill will take away the freedoms that our citizens already enjoy. However, those freedoms alone are not enough: they need to be complemented by positive rights that individuals can assert when they believe that they have been treated unfairly by the state, or that the state and its institutions have failed to properly protect them.'

At paragraphs 143 and 144 the Paper refers to the failure of claims in negligence against the police where the UK courts found that no duty of care was owed in negligence. They contrast this with the decision of Strasbourg that a positive duty to protect under Article 2 is owed by the police. However, Strasbourg found that the UK failed to provide a domestic remedy. This left two options: extension of the law of negligence, or extension of a duty under the HRA. Domestic courts preferred the latter, restricting any duties to be owed under the HRA, putting in place a threshold of 'real and immediate risk', which is higher than 'reasonable foreseeability' in tort law. This was upheld by the House of Lords in 2008.[34]

Domestic courts have shown judicial restraint, recognising the need not to impose impossible or disproportionate burdens on public authorities. The approach under the HRA is no less certain than if this had been incrementally developed through the common law duty of care. Furthermore, once this duty is engaged, it only crystallises where the public authority knows or ought to know there is a real and immediate risk to life, and is only then obliged to do all it reasonably can reasonably be expected to mitigate risk.[35]

The courts have been cautious in finding that positive duties arise. For example, in the recent case regarding conditions at Napier Barracks, *NB & Ors v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin), the High Court considered the COVID-19 and fire risk posed was not sufficiently real and immediate to give rise to a breach of Article 2, and that even though the Barracks did not ensure a standard of living adequate for the health of the applicants, it did not amount to inhuman and degrading treatment.

A significant divergence between domestic law and the ECHR, which prevented public bodies from holding these obligations, would likely result in increased litigation against the UK in Strasbourg. Therefore, while the consultation hopes to benefit from litigation against public authorities and the associated administrative burden, by restraining or restricting the scope of positive obligations, it will simply displace this litigation to Strasbourg.

In any case, as we have stated above, the focus of the Government should not be on the reduction of claims but on ensuring that the circumstances that gave rise to those claims are eliminated by ensuring better decision making by public bodies.

Furthermore, if this is such a concern for the Government, we would query why the IHRAR was not asked to consider the impact of positive obligations and why the public was not consulted in its call for evidence.

We oppose any proposals to restrict positive obligations arising from the HRA, as these are crucial to the protection of rights.

[34] *Chief Constable of Hertfordshire Police v Van Colle and Smith v Chief Constable of Sussex* [2008] UKHL 50.
[35] *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72.

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

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

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

> **Option 1: Repeal section 3 and do not replace it.**
>
> **Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation. We would welcome comments on the above options, and the illustrative clauses in Appendix 2.**

We do not support, and no proper case has been made for, any reform of section 3 HRA. Therefore, we reject both proposed options and clauses.

We vehemently oppose Option 1. We consider that any new Bill of Rights will equally require an interpretative power for individuals to use the courts to correct human rights violations. To deprive the courts of this power in any new Bill of Rights would be to essentially deprive the new section of its constitutional status. We are glad to hear the government is 'minded to agree'[36] that repeal is unwarranted, as was the view of the IHRAR Panel.[37] Indeed, the IHRAR provided robust reasons for rejecting the option of repealing section 3, finding that 'repeal would significantly weaken the overall scheme of the HRA by removing one of the key means by which Convention rights are to be given their full effect in UK domestic law' and 'would raise real concern as to adversely affecting devolution and the Northern Ireland Peace Agreement'.[38]

However, we also strongly oppose the weak interpretative power proposed in Option 2. We consider that section 3 HRA allows the courts to adopt a statutory interpretation that complies with Convention rights (as defined in Schedule 1 to the HRA). It already represents a careful balance that preserves the role of Parliament. Both options 2A and 2B are regressive, and would weaken human right protection.

The consultation paper states that 'as it has been applied in practice', the HRA 'has moved too far towards judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament'.[39]

However, this conclusion is not evidence-based. It ignores the evidence-based findings of the IHRAR that since 2004 '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'; '[o]n the contrary, judicial restraint could

[36] Consultation Paper, page 69, para 237.
[37] IHRAR, pages 234-5, paras 122-129.
[38] ibid, para 128.
[39] Consultation Paper, page 68, para 233.

properly be said have been exercised in the use of section 3'.[40] The IHRAR panel considered Option 2 and the majority rejected it. It was not considered that it would improve the operation of section 3, it would require them to 'search for a meaning independent of Parliament's intention, whereas, on a proper analysis, it requires them to give effect to Parliament's intention in the HRA', and 'were also concerned that this option would reduce the current level of Convention rights protection provided for by the HRA' and 'runs the risk of upsetting the current devolution settlement, and the Northern Ireland Peace Agreement'.[41] Reducing the level of Convention protection has the very clear effect that we have signalled throughout this response; it will result in breaches of Convention rights and decisions against the UK in Strasbourg. There will be more, rather than less, uncertainty.

As for parliamentary sovereignty, it was firmly the view of the IHRAR, '[t]hat remains intact: Parliament can at any time choose to enact legislation on the basis that it is outside the ambit of section 3. Through the HRA, Parliament in 1998 did not purport to bind its successors'.[42] It also remains open to Parliament, if they considered the courts had abused their interpretative obligation, to legislate in a manner contrary to the interpretation of the courts. Thus, its sovereignty is retained. Therefore, requiring courts to address violations through section 4 declarations of incompatibility is a cure for a problem that does not exist, and will only increase the administrative burdens by requiring the introduction of primary legislation or amendment under section 10 HRA.

While in theory section 3 authorises a stronger kind of interpretation than ordinary statutory interpretation, and it could be used even where the ordinary, unambiguous meaning of a statute would result in a breach of Convention rights as long as it is not against the grain of the legislation, in practice, the courts have approached the section with caution. Where the question before them is one of policy, courts have issued a section 4 declaration of incompatibility and deferred to Parliament.

As part of JUSTICE's response to the Government's Independent Human Rights Act Review, Florence Powell and Stephanie Needleman[43] assessed section 3 case law and found that:

1. Section 3 is used infrequently: over the period 1 January 2013 and 31 December 2020, only 25 cases used section 3 to interpret legislation that would otherwise have been incompatible with Convention rights. It was not used in many cases as the court refused to go beyond its institutional competence, and issued a declaration of incompatibly or disapplied secondary legislation; because the legislation did not breach Convention rights; ordinary principles of statutory interpretation could be used to ensure Convention compliance; or the court applied section 6 HRA where one party was a public body or to disapply subordinate legislation.

[40] IHRAR page 213, para 81.
[41] ibid, pages 238-239, paras 141-143.
[42] ibid, page 238, para 141.
[43] Florence Powell and Stephanie Needleman, 'How radical an instrument is Section 3 of the Human Rights Act 1998?' *UK Constitutional Law Association* (24 March 2021) <https://ukconstitutionallaw.org/2021/03/24/florence-powell-and-stephanie-needleman-how-radical-an-instrument-is-section-3-of-the-human-rights-act-1998/> accessed 7 March 2022.

2. Where the courts relied on section 3, it 'is generally neither radical nor contrary to Parliament's intention' and the courts used it 'to address unforeseen drafting issues or factual situations that clearly fell within the overall intention of the legislative scheme'. Therefore, it has been crucial to protecting Convention rights and realising Parliament's overarching intention in the grain of the legislation.
3. There were 34 cases where section 3 was used to support an interpretation that was reached using normal principles of statutory interpretation, and then consideration was given to how the application of section 3 would reach the same result, or that the conclusion was Convention compliant. Therefore, section 3 is often no more radical than ordinary common law principles.
4. Section 3 has become embedded in judicial decision-making, and to alter the provision would be to create legal uncertainty as to how courts would approach statutory interpretation; for example, where there is a clear drafting error.

Options 2A and 2B would undermine the above approach. Where the court's human rights compatible interpretation was consistent with the purpose of the legislation, but contrary to the ordinary meaning of the poorly drafted words, they could not remedy the error. This would undermine the UK's commitment to human rights protection.

Case law prohibits the use of section 3 where it would lead to a departure from 'a clear and prominent feature' of legislation.[44] Interpretations using section 3 must be no more than what is 'necessary' to ensure compliance with human rights standards.[45] There has been judicial restraint in choosing not to employ section 3. For example, the claimants in the prisoners' voting rights case asked the Scottish courts to interpret domestic legislation prohibiting prisoners from voting in elections in a manner which would essentially reverse this position.[46] The Registration Appeal Court of Scotland, appropriately, rejected this argument and a declaration of incompatibility was issued instead.[47] The clear words of Parliament could not be departed from in such a case.

Furthermore, it is not the case that the courts are only employing section 3 with the objection of the Government. In many cases, section 3 HRA was invoked by the Government as its preferred solution to remedying a rights incompatibility:

- *Ghaidan v Godin-Mendoza* [2004] UKHL 30;
- *Hammond v Secretary of State* [2005] UKHL 69;
- *Pomiechowski v Poland* [2012] UKSC 20;
- *R (H) v Mental Health Review Tribunal for North and East London Region* [2001] EWCA Civ 415;
- *International Transport Roth v Secretary of State for the Home Department* [2002] EWCA Civ 158;
- *R (D) v Secretary of State for the Home Department* [2002] EWHC 2805;
- *Re King* [2002] NICA 48;
- *R v Greenaway* [2002] NICC 7;

[44] *Re Z* [2015] EWFC 73 at [35]-[36].
[45] *R (Aviva Insurance) v Secretary of State for Work and Pensions* [2021] EWHC (Admin) at [28] and [36].
[46] *Smith v Scott* [2007] CSIH 9.
[47] ibid, at [26]-[27] and [58].

- *R v Holding* [2005] EWCA Crim 3185;
- *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28;
- *R (Wright) v Secretary of State for Health* [2009] UKHL 3;
- *Principal Reporter v K* [2010] UKSC 56;
- *TTM v Hackney* [2011] EWCA Civ 4; and
- *HM's Application for Judicial Review* [2014] NIQB 43.

As above, given that it is sovereign, Parliament could choose to legislate in a manner contrary to the section 3 interpretation of the courts. However, in practice, Parliament has often opted to do the opposite, and has endorsed section 3 interpretations:

- Following the decision of the House of Lords in *R (O) v Crown Court* [2006] UKHL 42, the Criminal Justice and Public Order Act 1994 was amended;

- After *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, TPIMs were established to replace control orders, which included specific provisions protecting against breaches of Article 6 ECHR; and

- The Damages (Scotland) Act 2011 replaced provisions of the Fatal Accidents Act 1976 in line with the approach in *McGibbon v McAllister* (2008) CSOH 4.

For these reasons, we do not consider that section 3 requires reform; it has been an important tool cautiously used by the courts to ensure the vindication of rights and its use has been pleaded by both individuals and public bodies in numerous human rights claims. Without it, there would be gaps in protection resulting in Strasbourg litigation, further domestic litigation, and declarations of incompatibility.

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

IHRAR recommended that the terms of reference of the Joint Committee on Human Rights ('JCHR') be expanded 'to enhance its scrutiny role of section 3 judgments, and how parliamentary consideration of such judgments and JCHR reports concerning them, could also properly be improved' and to create an arrangement analogous to the remedial order-making process.[48] We endorse this recommendation and encourage Parliamentary engagement.

[48] IHRAR, page 256, paras 200-201.

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

We see no harm in the IHRAR's recommendation that the courts, Government and Parliament put in place a database to record superior UK court judgments relying on section 3 to interpret legislation compatibility with Convention rights to provide greater clarity and transparency regarding the court's use of the section.

We believe that if this were done, as the research of civil society and academics has shown, it would be clear that the use of section 3 by the courts has not been radical, but rather that it has been cautious and respectful of its institutional competence.

One word of caution we would express is that, as with all databases, it will be important that it is accurate and kept up to date, or reliance on it by the courts, Parliament, and others might be misplaced. Therefore, time and resources would need to be allocated to ensure this is done.

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

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

There is no evidence to indicate that the HRA is a hindrance to delegated law-making. There are very few cases where the courts actually find that a piece of secondary legislation breaches the HRA. In response to this question, we refer to the UK Constitutional Law Association's article 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making'.[49] We agree with the conclusion of the authors of that article: there are significant issues in relation to the system of delegated legislation, but the role of the courts is not one. As detailed in the article, there have been 14 successful challenges to delegated legislation based on the Human Rights Act in the past seven years, in the context of the thousands of statutory instruments made each year. In the majority of cases where the courts have found that a provision of secondary legislation breaches the HRA, courts do not quash or invalidate the offending provisions — they declare them unlawful.

We cannot see any harm in issuing a declaration of incompatibility for secondary legislation, so long as the non-binding declaration of incompatibility is one of multiple remedial discretionary powers available to judges. This is currently the case, as section 4(3) HRA enables courts to make a declaration of incompatibility for certain provisions of subordinate legislation.

[49] J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', *UK Constitutional Law Association* (22 February 2021) <https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/> accessed 3 March 2022.

However, the consultation proposes 'to explore whether there is a case for providing that declarations of incompatibility are also the *only* remedy available to courts in relation to certain secondary legislation'.[50] Therefore, if this is the true question being asked, then the wording of Question 15 is misleading.

For secondary legislation that is incompatible with the HRA, a piece of primary legislation, declarations of incompatibility should not replace quashing orders.[51] Secondary legislation passed by the Government does not enjoy the same sovereignty-based protections as primary legislation passed by Parliament. Often, judicial review of a piece of secondary legislation will be the first substantial scrutiny it has received as the government controls whether debates on negative procedure statutory instruments occur and membership of Delegated Legislation Committees for affirmative procedure debates. Parliamentary demands mean that the vast amount of secondary legislation cannot be afforded significant scrutiny in either House, and thus whilst technically approved by Parliament, Parliament's consideration of it is limited.[52]

On 24 November 2021, the House of Lords Delegated Powers and Regulatory Reform Committee 'concluded that it is now a matter of urgency that Parliament should take stock and consider how the balance of power can be re-set'.[53] They warned of the denial of democracy, and shift of power from Parliament to the executive: 'The abuse of delegated powers is in effect an abuse of Parliament and an abuse of democracy'.[54] On the same day, the House of Lords Secondary Legislation Scrutiny Committee called for a reset of the balance of power between Parliament and government, warning, 'the more that is left to secondary legislation, the greater the democratic deficit because, in contrast to primary legislation, there is relatively scant effective parliamentary scrutiny of secondary legislation; it cannot be amended; in some cases, it may become law without any parliamentary debate; and, because the decision to accept or reject is all or nothing, very rarely will the Houses reject it'.[55]

No case has been made in the Consultation Paper of judicial overreach. If anything, the Supreme Court has repeatedly shown deference to the executive in socio-economic policy, an area often covered by secondary legislation. In immigration law, for example, the Supreme Court refused to strike down or declare invalid even an aspect of the Immigration Rules containing an English language requirement for

[50] Consultation Paper, page 71, para 250 (emphasis added).
[51] *A & Others v Secretary of State for the Home Department* [2004] UKHL 56.
[52] This was noted particularly by the Supreme Court in *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 at [32] in relation to the negative resolution procedure. Notably in *Tigere*, the Supreme Court declined to quash the legislation, leaving it open to the Secretary of State to create a careful criterion to avoid breaching Convention rights.
[53] House of Lords Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (HL Paper 106, 24 November 2021) page 3 <https://publications.parliament.uk/pa/ld5802/ldselect/lddelreg/106/106.pdf> accessed 4 March 2022.
[54] ibid, page 5.
[55] House of Lords Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament* (HL Paper 105, 24 November 2021) page 2 <https://publications.parliament.uk/pa/ld5802/ldselect/ldsecleg/105/105.pdf> accessed 4 March 2022.

partners of British and settled persons, as it would not be an 'unjustified interference with article 8 rights in all cases'.[56]

Subordinate legislation is made by the executive using powers delegated by Parliament. If the executive misuses those powers to create laws that infringe human rights, then Parliament has mandated that the courts address this through the HRA. The court's role in these cases is in substance no different from the ordinary application of basic public law principles (which pre-date the HRA). It is well established that, 'If subordinate legislation is ultra vires on any basis, it is unlawful and of no effect in law.'[57] As Singh LJ has indicated, '[t]his is simply an example of the fundamental principle that the executive cannot act in a way which is inconsistent with the will of Parliament'.[58]

The proposal would alter the constitutional importance of secondary legislation of Ministers in Westminster by insulating it from the courts, and raising it above primary legislation of devolved legislatures which the courts may still strike down as incompatible.

The IHRAR considered and rejected this proposal.[59]

Fundamentally, we must also oppose this proposal because we consider it a breach of the rule of law to require courts and tribunals, whose function is to uphold and apply the law, to apply secondary legislation that breaches human rights and is incompatible with primary legislation.

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.

Clause 1 of the Judicial Review and Courts Bill, which has completed its Committee Stage in the House of Lords, would give the courts the power to make quashing orders with only suspended and/or prospective effect when it appears to the court that it would as 'a matter of substance, offer adequate redress in relation to the relevant defect, the court must exercise the powers in that subsection accordingly unless it sees good reason not to do so.' We are of the view that this fetter on judicial remedial discretion does not guarantee an effective remedy for individuals for violation of their human rights, as required by Article 13 ECHR.

Such powers would only benefit a defendant public authority. We do not consider that they should remain part of the Judicial Review and Courts Bill and we do not consider that they should be introduced under the Bill of Rights. These proposals of the Government have yet to receive the full scrutiny of both Houses of Parliament; accordingly it is too early to consult on extending these powers to human rights.

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[56] *R (Bibi) v Secretary of State for the Home Department (Rev 1)* [2015] UKSC 68 [60].
[57] *Boddington v British Transport Police* [1998] UKHL 13.
[58] *R (Al-Enein) v Secretary of State for the Home Department* [2020] 1 WLR 1349 at [28].
[59] IHRAR, pages 322-324, paras 55-64.

Furthermore, we must voice our strong opposition to prospective orders. Such orders were not recommended by the Independent Review of Administrative Law. They would deny a remedy to claimants bringing a case, and only assist those affected in the future even if they suffered the same violation of their rights. We do not consider a case has been made for treating the claimant any less favourably, and it is likely to have a chilling effect in their coming forward. It would also mean that there would be no practical consequences for finding that a public body had violated a human right.

If, contrary to our objection to the suspensive power, such a power is introduced, it should be clear that any suspensive power is discretionary and it is not the case that quashing orders of incompatible secondary legislation can *only* be made in such a manner. We object to the limitations in sub-section (8) of the new section 29A proposed for insertion to the Senior Courts Act 1981: '*any detriment to good administration* that would result from exercising or failing to exercise the power' and 'any action taken or *proposed to be taken*, or undertaking given, by a person with responsibility in connection with the impugned act'.[60]

We are deeply concerned that these proposals to limit judicial discretion will undermine the rule of law and shield unlawful executive legislation. If the offending clause of the Judicial Review and Courts Bill does become law, we would oppose the extension of these powers to the Bill of Rights. We strongly suggest the Government conduct a consultation on the *specifics* of these powers before drafting any Bill.

Remedial orders

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

In particular, should it be:

a. similar to that contained in section 10 of the Human Rights Act;

b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;

c. limited only to remedial orders made under the 'urgent' procedure; or

d. abolished altogether?

Please provide reasons.

We do not support options (c) or (d), which would weaken the remedial process.

Rather, we recommend that it should be similar to section 10 HRA, but there is greater scrutiny of legislation to ensure that issues identified by the court are remedied. Furthermore, we do not consider it

[60] Judicial Review and Courts Bill, Clause 1(8) emphasis added.

constitutionally appropriate for the executive to amend the HRA through a section 10 remedial order, and thus also support (b).

The current process is that a draft order is first considered by the JCHR, and then must be laid before Parliament and at least 60 days after that date the House of Commons and the House of Lords must approve the draft order. There is provision for urgent matters, but it is seen as a last resort.

The primary issue with this process is that the remedying of the relevant law is left in the hands of the government to bring to Parliament. The Secretary of State may delay the bringing forward of a remedial order for quite some time. For example, there was a significant delay in respect of the British Nationality Act 1981 (Remedial) Order 2019. Part of that Order was to amend the law following the declaration of incompatibility in *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, a case concerning historic discrimination in nationality laws as they related to unmarried parents. The judgment was handed down on 19 October 2016, however the Order only entered into force on 25 July 2019.

The wide discretion conferred on the Government to bring forth legislation to remedy the incompatibility identified by the court can also lead to situations where the remedial order is unduly narrow. When the draft version of the British Nationality Act 1981 (Remedial) Order 2019 was presented to Parliament, ILPA raised concerns that it did not remove the requirement that children who are entitled to registration as British citizens are subject to the good character test.[61] ILPA also argued the legislation was not following the spirit of the *Johnson* decision. The Joint Committee on Human Rights, in its first report on the draft Order, noted the variety of issues that needed to be addressed that related to the Order and recommended that the Government bring forward a Bill to address these issues rather than proceed to do so through the Order. However, the Government appeared to take the view that this was unnecessary on the basis of a narrow view of what the courts had required in their declarations of incompatibility while simultaneously acknowledging the concerns raised. Ultimately, therefore, the JCHR recommended the approval of the draft Order notwithstanding that it dedicated a significant amount of time in its second report addressing various issues that ought to have been remedied in the same legislation.[62]

This example shows that the remedial Order process can be a weak tool in meaningfully responding to human rights issues identified by the court. The point of the declaration of incompatibility process is to draw to the attention of Parliament where the laws it has passed have led to the violation of human rights so that Parliament can decide how best to address it. In reality, however, because of the way the HRA is constructed and because of the dominance of the executive in the passage of delegated

[61] ILPA, 'Written Evidence from the Immigration Law Practitioners' Association Re: Draft British Nationality Act 1981 (Remedial) Order 2019 (22 February 2019) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rightscommittee/draft-british-nationality-act-1981-remedial-order-2019/written/96914.pdf> accessed 7 March 2022.

[62] Joint Committee on Human Rights, 'Good Character Requirements: Draft British Nationality Act 1981 (Remedial) Order 2019 - Second Report' <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1943/194305.htm#_idTextAnchor005> accessed 7 March 2022.

legislation, Parliament's role is generally one of rubber stamping rather than of having any material input into responding to the issues identified by the court. This does not represent a good governance model.

Statement of Compatibility – Section 19 of the Human Rights Act

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

No case has been made for weakening the obligation on a Minister to state whether, in their opinion, a Bill is compatible with the HRA. As a signatory to the ECHR, Bills should be compatible, and it does not undermine the constitutional balance between Government and Parliament for a Minister to make such a statement.

If anything, we consider that section 19 does not correct the imbalance in executive power, which already exists, as noted by the House of Lords Committees in relation to secondary legislation. The problem is structural: the executive dominated and adversarial political system.

The Nationality and Borders Bill currently passing through Parliament exemplifies that section 19 does not avert the Government from introducing legislation that violates Convention rights. Numerous clauses within the Bill are likely to lead to infringements of Convention rights, with provision for the deprivation of citizenship without notice in Clause 9 being a clear example. The Government has shown its willingness to proceed with legislation that it knows has a high risk of being found to be incompatible with rights by the courts, and has shown its unwillingness to make a 'nevertheless' declaration under section 19(1)(b), that although the Minister is 'unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.' JCHR's scrutiny of legislation for Convention rights-compatibility has proved an extremely important resource to support the scrutiny of parliamentarians. For example, JCHR has released numerous reports throughout the passage of the Nationality and Borders Bill detailing the ways in which the Bill is likely to contravene human rights, and providing recommended amendments. However, these have not altered the view of the Government of the Bill's compatibility with Convention rights.

Structural change is required to ensure legislation that is likely to infringe human rights does not pass into law; and, if that is not possible, the judiciary must be permitted to protect fundamental human rights without the executive further seeking to dilute its powers to check and balance.

The acceptance 'that government should be restrained by the protection of fundamental rights',[63] should lead the Government to abandon its plans in this consultation to diminish the powers of the judiciary to protect fundamental rights.

[63] Consultation Paper, page 47, para 154.

Application to Wales, Scotland and Northern Ireland

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

We recognise that the UK is a deeply plural state with devolved governments, distinct constitutional contexts, separate legal systems and legal traditions. However, to ensure the human rights protection of all persons within those jurisdictions we recommend that the Government abandon its proposed reforms of the HRA. This consultation has failed to reflect and consider the impact of these reforms on these constituent parts of the UK. This singular question is insufficient consultation for a uniform set of reforms that would apply across the UK. It fails to hear the numerous statements from devolved institutions rejecting any attempts to weaken protection under the HRA.

Convention rights were key pillars of the devolution settlements in Scotland, Northern Ireland and Wales. The HRA is part of a broader constitutional framework of the devolved institutions and bodies as devolved legislation must be Convention compatible, defined with reference to the HRA.[64]

To abandon or amend the HRA would cause legal and constitutional uncertainty in the devolved administrations. Human rights are not a manner reserved to Westminster. Given the impact of the reforms on the constitutional settlements, Westminster would arguably require the consent of the devolved legislatures under the Sewel Convention.

Convention rights were given further domestic effect by the Northern Ireland Peace Agreement (the Good Friday Agreement or Belfast Agreement) which set out ECHR compliance as a 'safeguard' for the peace process in Northern Ireland.[65] Additionally, the Agreement states in the 'Rights, Safeguards and Equality of Opportunity' section that '[t]he British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency'.[66] This commitment was reiterated recently in Article 2(1) of the Northern Ireland Protocol to the Withdrawal Agreement. The Northern Ireland Act 1998, like its Scottish

[64] For example, see Scotland Act 1998, section 29 and 126; Government of Wales Act 2006, section 108A(2)(e).
[65] Northern Ireland Peace Agreement (Good Friday or Belfast Agreement) (10 April 1998), Democratic Institutions In Northern Ireland, at para 5, 'There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including:
(b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission;
(c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland;'
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf> accessed 7 March 2022.
[66] ibid, page 16, para 2.

counterpart, requires decisions of the Northern Ireland Assembly and Executive to be compatible with 'Convention rights', defining the term with reference to meaning in the Human Rights Act 1998.[67]

The Consultation fails to appreciate that its proposals to diminish human rights, and to diverge from the ECHR and Strasbourg jurisprudence, would risk breaching the Good Friday Agreement and thus unsettling this delicate balance in Northern Ireland and with Ireland. Rights would not be completely incorporated and domestic remedies for breach of the Convention would be drastically reduced leaving resort only to Strasbourg. Furthermore, the Consultation Paper has failed to consider how these proposals to diminish human rights across the UK would undermine the development of a Northern Ireland Bill of Rights, mentioned in the Good Friday Agreement safeguard.

We oppose the proposals to reform the HRA, which will weaken protection of human rights in the devolved nations, destabilise the broader constitutional settlements, and result in legal uncertainty.

We echo the JCHR: 'It is essential that proposals to amend the HRA take account of its unique role in the constitutional arrangements of the devolved nations and the implications for the future of the union. The Government should not pursue reform of the HRA without the consent of the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly.'[68]

Public authorities: section 6 of the Human Rights Act

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

We agree that it is beneficial to have a definition that can evolve in line with the delivery of public functions.

In the immigration, asylum and nationality law sphere we increasingly see the Government outsource to commercial entities, for example, Sopra Steria, TLS, VFS, Serco, Mears Group, Clearsprings Ready Homes, to name a few visa application centres and a few asylum accommodation providers.

We understand from the consultation paper that the need for "clarity" is based on the decisions of the Inner and Outer House of the Court of Session in *Ali v Serco*.[69] Serco provides accommodation under a contract with the Home Secretary. The Home Secretary is obliged to provide asylum accommodation under section 95 of the Immigration and Asylum Act 1999. The Outer House found that Serco took the place of the central government in carrying out a 'humanitarian function' and was thus exercising a function of a public nature.[70] The Inner House disagreed and argued there was a 'fundamental

[67] Northern Ireland Act 1998, section 6(2)(c), section 24(1)(a), section 98(1).
[68] Joint Committee on Human Rights, *Third Report on the Government's Independent Review of the Human Rights Act* (23 June 2021) page 74, para 258 <https://committees.parliament.uk/publications/6592/documents/71259/default/> accessed 7 March 2022.
[69] Consultation Paper, page 75, para 267.
[70] *Ali (Iraq) v Serco* [2019] CSOH 34.

distinction' between 'the entity that is charged with the public law responsibility' who cannot absolve itself of responsibility and 'the private operator who contracts with that entity to provide the service'.[71]

However, we would be concerned by any attempt of the Government to absolve quasi-private bodies of responsibility, particularly when there are other proposals within this consultation to reduce accountability of public authorities, and limit the remedial powers of the courts. If the Government does not wish to hold private bodies to account, then public bodies must be able to be held to account.

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

> **Option 1: Provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or**
>
> **Option 2: Retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.**

The best way for the Government to give public authorities greater confidence to perform their functions within the bounds of human rights law is for the Government to ensure that its legislation is compliant with Convention rights. We discuss this in detail throughout this response, including in relation to section 19 statements.

We do not support the replacement of section 6(2). Both options would reduce the protection available under the HRA.

It is unclear how Option 1 would work in practice so that 'Parliament rather than the public authority should bear the responsibility for addressing any declaration of incompatibility by the courts'.[72] If public authorities acting under primary legislation can do so 'without attracting litigation',[73] how can a court make a section 4 declaration of incompatibility? It is clear that this option is illogical. Furthermore, the shortened version of Option 1 in the question is misleading as the explanatory paragraph underneath it refers to 'giving effect to provisions of *or made under* primary legislation'.[74] If this is a suggestion that following subordinate legislation would insulate public authorities from a human rights challenge and prevent claimants from accessing a domestic remedy, this would be a significant affront to the separation of powers, rule of law, and domestic human rights protection. We have detailed our concerns above in relation to the insulation of secondary legislation from quashing orders. In relation to Option 2, we repeat our objections for the proposals to amend section 3, weakening the interpretative power and human rights protection. These equally apply to this proposal.

[71] *Ali (Iraq) v Serco Ltd* [2019] CSIH 54 at [54].
[72] Consultation Paper, page 77, para 274.
[73] ibid.
[74] ibid.

Extraterritorial jurisdiction

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

ILPA does not have specific expertise in relation to the purported tension between the extraterritorial jurisdiction of the Convention and the law of armed conflict. However, we do not support any further restrictions to jurisdiction.

Article 1 ECHR requires state parties to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. Throughout the passage of the Nationality and Borders Bill in Parliament, we have been concerned with its compliance with the Convention. However, there are particular concerns regarding certain plans, such as removal of persons with pending asylum claims from the UK, and offshore processing of asylum claims outside the UK's territory under Clause 28 and Schedule 3 of the Bill. One country which has rejected involvement in such plans is Ghana;[75] notably, it is not a contracting party to the ECHR. The UK's use of military barracks in the UK, such as Napier Barracks, to hold persons whilst their asylum claims are processed, has raised grave concerns and resulted in circumstances which were found to constitute a violation of residents' right to liberty under Article 5 ECHR.[76] Equally, holding persons in overseas centres, as Australia did in Papua New Guinea and Nauru, gives rise to human rights concerns regarding sufficiency of safeguards for fair and efficient processing of their claims and effective protection against *refoulement*.

The Nationality and Borders Bill proposes to confer new maritime enforcement powers on immigration and enforcement officers, extending these new powers into foreign and international waters.[77] On reasonable grounds of *suspicion* that certain immigration-related criminal offences,[78] the Home Office will be able to operate boats in UK territorial waters and use powers to stop, board, *require the ship to be taken to any place* (on land or on water) in the UK or *elsewhere* and be detained there, and/or *divert* a ship requiring it to leave United Kingdom waters.[79] The new power to require a ship to leave UK waters is

[75] Charles Hymas, 'Ghana dismisses reports it could host processing centre for Channel migrants' *The Telegraph* (18 January 2022) <https://www.telegraph.co.uk/news/2022/01/18/migrant-crossings-already-three-times-higher-last-january-figures/> accessed 8 March 2022.

[76] *NB & Ors v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin) at [324]; ILPA, *Home Office Consultation on 'Napier Barracks planning application'* (3 February 2022) <https://ilpa.org.uk/home-office-consultation-on-napier-barracks-planning-application/> accessed 8 March 2022.

[77] See Paragraph 2 of Schedule 6 to the Nationality and Borders Bill, inserting section 28LA(1) of the Immigration Act 1971.

[78] See Paragraph 8 of Schedule 6 to the Nationality and Borders Bill.

[79] See Clause 44 and Schedule 6, particularly Paragraph 10 of Schedule 6 to the Nationality and Borders Bill, inserting B1 in Part A1 of the Immigration Act 1971.

accompanied by a power of a relevant officer to 'require any person on board the ship to take such action as is reasonably necessary to ensure that person leaves United Kingdom waters'.[80]

The ECtHR has condemned pushback practices at sea. For example, in the case of *Hirsi Jamaa and others v Italy*, the Grand Chamber found that the applicants in a boat intercepted by the Italian coastguard and returned to Libya were within the jurisdiction of Italy for the purposes of Article 1 ECHR as 'the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities'.[81] Furthermore, it found that there had been a violation of Article 3, as the applicants were exposed to ill-treatment or repatriation.

Therefore, we are firmly of the view that the UK must remain accountable under the ECHR and any new Bill of Rights for the treatment of persons over whom UK agents exert authority and control, or in an area where the UK exercises effective control, even if they are outside of the UK's territorial boundaries.

In a separate context relating to exterritoriality of human rights, we are particularly concerned about the importance of the Home Secretary making careful risk assessments in cases involving deprivation of citizenship. During the passage of the Immigration Act 2014, when the Rt Hon Theresa May MP was Home Secretary, an ECHR Supplementary Memorandum was published in January 2014, stating, 'the Secretary of State has a practice of not depriving individuals of British citizenship when they are not within the UK's jurisdiction for ECHR purposes if she is satisfied that doing so would expose those individuals to a real risk of treatment which would constitute a breach of article 2 or 3 if they were within the UK's jurisdiction and those articles were engaged'.[82]

This Policy is crucial as the United Kingdom has developed a practice of depriving a person of their citizenship after they have left the United Kingdom, and thus the Government can attempt to argue that they are outside of the jurisdiction of the UK for Convention purposes. For example, in the case of *P3 v Secretary of State for the Home Department* [2021] UKSIAC 148/2018 and 148/2020 (11 February 2021), the Home Secretary deliberately waited for *P3* to leave the UK to visit Iraq in December 2017 before serving the deprivation order, and then argued that *P3* could not rely on article 8 as he was outside the UK's jurisdiction.

In the case of *Begum,*[83] the Supreme Court found that the Special Immigration Appeals Commission ('SIAC') can only review the Home Secretary's assessment of whether there is a real risk of treatment contrary to Articles 2 or 3 ECHR as a direct and foreseeable consequence of the deprivation decision using the principles of administrative law. SIAC does not conduct a full merits appeal. Therefore, it is more important than ever that an accurate risk assessment is conducted by the Home Secretary under

[80] ibid, Section B1(5).
[81] *Hirsi Jamaa and Others v Italy* (Application no. 27765/09) at [81]-[82].
[82] Home Office, 'European Convention on Human Rights Supplementary Memorandum by the Home Office' on Deprivation of Citizenship: Conduct Seriously Prejudicial to the Vital Interests of the United Kingdom (January 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/276660/Deprivation_ECHR_memo.pdf> accessed 7 March 2021.
[83] *Begum v Secretary of State for the Home Department* [2021] UKSC 7.

the extra-territorial policy before depriving a person of their citizenship in a jurisdiction in which the ECHR may not apply.

We oppose the diminishment of human rights protection through reform of the HRA.

Qualified and limited rights

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

> **Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.**
>
> **Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right. We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.**

We oppose any attempt to provide guidance to courts in the Bill of Rights on the proportionality assessment. These proposals are without foundation.

The Government's stated intention is to ensure that the courts respect 'where Parliament has expressed its clear will on complex and diverse issues relating to the public interest'.[84] However, this is already being secured by the court. There is no justification for further attempts to interfere with the nuanced[85] and structured approach the courts have taken to carefully weigh and balance public interest and fundamental rights, with due judicial deference and a margin of discretion for the democratically elected legislature and expert executive decisions.

For example, the Supreme Court in *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 at [46] has shown deference to the Secretary of State's policy in the Immigration Rules (which are mere statements of practice, rather than legislation) as to factors which should be taken into account in Article 8 assessment:

> *'While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in*

[84] Consultation Paper, page 80, para 291.
[85] IHRAR, page 307, para 28.

striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The margin of appreciation of national authorities is not unlimited, but it is nevertheless real and important. Immigration control is an intensely political issue, on which differing views are held within the contracting states, and as between those states. The ECHR has therefore to be applied in a manner which is capable of accommodating different approaches, within limits. Under the constitutional arrangements existing within the UK, the courts can review the compatibility of decision-making in relation to immigration with the Convention rights, but the authorities responsible for determining policy in relation to immigration, within the limits of the national margin of appreciation, are the Secretary of State and Parliament.' (emphasis added)

Furthermore, there is no need for legislative guidance, when there is detailed judicial guidance regarding the application of the proportionality principle.[86]

It would only further confuse an already complex area of the law to add further qualifications to the weight to be given to various parts of the 5-step proportionality assessment in *R (on the Application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 at [17]:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

Option 1 proposes to clarify that in considering the fourth step, whether the interference is 'necessary', the courts should give great weight to legislation enacted by Parliament. This is worded very poorly in the draft clause which refers to 'Parliament's view that the *legislation',* rather than the *interference*, 'is necessary in a democratic society'.[87] Option 2 illogically requires a court or tribunal to give 'great weight to the *fact* that Parliament was acting in the public interest in passing the legislation'.[88]

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[86] *Bank Mellat v Her Majesty's Treasury (No. 1)* [2013] UKSC 38 [2014] AC 700; *Huang v Secretary of State for the Home Department* [2007] UKHL 11; *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60.

[87] Consultation Paper, page 100 (italic emphasis added).

[88] ibid.

The court has already taken a more deferential approach in immigration law than is proposed in the Options:

- In *FK & OK (Botswana) v Secretary of State for the Home Department* [2013] EWCA Civ 238 at [11], Sir Stanley Burnton said that 'the maintenance of immigration control is not an aim that is implied for the purposes of article 8.2. Its maintenance is necessary in order to preserve or to foster the economic well-being of the country, in order to protect health and morals, and for the protection of the rights and freedoms of others. If there were no immigration control, enormous numbers of persons would be able to enter this country, and would be entitled to claim social security benefits, the benefits of the National Health Service, to be housed (or to compete for housing with those in this country) and to compete for employment with those already here. Their children would be entitled to be educated at the taxpayers' expense (as was the second appellant). All such matters (and I do not suggest that they are the only matters) go to the economic well-being of the country. That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of article 8*.2.'*

- In *Shahzad (Art 8: legitimate aim)* [2014] UKUT 00085 (IAC) the Upper Tribunal held per its headnote that '(i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it. (ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both. (iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

- In *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 at [25] Lord Reed held that 'the court has treated the legitimate aim pursued by deportation, on the basis of a person's conviction of a criminal offence, as the "prevention of disorder or crime" (although there are also a small number of cases in which public safety has been accepted to be an additional aim).'

Therefore, in most Article 8 immigration appeals, this fourth step is answered in the affirmative by the courts.

Furthermore, in immigration law, Parliament has already sought to delimit and codify the weight which the courts must give to certain factors in the fifth step of the Article 8 proportionality assessment, for example, in section 117B in Part 4A of the Nationality, Immigration and Asylum Act 2002, inserted by the Immigration Act 2014:

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

Section 117C of the same Act also provides considerations in cases involving foreign national criminals. Contrary to the Government's assertion, the scope for challenging deportation orders has not expanded nor have the human rights restrictions on the government's ability to deport serious foreign offenders.[89] Rather, the section 117C codification of weights to be given in proportionality assessments by our independent judiciary has resulted in raising the bar for finding a disproportionate interference with Article 8.

The statistics provided in the Consultation Paper are as follows:

> 'Home Office internal data shows that, from April 2008 to June 2021, 21,521 appeals against deportation were lodged by FNOs. Of these, 6,042 FNOs had their deportation appeal allowed at the First Tier Tribunal, with around 40% (2,392) of them doing so on human rights grounds'.[90]

However, statistics published on 24 February 2022 on Foreign National Offender appeals note that in 2018 to 2019 of 1,836 appeals only 237 (12.9%) were allowed solely on human rights grounds, in 2019 to 2020 of 1,326 appeals only 187 (14.1%) were allowed solely on human rights grounds, and in the period

[89] Consultation Paper, page 45.
[90] ibid.

2020 to 2021 of 568 appeals only 44 (7.7%) were allowed solely on human rights grounds.[91] Compare this to 2009 to 2010, in which 186 of 1,744 (10.7%) were allowed on human rights grounds only, in 2010 to 2011, 249 of 1,724 (14.4%) appeals were allowed on human rights grounds only, and in 2011 to 2012, 323 of 1,613 (20%) were allowed on human rights grounds only. Therefore, this hardly shows an expansion in the dataset provided.

Codification suffers from the drawback we have identified throughout this response: it is the subject of many years of further litigation to define various terms used. For example, the courts had to define 'precarious' in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58, 'unlawfully' in *Akinyemi v Secretary of State for the Home Department* [2017] EWCA Civ 236, and 'reasonable to expect' and 'unduly harsh' in *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53. However, this detailed guidance is now well understood and implemented in immigration cases.

Therefore, we are of the view that this is well trodden territory in immigration law and the relevant clarifications have been provided through detailed case law and further primary legislation. It is clear that the courts have given this legislation enacted by Parliament great weight, in determining what is deemed to be 'necessary'. The courts have adopted a careful approach to the public interest, with significant judicial deference to the executive's and Parliament's assessment of the public interest, including in financial, socio-economic, and matters of national security. This is equally true in nationality law, as exemplified by several recent cases:

- The deferential approach to the Executive's assessment of national security in *Begum v Secretary of State for the Home Department* [2021] UKSC 7 at [108]-[111].

- The recent case of *R (on the application of The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3 at [51]: 'The appropriateness of imposing the fee on children who apply for British citizenship under section 1(4) of the 1981 Act is a question of policy which is for political determination. It is not a matter for judges';

- The decision of the Court of Appeal in *R (on the application of D4) (Notice of Deprivation of Citizenship) v Secretary of State for the Home Department* [2022] EWCA Civ 33 at [60]: 'It is for Parliament to decide whether in such circumstances the requirement for notice in section 40(5) should be forgone, or whether the Home Secretary should be precluded from making an order. These are legislative choices for Parliament'.

If there is a lack of clarity in the proportionality assessment it is due to the necessity of the courts to turn to the individual specifics of a case, which cannot be codified in law and for which weight should not be

[91] Home Office, 'Statistical note: FNO appeals lodged and allowed on human rights grounds, 2008 to 2021' (24 February 2022) <https://www.gov.uk/government/publications/foreign-national-offenders-appeals-on-human-rights-grounds-2008-to-2021/statistical-note-fno-appeals-lodged-and-allowed-on-human-rights-grounds-2008-to-2021> accessed 8 March 2022.

pre-assigned. Such an assessment, however, is well within the institutional competence of the judiciary who must carry out careful balancing exercises on a quotidien basis. We are of the view that both proposed options and clauses will result in uncertainty and further litigation, rather than assisting the courts to determine whether an interference with a right is proportionate.

We do not support an expansion of the codified approach to every right and to every area of law. In fact, we oppose in the strongest terms the continued attempts by this Government to tie the hands of the judiciary to preordain the outcome of human rights claims.

Deportations in the public interest

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

> **Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment.**
>
> **Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights.**
>
> **Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.**

First, we do not consider that meritorious human rights claims 'frustrate' deportations. The Nationality, Immigration and Asylum Act 2002 contains considerable safeguards against clearly unfounded claims under section 94 and claims that should have been made earlier under section 96, permits removal whilst an appeal is pending in certain circumstances under section 94B, and has safeguards for repeat claims under paragraph 353 of the Immigration Rules. We do not consider that the Government should attempt to legislate to permit deportations where it would violate its international obligations under the ECHR and breach fundamental rights of the deportee, and family members such as British citizen children, and/or partners. The examples chosen in the Consultation Paper provide an inaccurate picture. The specifics of 'Case X' have been omitted, and no reported determination is cited. The consultation seeks to rely on two further unreported cases, whilst omitting their key facts.

The Consultation Paper in citing *Secretary of State for the Home Department v Aziz Dagli* (HU/01512/2019) refers only to the fact that he was a Turkish national 'convicted of an offence of grievous bodily harm and sentenced to 54 months' imprisonment' and had a 'period of lawful residence

and marriage to a UK national'.[92] It fails to mention several relevant facts the Upper Tribunal retained from the First-tier Tribunal: 'that he entered a guilty plea (albeit at a late stage); that his actions in committing the index offence were very much out of character and he has expressed remorse; that he was a model prisoner and was on unconditional bail; that he has lived in the UK for over 30 years and is socially and culturally integrated in the UK; that he has no ties with Turkey and would have start anew if sent there; that he has a genuine and subsisting relationship with his wife and has a close and supportive family unit with his adult children and step-child and grandchildren; that the claimant's adult son, R, is unwell with Crohn's disease and is reliant on his father for assistance.'[93] Nor does it mention the nuanced balancing exercise conducted by the Upper Tribunal in reaching its conclusion:

> *'I must weigh the strong public interest in the deportation of the claimant who has committed a most serious crime of violence and spent four and a half years in prison against the right to respect for family and private life of him as a person who can meet two exceptions to deportation, who has significant aspects of meeting those exceptions which I find to be properly over and above the minimum basis of meeting them, particularly his 31 year marriage to a British citizen, and who has in addition a family life relationship providing real, effective and committed support to his adult son R, and is uniquely able to assist R who is in a parlous physical and psychological condition. I conclude that it can properly be said that there are very compelling circumstances in this case, and that this is one of the rare and exceptional cases where the claimant is entitled to succeed in his appeal as deportation would ultimately amount to a disproportionate interference with his right to respect for his Article 8 ECHR rights'.*[94]

The Consultation Paper similarly cites *Secretary of State for the Home Department v Oyewopo Olorisade* (HU/16908/2018) but fails to mention relevant facts.[95]

There are numerous reported cases in which the courts have found that deportation would not breach Article 8 ECHR under the stringent criteria in section 117C. We would direct the authors of the Consultation Paper to research and engage with these to ensure that the picture provided in the paper is not distorted by cherry-picked unreported cases.

Second, we consider that the best way for the Government to ensure that human rights claims are not made at a late stage is to ensure early access to publicly funded legal advice. We repeat our submissions regarding the lack of availability of such advice and that reform of the system is needed to ensure that those with meritorious claims receive the correct advice to make the appropriate representations, applications, and/or provide the relevant evidence at an early stage.

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[92] Consultation Paper, page 38.

[93] *Secretary of State for the Home Department v Aziz Dagli* (HU/01512/2019) [31].

[94] ibid [45].

[95] For example, it does not mention the 'appellant was born in this country and lived here and in Nigeria until his ninth birthday. Since then he has known only life in this country' at [27] or that '[t]he true figure of the appellant's lawful residence, based on the judge's unchallenged earlier calculations, is in the region of 18 years and 5 months' at [32].

Third, we consider that there is a need to focus on quicker and higher quality decision-making to ensure that the first instance decision is correct. This will necessarily reduce the number of successful human rights appeals.

We recommend the Government focus on those reforms and we reject all three options proposed by Question 24.

Option 2 recommends 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'. Such a scheme already exists for Article 8 ECHR in Part 5A of the Nationality, Immigration and Asylum Act 2002. It is not clear which other 'rights' are proposed to be included in the scheme. However, we would be extremely wary of the extension of legislative prescription of the balancing exercise, which will certainly result in further litigation. Furthermore, we would remind the Government that certain rights, such as Article 3, cannot be balanced against the public interest.

Options 1 and 3 are deeply problematic. In running with the theme throughout this Consultation, they would seek to either tie the hand of judges and add an arbitrary threshold that would undermine the very essence of a careful fact-specific and nuanced proportionality assessment (Option 1), or oust jurisdiction of the courts to consider appeals against deportation orders unless the decision is 'obviously flawed', significantly undermining access to justice and weakening the accountability of public bodies (Option 3).

We are concerned that all three proposals will result in litigation regarding the imposition of any new scheme, further claims to the ECtHR if decisions are inconsistent with the ECHR, and further Rule 39 applications to the ECtHR for urgent suspensive interim relief. Thus, they will send claims to Strasbourg rather than bringing rights home, fail to provide an effective domestic remedy, and diminish the role of domestic courts.

Illegal and irregular migration

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

The Consultation fails to explain the 'impediments arising from the Convention and the Human Rights Act' and provides no evidence or detail of the 'challenges' posed. This question lacks legal foundation. The only clear basis for this question is xenophobia and a political desire to marginalise and erode the rights of 'illegal migrants'.

Throughout our response, we have detailed the mechanisms in place in immigration law which filter out abusive claims and ensure those without standing cannot bring claims. We have also detailed the

permission stages that are in place for onward appeals, and the due judicial deference which is shown by the courts and tribunals to Parliament and the executive in the assessment of human rights claims.

We are concerned that as with other questions in this consultation, the necessary implication is that the Government intends to prevent meritorious human rights 'challenges', classified as 'impediments', from being brought. We strongly oppose any attempt to inhibit the ability of any person, including migrants and persons seeking asylum, to access legal advice, claim asylum, make human rights claims, and challenge decisions, as well as any attempt to remove potential victims at real risk of facing torture and inhuman or degrading treatment or death.

We welcome the Government's intention to respect its international obligations. However, if this is truly the case, the best way to do so is not to undermine these obligations, including *non-refoulement*, through amendments to the HRA which would reduce fundamental human rights protection and decouple domestic rights with those under the ECHR. Furthermore, the Government should take on board the comments of parliamentarians, the UNHCR, UN Special Rapporteurs, the JCHR, numerous civil society organisations, including ILPA,[96] and other experts who have warned of the detrimental provisions in the Nationality and Borders Bill which will result in the United Kingdom breaching its obligations under various conventions including the ECHR, the 1951 Refugee Convention, the 1961 Convention on the Reduction of Statelessness, and the UN Convention of the Law of the Sea.

If the Government truly wishes to reduce irregular arrival in the UK, then it must make a commitment to providing safe and legal routes to reduce the need for persons to arrive irregularly.

For example, in our recent letter to the Home Secretary, we have asked the Government to open routes for resettlement of persons fleeing Ukraine as a result of the Russian invasion:

> 'Ukraine's neighbours cannot be expected to shoulder the responsibility of accommodating refugees alone, and the UK must act in solidarity with them. Therefore, in addition to its family reunion schemes, the Home Secretary should also commit to resettling people who need international protection, with a target of at least 10,000 people a year. The House of Lords agreed with this proposal consenting to amendment 49 to insert a new clause containing this requirement in the Nationality and Borders Bill.[97] We urge the Government to accept this amendment when the Bill returns to the House of Commons.

[96] For example, see ILPA, 'Nationality and Borders Bill: ILPA House of Lords Committee Stage Briefings' (22 January 2022) <https://ilpa.org.uk/nationality-and-borders-bill-ilpa-house-of-lords-committee-stage-briefings/> accessed 8 March 2022.

[97] UK Parliament Votes in Parliament, 'Nationality and Borders Bill Division 4: held on 2 March 2022' <https://votes.parliament.uk/Votes/Lords/Division/2701> accessed 4 March 2022.

Without substantial resettlement programs, recourse to irregular migration routes will inevitably increase, and refugees will lose their lives.'[98]

During Report Stage of the Nationality and Borders Bill in the House of Lords, we supported Lord Dubs' amendment 48 to open a new safe route to family reunion for refugees in Europe,[99] to which the House consented on 2 March 2022.[100]

The solutions we recommend are within the gift of the Government.

Remedies and the wider public interest

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

a. the impact on the provision of public services;

b. the extent to which the statutory obligation had been discharged;

c. the extent of the breach; and

d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

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

ILPA is of the view that any provision must not interfere with the judicial function, in particular the ability of the courts to make a holistic assessment of all the factors it considers to be relevant. We do not support any provision which would further hamper the discretion of the court to grant such relief or remedy as it considers appropriate, including the award of damages. No single factor should be decisive in the assessment of damages under the HRA, which may be necessary to afford just satisfaction in accordance with section 8(3) HRA to compensate a claimant for the harm they have suffered. We oppose the inclusion of (d), which is sufficiently addressed in section 6(2) HRA, and any attempt to rely on the impact on public resources to reduce public accountability.

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[98] ILPA, 'ILPA Letter to the Secretary of State for the Home Department and the Secretary of State for Levelling Up, Housing and Communities regarding Ukraine' (4 March 2022) <https://ilpa.org.uk/letter-to-the-secretary-of-state-for-the-home-department-and-the-secretary-of-state-for-levelling-up-housing-and-communities-regarding-ukraine/> accessed 8 March 2022.

[99] ILPA and others, 'Briefing: Refugee family reunion for unaccompanied children' <https://ilpa.org.uk/wp-content/uploads/2022/02/ILPA-et-al-Joint-Briefing-Family-Reunion-Amendment-Report.pdf > accessed 8 March 2022.

[100] UK Parliament Votes in Parliament, 'Nationality and Borders Bill Division 4: held on 2 March 2022' <https://votes.parliament.uk/Votes/Lords/Division/2700> accessed 8 March 2022.

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

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

> **Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or**
>
> **Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.**

Once more this question reveals that the Government wishes to create a dichotomy, between claimants deemed genuine, 'responsible', and worthy, and those who are deemed not to be. We firmly oppose this underlying premise to the consultation, which would erode the universality of human rights and equality before the law.

If a person has a meritorious human rights claim, if their fundamental rights have been infringed upon by the state, they should not be barred from bringing a claim or receiving just satisfaction in accordance with section 8 HRA.

We are concerned that inconsistency and departure from the ECHR will result in a failure to provide an effective remedy (Article 13), or compensation for arbitrary deprivation of liberty (Article 5(5)).

We do not support either of these options as they would restrict satisfaction and public accountability. We note that neither of these proposals was put to or recommended by the IHRAR. We are particularly concerned by Option 2 and the suggestion that certain conduct, such as prior convictions or adverse immigration history, could always mean that a person would never receive human rights damages, which would disproportionately affect certain vulnerable and marginalised groups.

We support a nuanced approach that considers multiple factors including the connection between conduct of the individual and breach of their rights, and the culpability and conduct of both parties. We do not support any proposals to delimit the ability of the court to consider all relevant factors in relation to the specifics of a case.

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

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

We oppose the introduction of the clause, and do not see a need for it. It is clear within the UK constitutional framework that Parliament is sovereign.

However, we are concerned that the proposals in the draft clause may undermine the UK's commitments under the ECHR and discourage compliance with Strasbourg rulings.

Part and parcel of the Convention is not only the requirement for contracting states to observe the rights and obligations deriving from it (Article 1), and establishing the ECtHR (Article 19), but also to find violations of the Convention through judgments which 'High Contracting Parties undertake to abide' in any case to which they are parties and supervise the execution of judgments (Article 46).

It is within this context that the proposed clause must be seen which suggests that:

> *(1) The Bill of Rights affirms that the judgments and decisions of the European Court of Human Rights—*
>
> *(a) are not part of the law of any part of the United Kingdom, and*
>
> *(b) cannot affect the right of Parliament to legislate or otherwise affect the constitutional principle of Parliamentary sovereign.*[101]

There have been clear instances where the United Kingdom has decided not to implement ECtHR judgments and has engaged with the Committee of Ministers who supervise the execution of final judgments of the ECtHR. Whilst our primary position would be that contracting states should generally seek to implement ECtHR judgments against them, we do not see a case has been made for reform.

Impacts

Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:

> **a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate;**
>
> **b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate; and**
>
> **c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.**

We are of the view that it is for the Government to collect evidence on the equalities impact on individuals with particular protected characteristics, rather than to outsource this task to those

[101] Consultation Paper, page 101.

responding to this consultation. We have noted throughout this consultation the lack of evidential basis for the proposals. We recommend that as part of its assessment, the Government turn to data which will be far more accessible to it than to us and re-assess whether its proposals are justified on the basis of that data.

It is clear that in this consultation the effect on those with relevant protected characteristics has been sidelined. The very manner in which this consultation was conducted, with a failure to ensure the consultation was accessible to disabled people from the outset, is evidence of the lack of forethought for those who may be disadvantaged by the proposals.

We recommend the Government consider how the reform of the HRA may result in the Government failing to secure Convention rights without discrimination on the gorunds detailed in Article 14 ECHR. We are particularly concerned that the proposals will result in further marginalisation of migrants, persons seeking asylum, persons of certain races or ethnic backgrounds, and victims of human trafficking.

ILPA is a membership association formed of barristers, solicitors, advocates, academics, non-governmental organisations and individuals practising or with a substantial interest in immigration, asylum and nationality law. However, the Government should also be engaging with those with lived experience, particularly vulnerable persons, who have brought human rights claims, to assess the impact that the proposed Bill will have upon them and their family members. We do not consider that this consultation was sufficient to engage the public on these matters, and the technical nature of the questions will have likely deterred many from responding.

We have rejected the premise of this consultation, as lacking evidence. We cannot see that the proposals for reform would be beneficial, and we have outlined the detriment rather than the benefits we see flowing from the proposed Bill of Rights. Therefore, we do not consider it appropriate to provide reasons and evidence in relation to the sub-questions. The way forward we recommend for mitigation of impact is abandonment of these proposals altogether, and to use the responses received to reconsider how to enhance rather than diminish human rights protection in the UK.

Our Details

I request that the Government keeps my submission anonymous, and does not reveal my personal information in any published materials about the consultation and its future work on this issue.	☐
Full Name:	Zoe Bantleman
Type of organisation or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.) Delete where appropriate	- Associations
Date:	8 March 2022
What region are you in? Delete where appropriate	- North East - North West - Yorkshire / Humberside - East Midlands - West Midlands - Wales - East Anglia - South East - South West - Greater London - Scotland - Northern Ireland - Other (please specify) - Don't want to say
Company name / organisation: (If applicable)	Immigration Law Practitioners' Association

Address: **Including postcode**	Lindsey House 40/42 Charterhouse Street London EC1M 6JN
If you would like us to acknowledge receipt of your response, please state yes: (Delete if you do not wish to have your response acknowledged)	**YES** – I would like the Ministry of Justice to send a receipt of acknowledgement of this response.
Address to which the acknowledgement should be sent, if different from above: (We recommend using an email address)	