



The Global Justice Academy
at
Edinburgh Law School

Submission to the
Ministry of Justice
Consultation

on

Human Rights Act Reform: A
Modern Bill Of Rights – A
Consultation to Reform the Human
Rights Act 1998
(CP 588, December 2021)



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Human Rights Act Reform: A Modern Bill Of Rights
A consultation to reform the Human Rights Act 1998

Written Consultation Response

The Consultation Paper begins with the following statement: ‘This consultation marks the next step in the development of the UK’s tradition of upholding human rights’. However, as will be demonstrated below, the proposals contained therein, including the introduction of a British Bill of Rights, are actually a thinly veiled plan to diminish the human rights of all people living in Britain. Not only do the proposals demonstrate a clear misunderstanding of the way in which the current legal framework exists to protect every member of society, including the most marginalized members of our society, but the proposals also ignore the delicate relationship between Westminster and devolved governments of Northern Ireland, Scotland and Wales. The assumptions underpinning many of the proposals have no evidence to support them and would cause extreme uncertainty in the British legal system.

1. 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.

As traditionally understood, courts are able to draw from any materials they deem necessary to interpret questions of law. The Consultation’s proposed options to amend section 2 would not only represent a radical change to the current position under Human Rights Act 1998 but would also lead to increased litigation due to the uncertainty that they would bring.

The Human Rights Act 1998 (HRA) was to “bring rights home”, specifically the rights set out in the European Convention of Human Rights, as outlined through the structure and wording of the HRA and Schedule 1 of the Act. The copious evidence that exists demonstrates that this was never intended to mean that UK courts must follow Strasbourg case law to the letter. Nor has the HRA required UK courts to cede authority over domestic law to the European Court of Human Rights. Instead, the HRA has enabled UK citizens to raise claims for redress before the domestic courts for a breach of ECHR rights. The HRA removed the need, in most cases, to apply to the European Court of Human Rights. This essential measure has reinforced the UK’s commitment to access to justice and saved time and costs for both the UK and its people. In short, domestic courts have had the opportunity to reflect on human rights claims in the contemporary legal and social landscape before any potential application to the European Court of Human Rights.

Furthermore, section 7 of the HRA provided a new cause of action as well as for the interpretation of domestic legislation and the common law in accordance with convention rights. The UK Parliament provided the means by which domestic law could be aligned with ECHR law, where

our courts considered this necessary, and where it was in keeping with the protection of rights in the UK.

The primary purpose of the HRA would be radically changed by the proposed amendments by substantially weakening the understanding of the Act through decoupling domestic rights from Convention rights. Unlike the HRA, the proposed British Bill of Rights would no longer be premised on providing for a domestic remedy for breach of ECHR rights and would no longer seek to align domestic law with Convention law. Under this illogical formula, the UK will remain a member of the European Convention on Human rights and UK citizens will retain the right of individual petition, which runs the very real risk of UK citizens not being able to obtain a remedy for a breach of their ECHR rights domestically. Both the UK and its people would be disadvantaged as a result of costly and lengthy applications to Strasbourg.

UK courts are currently able to draw on a wide range of law when reaching decisions on human rights in legal controversies. HRA s2 obliges UK courts to 'take into account' of any relevant jurisprudence of the European Court of Human Rights and does not prohibit courts from additionally taking into account case law from jurisdictions further afield. It has taken almost 20 years to establish a settled approach. The proposed amendments would create a great deal of uncertainty for years to come in contrast with the present approach. A number of cases would need to reach the Supreme Court in order to clarify the meaning and application of the proposed new rules. The jurisprudence of national courts outside the Council of Europe can provide a valuable perspective in human rights cases, especially where the Strasbourg jurisprudence is not on point, is unclear, or has reasoning that misunderstands the application of some aspect of national law. References to foreign case law also aids in illustrating why UK courts might find it important to depart from the Strasbourg case law and, in so doing, help to build dialogue with the Strasbourg Court and other Council of Europe states, see for example *R v Horncastle* [2009] UKSC 14, Annex 1, where Lord Mance offered a detailed analysis of the relevant jurisprudence of foreign national courts. Under the HRA, all of these opportunities are possible, as evidenced by data on the UK Supreme Court's reference to foreign jurisprudence: of the 533 cases handed down by the UK Supreme Court in the first eight years of its work (2009-2017), 152 cases engage human rights issues and 38% (57 of 152) explicitly cite foreign courts. While most references in UK courts are drawn from offspring common law jurisdictions such as Australia, the United States and Canada, this practice also contributes to the development of a human rights *jus commune*.

There are three (possibly more) problematic issues would be raised by the proposal to include in primary legislation reference to sources of law other than just to jurisprudence of the European Court of Human Rights, including:

- i. While we do not accept that there is evidence of 'mission creep', even if there was, these proposals would only increase this. The Consultation Paper suggest that there are boundless sources of human rights jurisprudence and law that could be considered by UK courts. However, considering the highly variable implementation approaches utilised across non-European jurisdictions, the different economic situations, cultures, etc., the application of specific human rights in different legal controversies will be less clear due to extremely varied systems in which the rights are operating. In short,

consistency will be less clear as interpretations outside of Europe will be tethered to other human rights instruments, whether international or regional, such as the American Convention on Human Rights or African Charter.

ii. It would take many years for the common law system, through the Supreme Court, to determine which jurisdictions might take precedence. Without some clear idea of hierarchy or ordering there will be no certainty in addressing rights controversies and, instead, a 'lucky dip' approach will prevail.

iii. Casting a wider net will require much more familiarity with foreign jurisdictions and demand increased citations and arguments with respect to why certain cases are more important and how that legal system relates to the UK.

In short, the proposals would usher in uncertainty where the courts would longer be bound to follow two decades of HRA decisions. This would, in effect, reverse 20 years of progress on human rights adjudication. This presents questions regarding issues previously litigated under the HRA, such as would these issues need to be re-litigated under proposed British Bill of Rights? This would open the floodgates to litigation that is not necessary at present and amplify the costs of bedding down a new human rights framework multifold.

Furthermore, the Option 2 proposal to refer to the *Travaux Préparatoires* of the ECHR is a simplistic, misguided idea indicating a lack of understanding of international law and its evolutionary nature. Not only are these dated and offered in the vague language of a time when the map of Europe was far different, the world at large existed in a very different form at that point, without the technological, scientific and social developments that connect people and governments today.

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?

The Supreme Court is *already* the 'ultimate judicial arbiter' of UK laws. Section 2 of the HRA ensures this, by requiring domestic authorities only to 'take into account' case law from the European Court of Human Rights when making determinations in cases arising under the HRA. In interpreting the rights outlined in the ECHR vis-a-vis the HRA it makes sense to look to the European Court of Human Rights as the ultimate interpretive authority for the Convention. The Consultation Paper erroneously suggests that UK courts feel wedded to Strasbourg jurisprudence (the 'Ullah principle') but there is no evidence to support this. Numerous examples demonstrate the Supreme Court's independence in stepping away from Strasbourg case law, such as when it would lead to negative or absurd consequences, where the UK court disagrees with the basic reasoning of the Strasbourg court, or where the domestic court simply thinks the Strasbourg decision is wrong. See the following examples:

- In *R v Horncastle* [2009] UKSC 14, the Supreme Court considered, and rejected, Strasbourg authority, which suggested that the use of hearsay evidence in certain criminal trials

would render the whole process unfair. The Court considered that the Strasbourg Court had not properly considered the nuance of the domestic system and the implications of adopting its view.

- In *R (Harkins) v Home Department* [2014] EWHC 3609 (Admin), the High Court chose not to follow a Strasbourg ruling which suggested that the Convention prohibited the UK government from extraditing criminals to face a life sentence in the USA. The domestic court considered that the case was out of step with previous decisions, and would make it more difficult to bring criminals to justice.
- In *Poshteh v Kensington* [2017] UKSC 36 the Supreme Court chose to reject an interpretation of Article 6 (right to a fair trial) adopted by Strasbourg in relation to the definition of a “civil right” in the context of homelessness. Put simply, whilst the Strasbourg Court thought that Article 6 did apply to certain kinds of housing decisions, the Supreme Court disagreed, finding that the right was not relevant at all in that context.
- In *R v Abdurahman* [2019] EWCA Crim 2239, the Criminal Division of the Court of Appeal chose not to follow a Strasbourg decision, which held that the right to a lawyer applied, and was breached, by an individual suspected of a terrorism offence. The domestic court found that no rights were breached in the circumstances, and that the Strasbourg court’s reasoning was faulty.

These decisions make clear that UK courts are comfortable with departing from Strasbourg case law. The point here is not to claim any view on the outcome of the particular cases or the UK courts’ reasoning, it is more to highlight that the underpinning premise of the proposals is flawed. Modifying the existing position serves no valid or useful purpose.

Trial by Jury

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

The introduction of a right to jury trial is unnecessary and serves more as a distraction from the substantial weakening of our existing human-rights protection in the other proposals in the Consultation. Adding trial by jury as a specific right would change very little in practice. Article 6 in the HRA already protects our right to a fair trial, which has strong protection. Furthermore, the consultation proposes that this will be a qualified right, although it has not provided a draft clause. If the qualification(s) for this right resemble those in the HRA, this might actually make it easier for public authorities to interfere with this right. It is also important to recognise that the jury trials have different impacts in the devolved nations across the UK. In particular, Scotland has a very different jury trial system than England and Wales.

Freedom of Expression

Questions 4 & 5:

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?

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?

The Consultation Paper presents the position that Strasbourg gives priority to personal privacy under ECHR Article 8 and, therefore, that consideration should be given to how to enhance freedom of expression in relation to the right to privacy. Here, the Consultation Paper is clearly responding to the media frenzy surrounding the recent Meghan Markle case (*Duchess of Sussex v Associated News Ltd* (2021)) where her personal privacy regarding a letter between a daughter and her father was given priority over media freedom. The decision, coupled with other cases both in the UK and in Strasbourg, have led some members of the press to argue that judicial activism is expanding the application of the tort of misuse of private information and data protection. (See *ML v Slovakia* (App. No. 34159/17, 2021) and *Bloomberg v ZXC* (Feb 2022)).

However, case law demonstrates that both the Supreme Court and the Strasbourg Court are able to balance the competing interests between privacy rights and freedom of expression. In *PJS v News Group Newspapers Ltd* [2016] A.C. 1081, the Supreme Court reaffirmed that ECHR Article 10 is to be treated as of a weight *equal* to that of Article 8 when the two are in conflict. This is a point supported by lawyers regularly defending privacy law cases, privacy and freedom of expression must be treated equally and carefully balanced on a case-by-case basis. The European Court of Human Rights has successfully conducted such balancing in a number of cases: *Von Hannover v Germany* (no. 2) (App nos. 40660/08 and 60641/08, 2012) §§ 95-113; *Axel Springer AG v Germany* (App no. 39954/08, 2012) §§ 78-95; and *Couderc and Hachette Filipacchi Associés v France* (App no. 40454/07, 2015) §§ 83-93.

These cases demonstrate that the Consultation Paper proposals are not responding to any existing evidence that UK courts or the Strasbourg Court is inappropriately prioritising privacy rights over media's rights to freedom of expression.

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

Both Article 10 ECHR and domestic law protect journalists' sources, specifically: the Contempt of Court Act 1981 s10; the Police and Criminal Evidence Act 1984 s9; and the Investigatory Powers Act 2016 (various provisions). The premise of this question suggests, without evidence, that the existing framework is not working well to protect journalists' sources. Improvements to the current framework should be made by strengthening the relevant legislation rather than

by departing from the language of ECHR Article 10 through the proposed British Bill of Rights' free speech provision. Furthermore, domestic legislation protects whistle-blowers from retaliation where they inform the press about wrongdoing (Public Interest Disclosure Act 1998). However, the government's proposed reforms to official secrecy legislation would put in place stricter penalties both for whistle-blowers sharing official information in the public interest, and for journalists disseminating such information. This appears to be in direct conflict with the Consultation Paper's stated purpose to strengthen protection for journalists' sources.

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.

There is no evidence that a permissions stage for human rights claims is necessary or desirable. Any move to pre-select or pre-screen applicants on the basis of worthiness or 'genuineness' through the introduction of a 'permission stage' goes against the protection of individuals' fundamental rights. Such a mechanism poses real concerns about access to justice as it would place a barrier between claimants and their ability to enforce their rights. 'Universal' human rights should be accessible to everyone, even if they are not favoured by the ruling political party. In the UK system there exist robust mechanisms for ensuring that spurious cases do not proceed. This includes the test for standing, as required by ECHR Article 34, which is incorporated by HRA s7 and makes clear that only 'victims' may bring proceedings under the HRA.

Litigants who are unable to satisfy the suggested more restrictive approach would still be able to submit their case to the Strasbourg Court. This is squarely the situation the HRA sought to avoid in 'bringing rights home'. Previous governments acknowledged that the expense of having to take a case to Strasbourg meant that many 'genuine' claimants were excluded due to the onerous expense. Imposing a more restrictive permission test would therefore have the opposite outcome as intended and reduce access to justice to the growing number of socially and economically marginalized in the UK.

Within the ECHR system, there has always operated a permissive element through the question of manifest inadmissibility on the merits. The entry into force of Protocol No. 14 in 2010 reinforces this through the 'no significant disadvantage' rule enshrined in ECHR Article 35 § 3 (b). In 2021, Protocol No. 15 amended Article 35 § 3 (b) of the Convention by removing the requirement that the case should have been heard at the domestic level before being excluded under this provision, thus expanding the rule. There is also a 'threshold of seriousness' required before a complaint can be successful on the merits before the Strasbourg Court. This threshold applies even after the admissibility stage, as demonstrated in *Ireland v UK* (App. No. 5310/71, 1978) in the context of ECHR Article 3 and *Axel Springer v Germany* (App. No. 39954/08, 2021) in the context of ECHR Article 8. It is unclear how a further permission stage at the domestic level

would serve to strengthen the ‘genuineness’ of a human rights claim when so many checkpoints already exist.

Victims of human rights interference already struggle to bring their claims forward. The extensive reductions to legal aid and the fact that many marginalized groups already are wary of the legal system means that many human rights breaches never make it to court already. Establishing an unnecessary screening procedure goes against the spirit of human rights protection.

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.

There should be no permissions stage. See previous response.

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?

There is no evidence to support the assumptions behind this question.

The wording of the question is problematic, which suggests questionable motivation behind its inclusion. While there may be good intentions in seeking to create a system that ensures claimants can have a vehicle for redress, the use of the word ‘genuine’ is unhelpful as it suggests there ought to be a pre-determination of which claimants are worthy of court time and which are not.

The existing lack of readily available legal aid means that there is a growing crisis with access to justice across the UK. For those who are economically marginalized and without financial means it is already difficult to enforce their rights in court due to the prohibitive financial burden. If the government truly wants to facilitate equality, including access to the courts for human rights litigation, the government needs to address the shortages in legal aid funding to allow for equality of access.

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 problems identified in the Consultation Paper that form the premise for the question are misrepresented, and suggest that the case law is misunderstood. Positive obligations are an established part of the protection of rights under the ECHR and any significant divergence by the UK would inevitably lead to more applications to Strasbourg. Positive obligations are, furthermore, a commonly recognised dimension of each of the international human rights

treaties to which the UK is party, including the International Covenant on Civil and Political Rights that encompasses most of the rights protected by the ECHR.

The Consultation Paper (paras 141-150, 167-170) deals with positive obligations generally, and specifically with the positive obligation to protect against real and immediate risk to life/serious harm contained in Articles 2 and 3, and the *Osman v UK* case. The Consultation Paper suggests that the *Osman* test undermines public protection as it places an ‘onerous burden’ on police forces and other frontline services and has had unintended consequences. There is no evidence to support the Consultation’s assertion at paragraph 150 where it is stated:

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.

This misrepresentation must be expressly addressed in the context of the assertion of the extent of the duty owed and the suggestion that the court have been ‘overly prescriptive’.

Two important features of the ECHR system that are omitted from the Consultation Paper which speak to the extent of obligations owed must be acknowledged. The first relates to resource allocation. The European Commission outlines that Member States are responsible for allocation of resources and this is a crucial part of the assessment of whether there has been a breach of the positive obligation to protect life. The European Commission report on the *Osman* case accepted that the resources of the state will have a bearing on the nature and scope of any positive obligation, stating that:

*Whether risk to life derives from disease, environmental factors or from the intentional activities of those acting outside the law, there will be a range of policy decisions, relating, inter alia, to **the use of state resources**, which it will be for contracting states to assess on the basis of their aims and priorities, subject to these being compatible with the values of democratic societies and the fundamental rights guaranteed in the Convention.* (emphasis added)

The second point is the clarity with which the *Osman* decision linked the positive obligation to protect life to the burdens imposed by such a duty by emphasizing that the positive obligation was not to be interpreted such as to impose ‘impossible or disproportionate burdens in the authorities’. The Court went to great lengths to offer a way forward at para 116:

For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly,

not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

These important discussions about balancing the dimensions of the positive obligations against the burdens on the state are entirely absent from the Consultation Paper.

Attempts to restrict the application of positive obligations will lead to more claims finding their way to Strasbourg. The assumptions underpinning question 11 regarding “significant problems” are not evidenced and the Consultation Paper either misunderstands or misrepresents ECHR case law. Positive obligations are essential to delivering fundamental rights in the UK. Positive obligations are the basis in which many state/public authorities ground their purpose, including the police investigating threats against life or claims of child endangerment. Restricting positive obligations would put children at risk of greater harms where public authorities have no obligation to investigate mistreatment and women at greater risk where there is no obligation to investigate domestic abuse. Fundamental rights cannot be fulfilled without the positive dimension of human right protections.

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.

The Independent Human Rights Act Review report found that HRA s3 was used cautiously by the UK courts and explicitly rejected its repeal. We therefore disagree with both Government’s proposed options regarding s3, as they are not only unnecessary, but they would reduce rights protections and hamper the ability of the UK courts to interpret legislation in a way which ensures it is compatible with the rights contained in the Bill of Rights.

References to the apparent danger posed by section 3 HRA (whether to Parliamentary intention or, perhaps more tellingly, to the freedom of the government to make policy choices) are often overstated. It is, of course, true that section 3 authorises - in theory - a stronger kind of interpretation than “normal” statutory interpretation, and that – again, in theory – this interpretation can go against the basic intent of Parliament.

However, in practice, section 3 very rarely has such a profound effect. In an important analysis of section 3 cases (referenced by the Independent Human Rights Act Review panel but not the MoJ), Florence Powell and Stephanie Needleman assessed the corpus of section 3 case law and found that, overall:

- There were “relatively few cases in which section 3 was decisive to a case’s outcome”. Often, section 3 HRA was used as an alternative to, or to supplement, more ordinary methods of interpretation.
- Usually, the result of section 3 was to impose relatively minor changes which did not go against Parliament’s intention. The courts are alive to the dangers of radical re-interpretation, and changes tend to be fairly modest, “with the courts being vigilant to not undermine Parliament’s intention”.

These conclusions align with judicial dicta, which prohibits the use of section 3 where it would lead to a departure from “a clear and prominent feature” of legislation (*Re Z* [2015] EWFC 73 at [36]); further, any changes which are made via section 3 must be “necessary” to ensure compliance with human rights standards; judges can go no further than this (*R (Aviva Insurance) v Secretary of State for Work and Pensions* [2021] EWHC (Admin) at [28] and [36]). As a result, in some recent cases judges have remarked that the interpretive powers under section 3 and the general powers of statutory interpretation are often employed in a very similar way in practice (see, e.g. *Jet2 v Denby*, UKEAT/0070/17/LA (2017) at [47]; *R (E) v Islington LBC* [2017] EWHC 1440 at [138]-[139]; *The Pharmacists' Defence Association Union v Boots Management Services Ltd* [2017] EWCA Civ 66 at [61]-[62]).

Three further points are worth noting.

Firstly, it is important to consider not only those cases where section 3 was used, but also those cases where it was not used. The claimants in the infamous “prisoner votes” case asked the Scottish courts to interpret domestic legislation prohibiting prisoners from voting in elections in a manner which would essentially reverse this position. The Scottish court, appropriately, rejected this argument and a declaration of incompatibility was issued instead. The clear words of parliament could not be departed from in such a case. (see the case here: *Smith v Scott* [2007] CSIH 9)

Secondly, it is useful to remember that in many cases, section 3 HRA was invoked by the government as its preferred solution to remedying a rights incompatibility. For example:

- In the seminal case of *Ghaidan v Godin-Mendoza* [2004] UKHL 30 the government argued for the use of section 3 to modify the Rent Act so as to include same-sex partners in those able to benefit from succession rights under a tenancy;
- It also did so in the case of *Hammond v Secretary of State* [2005] UKHL 69, a case demonstrating perhaps the most radical use of section 3, allowing the court to order an oral hearing in circumstances which, read literally, would be blocked off by statute.

- In *Pomiechowski v Poland* [2012] UKSC 20, the government advocated for a reading of the Extradition Act which allowed time limits prescribed therein to be extended by the court in exceptional circumstances.

Other cases in which the government advocated for the use of section 3 include *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; *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.

Thirdly, it is, as ever, open to Parliament to respond to section 3 interpretations it does not favour. Research has shown that it generally has not done so very frequently, if at all. By contrast, Parliament has chosen to uphold the interpretation given by courts using section 3 on multiple occasions. For example:

- Following the judgment of the House of Lords in *R (O) v Crown Court* [2006] UKHL 42, the Criminal Justice and Public Order Act 1994 was amended to include the specific wording read in by the judges.
- 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 Art 6.
- 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.

These examples suggest that rather than acting as some affront to Parliamentary intention, Parliament generally chooses not only to tolerate the interpretations afforded by section 3, but sometimes actively endorses them.

There is, therefore, no need for either the repeal or the replacement of s.3 HRA.

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

We disagree with the consultation's suggestion that the HRA takes power away from or reduces the role of Parliament (see Q12 above). The HRA was deliberately designed to fit with the way the UK's system works and ensure Parliament is sovereign and can make or change laws, including when they think the law has been wrongly interpreted or applied by the courts.

The HRAR recommended that the role of the Joint Committee on Human Rights (JCHR) could be enhanced in order to increase Parliamentary engagement with the interpretation of legislation by the UK courts. We would welcome this enhanced role for the JCHR and Parliament more generally in the protection of rights, but this should not be taken as endorsing this Consultation in any way. However, in order to provide for this, the JCHR should be properly resourced to

enable it to also continue to perform its vital function of scrutinizing every Government Bill for its compatibility with human rights. This can be done without any changes to the HRA as this is a parliamentary process.

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

We disagree with the Government's suggestion that there is a problem with the operation of S 3 of the HRA and with its representation in the Consultation. The Independent Human Rights Act Review (IHRAR) panel noted "any damaging perceptions as to the operation of Section 3 are best dispelled by increased data as to its usage" (chapter 5, p181). We would agree with the IHRAR that gathering information on how section 3 HRA is used would increase transparency. However, this should also not be taken as endorsing this Consultation in any way.

The creation of such a database should be designed, developed and maintained by a well-resourced expert body that is fully independent from the Government.

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?

Few examples exist where UK courts actually found that a piece of secondary legislation breaches the HRA (research by Joe Tomlinson, Lewis Graham, and Alexandra Sinclair reveals that there are about 2 cases per year). Where courts have found that a provision of secondary legislation breaches the HRA, in most instances, courts do not quash or invalidate the offending provisions, but instead make a (regular) declaration pointing out the unlawfulness. Adding the possibility of issuing a declaration of incompatibility with regards to secondary legislation seems a pointless exercise. Fundamentally, laws passed by the government should not have the same protections as laws passed by Parliament. This is also about respecting the sovereignty of the UK Parliament because Parliament has not authorised government ministers / bodies to make laws that breach human rights. So, when the government ministers / bodies do this, they are acting outside of the powers the UK parliament has given them to make law.

UK courts do not review primary legislation on the basis that it was enacted through the legislative process by the sovereign parliament, with various opportunities for scrutiny along the way. Secondary legislation, on the other hand, is made by government ministers, under an authority which has been delegated by parliament. Additionally, there is a very large body of secondary legislation made by the government executive that is subject to far less parliamentary scrutiny than primary legislation. Where there is limited opportunity for legislative scrutiny, judicial scrutiny takes on a heightened importance.

There are a series of further problems that would result from this proposal:

- The proposal would make the treatment of secondary legislation different depending on whether a case was argued on human rights grounds or on ordinary public law principles.

It would be a strange outcome if secondary legislation violating human rights could not be quashed while secondary legislation which runs into unlawfulness based on ordinary public law principles could be. Should there be any attempt to restrict the jurisdiction of the courts in this way, claimants may be more likely to mount challenges to relevant secondary legislation on the basis of ordinary public law principles. As guardians of the rule of law, the courts are also more likely to be rigorous in their review of any secondary legislation which purports to diminish the scope of fundamental rights: *Ahmed v HM Treasury* [2010] UKSC 2; [2010] 2 AC 534.

- The proposal risks creating worrying disparities between Westminster and the devolved nations. The devolution legislation makes compatibility with Convention rights a limit to legislative competence: Scotland Act 1998, s28(2)(d); Government of Wales Act 2006, s94(6)(c); Northern Ireland Act 1998, s6(2)(c). Thus, any legislation passed by a devolved legislature which is not compatible with the Convention can be quashed. Restricting courts to a declaration of incompatibility in respect of secondary legislation would raise the status of secondary legislation made by Ministers in Westminster above the status of purportedly primary legislation passed by the devolved legislature.
- This proposal would also limit the ability of courts to provide remedies for violations of Convention rights. A declaration of incompatibility is discretionary: it triggers a power, rather than a duty, for a government minister to amend incompatible legislation.

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.

Section 19 has brought about significant positive improvements for the protection of human rights in the UK. The Independent Human Rights Act Review (IHRAR) considered various options to tweak section 19 which would give more options/scope for its use (so this is different to the Government's proposals, which suggest there is some sort of problem with Section 19 without identifying what that is). The IHRAR decided these were not necessary. The report says "section 19 plays an important role in helping to ensure that Government and Parliament consider the application of [the rights in the Human Rights Act]..to new legislation ... there can be no doubt that it has had a major, transformational and beneficial effect on the practice of Government and Parliament in taking account of human rights issues when preparing and passing legislation." (Chapter 5, page 244). We agree with the IHRAR that no reform is necessary nor advisable.

Most notably, section 19 has led to significant changes in the process of a Bill's development and assessment, with policy officials and government lawyers involved in a systematic evaluation of a Bill's compliance with Convention rights. These detailed compatibility assessments, which come at the early stages of a Bill's development, increase the likelihood that Bills with rights-compliant legislative aims are drafted in a manner that is compatible with Convention rights, which is a positive step. The pre-introduction competence checks also mean that it is extremely unlikely that a Minister will be unaware of the impact that legislation might have on Convention rights when it is introduced to Parliament.

Despite this, the courts have found that a significant number of Acts of Parliament have been incompatible with Convention rights. This is in spite of the fact that only two Bills have received 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.' This indicates that the Government is willing to proceed with legislation that it knows has a high risk of being found to be incompatible with rights by the courts but that, at the same time, it is unwilling to inform Parliament and others of this risk by making a 'nevertheless' declaration. This incongruence makes meaningful parliamentary scrutiny of statements of compatibility essential. Without it, there is a risk that the Government's reasoning will remain untested and that legislation that violates the rights of individuals in the UK will be passed into law. To this end, Cabinet Office guidelines now instruct Government departments to provide reasons for their conclusion on a Bill's compatibility with Convention rights in the Bill's explanatory notes or, when necessary, in a separate memorandum. This new approach is positive in that it has obliged Ministers to provide more detailed justifications as to why they consider that the legislation is rights-compatible.

This new approach has assisted Parliament, mainly through the Joint Committee on Human Rights (JCHR), in its scrutiny of legislation for Convention rights-compatibility. The JCHR reports are an excellent resource for parliamentarians to use when deciding whether to pass, amend or vote against legislation on the basis of its impact on Convention rights.

Much of part III of this consultation relies on the assumption that there needs to be 'a more balanced approach to the proper constitutional relationship between Parliament and the courts on human rights issues' (Consultation Document para. 236). Any attempt to re-balance this relationship should be focused on strengthening Parliament's ability to hold the Government to account rather than weakening the role of the courts. The acceptance 'that government should be restrained by the protection of fundamental rights' (Consultation Document para. 154), should lead the Government to rethink its plans (in questions 12-15) to diminish the powers of the judiciary to protect fundamental rights.

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?

The UK is a multilevel and deeply plural state with devolved governments in Scotland, Northern Ireland and Wales, separate legal systems which partially overlap with the devolved territorial boundaries, and distinct legal traditions. This deep pluralism also affects the human rights framework and how it applies across the UK, yet this is not reflected in the current consultation or in the Government's reform proposals. In this way, the consultation either misunderstands or ignores the complexity of the internal constitutional articulation of human rights protection and the fundamental role of the ECHR /HRA as a common baseline for human rights interpretation

across the UK. This pluralism was considered in the Parliament's Joint Committee on Human Rights' inquiry into the Government's review, and we refer to this in our answer.

The proposed changes to the Human Rights Act 1998 / creation of a Bill of Rights in the consultation have originated from the UK Government alone and propose a uniform set of reforms to apply across the UK. In particular, the proposals do not take into account the role of the ECHR and the HRA as key pillars of the devolution settlements in Scotland, Northern Ireland and Wales, and provide no consideration of how these reforms would apply in practice in the devolved contexts or to the separate UK jurisdictions and legal traditions. Furthermore, they do not take into consideration the strong opposition to reforms aimed at weakening the scope, and avenues for protection, of ECHR rights across the devolved institutions and bodies.

In Northern Ireland, the incorporation of ECHR rights into the law of Northern Ireland was one of the fundamental commitments and safeguards of the peace process and the Belfast/Good Friday Agreement (B/GFA). The HRA currently fulfils this part of the Agreement. As a result, the evidence provided for the Joint Committee's report highlights that the HRA has a distinctive constitutional function in Northern Ireland and that any efforts to alter it risk unsettling a delicate balance and would present significant risks to stability and peace in Northern Ireland. The Committee itself notes that it is very concerned about the possible implications of upsetting this framework. The UK's international standing and its relationship with Ireland could also suffer if its obligations under the B/GFA are not fully observed.

In Scotland, Northern Ireland and Wales, the HRA applies as part of a broader complex constitutional framework that places the ECHR at the heart of the organisation and functioning of the devolved institutions and bodies. The three devolution settlements all require devolved legislation to be compatible with ECHR rights, defined with reference to the HRA, resulting in the HRA/ECHR functioning as boundaries or limits to devolved competence. Any amendments to the scope of protection or interpretation of the HRA will therefore raise very complex questions about whether, and if so how, these will apply to the devolved settlements. In these contexts, these are human rights questions but also significant constitutional questions.

- If these reforms are to apply to the devolved settlements, the attempt to detach the interpretation of the rights in the HRA from the ECHR, and the opening up of this interpretation to a variety of other sources, would create significant uncertainty as to the interpretation of the boundaries of devolved competences, and thus of the legality of the actions of the devolved administrations.
- If they are not to apply to the devolved settlements, then this would create a two-tier system of rights interpretation, where in the context of the devolved settlements the previous ECHR based interpretation would continue, and in all other areas the new reforms would apply. This would be extremely complicated because the boundaries between devolved / non – devolved matters are not always clear cut. Furthermore, it is the same courts that decide on devolved / non-devolved matters, and they would then have to interpret specific rights differently for different contexts.

Whatever the option, these proposals would significantly complicate the legal interpretation and application of the UK's human rights framework and create a situation of constitutional instability and legal uncertainty for the devolved settlements.

Representatives from the different devolved institutions and bodies have on numerous occasions stated very clearly that they are against any type of reforms that would weaken the protection of the HRA / European Convention of Human Rights. Yet, it is evident that they have not been consulted in the drafting of these proposed reforms. Moreover, all three devolved administrations are currently promoting reforms to further strengthen and develop the protection of human rights in their devolved nations, designed to build on the current HRA/ECHR framework, and which would be significantly undermined by the Government's proposals.

While the devolved legislatures cannot amend the HRA, human rights as such are not a matter reserved to the Westminster Parliament and it is generally accepted that the devolved parliaments can legislate for the implementation of the ECHR within their sphere of competence. Because of this, and of the more general impact the proposed reforms would have on the devolution frameworks, the Sewel Convention would apply to any Bill designed to incorporate them and the Westminster Parliament should not proceed without the consent of the devolved legislatures. Any attempt by the Government to proceed with such a Bill without the devolved legislatures' consent would result in a significant constitutional crisis which could potentially threaten the future of the Union.

Overall, we strongly support and further build on the conclusions of the Parliament's Joint Committee on Human Rights' report on the review of the HRA on these matters:

- It is essential that any proposals to amend the HRA/treatment of the ECHR take account of their unique role in the constitutional arrangements of the devolved nations and the implications for the future of the union.
- No amendments should be made that weaken the scope and avenues for protection of ECHR /HRA rights, as these would erode the safeguards of the peace process and the Belfast/Good Friday Agreement (B/GFA) in Northern Ireland and destabilise the broader constitutional settlements for all the UK devolved nations.
- The Government should not pursue reform of the HRA without the consent of the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly.

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.

There is no need to change the definition of public authorities. Changing the definition of public authorities opens up another potential clash with the devolved nations' abilities to govern devolved areas of policy. What counts as a 'public authority' should remain flexible in line with the shifts in distribution of power and services which should accrue liability under the Human Rights Act. Narrowing the definition of a public authority only works to relieve private actors from

responsibility when carrying out the roles or duties on behalf of the government through contractual arrangements. If anything, this lack of accountability subjugates the public good to private economic enrichment. While local councils, government agencies and government departments are obviously public authorities, the attempt to exclude private companies carrying out 'public' functions should be held accountable in the same way as clearly public agents. The courts have offered a test for determining whether a particular actor is acting on behalf of the state: is the entity in question exercising the powers and fulfilling the duties of the state or is it merely fulfilling a contract on behalf of the state? An electrician who carries out repairs in a government building is a service provider that is simply performing a contract agreed with a government agency and is not a 'public authority'. Alternatively, if a private company is running a prison, that company should be considered a 'public authority' because it is exercising powers of detention on behalf of the state which directly relates to deprivation of liberty, among other rights.

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.

A unilateral settlement of the challenges posed by the extraterritorial application of the ECHR is not necessary. It would, furthermore, threaten the UK's relationship with its closest neighbors in Europe. The UK government should continue its dialogue with the Strasbourg court and focus on how it aims to give effect to the ECHR when acting outside UK territory.

The Consultation Paper suggests that there is uncertainty in the extraterritorial obligations owed by the ECHR Contracting Parties. However, the Strasbourg Court has consistently applied the framework it articulated in the 2011 judgment of *Al-Skeini v United Kingdom*. The *Al-Skeini* formula divides the extraterritorial application of the ECHR into two categories: (1) when the state exercises effective control of a territory; (2) where a state actor or agent exercises authority and control over an individual. While there are some areas that could be further clarified, such as the investigative obligations under ECHR Article 2 stemming from the *Hannan v Germany* and *Guzelyurtlu v Turkey and Cyprus* cases, these issues can and should be resolved judicially, rather than through a unilateral state intervention.

Both the European Court of Human Rights and UK courts have taken into account the challenging circumstances that accompany states when operating abroad and how this might impact their extraterritorial obligations. In *Jaloud v Netherlands*, for example, the Strasbourg Court made reasonable allowances for the difficult conditions under which investigators had to work in fulfilling the Article 2 investigative obligation. It focused on a number of conditions, including the location, the post-conflict context, language barriers and the hostility toward investigators. Furthermore, in cases such as *Hassan v United Kingdom*, in response to a request by the UK government, the Grand Chamber interpreted ECHR Article 5 in the context of international humanitarian law. The Strasbourg Court has also demonstrated that there are limits to

extraterritorial jurisdiction. For example, in the 2021 *Georgia v Russia (II)* decision the Court rejected the argument that jurisdiction extended to the ‘active phase’ of military operations. In *MN v Belgium*, too, the Strasbourg rejected the extension of extraterritorial jurisdiction to asylum applications made to the Belgian Consulate in Beirut.

In short, despite points of contestation, the European Court of Human Rights has been working with and keeping an open ear to government concerns, including the UK government, as it navigates the application of extraterritorial jurisdiction. This approach effectively balances governments’ obligations under the Convention and respects the fundamentals principles of jurisdiction.

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 strongly disagree with the assumptions underlying this proposal, which suggest that UK courts are not clear about how to apply a proportionality test in human rights cases. Proportionality, as it is currently interpreted and applied by the courts, is a vital part of the way human rights are protected under the HRA. It is key to balancing the rights of all people to ensure decisions protect both the person and the wider community, inside and outside the courtrooms. The HRA is working effectively in this context; no change is necessary.

The proposed options appear directed toward curtailing people’s human rights. As with most of the other proposals put forward in the Consultation Paper, this seems directed at diminishing the human rights protections of the most marginalised members of society. Though the majority of human rights may be qualified by state actions directed toward achieving legitimate aims in a democratic society (for example, ICCPR Articles 14 and 21 or ECHR Articles 6 and 8-11), interfering with the human rights of the most marginalized members of society only demonstrates a lack of understanding or respect for the rule of law in a democratic society.

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.

Each of the three options run contrary to the rule of law and fundamental principles set down in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and countless other human rights agreements to which the UK is party, including the ECHR. The UK, a country that was instrumental in the development of much of the international human rights architecture, suggests a new, closed-minded and discriminatory approach to applying human rights. This proposed tiered system of human rights-holders violates the fundamental principle of non-discrimination and its own equalities law. Excluding those whose views are different or unpopular from human rights protections runs afoul of the rule of law and the fundamental tenets of democracy.

Each of the three proposals aims to lessen the role and independence of the judiciary in examining human rights in legal controversies and signals a lack of respect for the judiciary and the rule of law. This would be a dangerous step towards autocracy as it would place too much responsibility in government ministers. Minority groups, including black and Asian members of society, already face higher criminal sentences and deportation orders in great disproportion to the rest of the population. As with many of the Consultation Paper's proposals, this is only thinly veiled racism. These proposals contravene the UK's obligations under the ECHR, particularly Article 13 (the right to an effective remedy for breach of human right), and also run afoul of numerous international human rights obligations owed by the UK. These proposals would leave many with no option other than to take their case to protect their human rights to the European Court of Human Rights in Strasbourg.

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?

This question suggests that migrants (non-British) who locate in the UK could be excluded from the full protection of human rights law. This would develop a regime that stands in direct

opposition to the ethos and purpose of human rights as a universal set of norms and disregards equality among all peoples. Ensuring that minority groups are protected against the decisions made on behalf of the majority, as represented by elected politicians, is crucial to a democratic society that is based equality. The underpinning assumptions to this question are inherently discriminatory.

The current UK immigration system consistently undervalues and overtly harms the lives of migrants and asylum seekers. While political rhetoric favours adding the label of 'illegal' to many migrants, this comes at the cost of the UK adhering to the objects and purpose of the Refugee Convention. Costs associated with constantly shifting immigration policy, visa applications, and legal representation combine to create one of the most hostile environments for migrants. Rather than deflecting the shortcomings of its policies by vilifying migrants, the government should direct its attention toward developing safe, legal routes to migrating to the UK in line with the Global Compact on Migration.

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.

Emphasising the role of responsibilities within the human rights framework is a deeply concerning idea, with which we fundamentally disagree. All human rights-laws, including our Human Rights Act (HRA), are based on the idea that every person has the same human rights, which they have because they are human. They are universal and inherent in all people. Human rights are not relative to a person's conduct, they are not earned or given by Governments. Responsibilities for upholding human rights lay with the Government. This is how the HRA works.

We strongly disagree with the Government's proposals to create a system in which the people they deem "underserving claimants" cannot access remedies if their human rights have been breached. If a new Bill of Rights incorporates these proposals, then it is not a human rights law.

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 strongly disagree with these proposals. Parliament is already responsible for responding to negative judgments from the European Court of Human Rights if it wants to. There is nothing in the HRA that forces the Government or Parliament to take any specific action if the European

Court makes a judgement against the UK. This was demonstrated with the discussion around prisoner voting; despite the Court's decision, it was for Parliament to decide whether they did (or did not) change the law in response to the judgment.

The HRA is working effectively in this context and no change is necessary.