Public Law Project

Public Law Project submission to the Human Rights Act consultation

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Introduction

The Human Rights Act 1998 ('HRA') underlines Parliament's commitment to the protection of the rights guaranteed in the European Convention on Human Rights ('ECHR') and the accountability of the executive through independent courts. Relying on the HRA, British residents can enforce their ECHR rights directly in British courts through British judges, rather than being required to pursue lengthy and expensive litigation in the European Court of Human Rights ('ECtHR').

The HRA has reduced costs for claimants and governments alike, increased the timeliness of claims, promoted the accountability of public bodies, enhanced the protection of domestic rights, supported access to justice by granting a new route of redress previously unavailable to British people, assisted the development of the common law, cemented the place of the UK Supreme Court as a world-renowned influential court, and defended the rule of law by facilitating the UK's adherence to the ECHR.

More than two decades after the HRA came into force, we agree that now is a worthwhile time to reflect on how the HRA has operated in practice, assess its strengths and weaknesses, and address misinformation and misunderstanding on how the HRA works. It is regrettable, therefore, that this consultation misses the opportunity to do that well.

First, the consultation bears little, if any relation, to the Independent Human Rights Act Review ('IHRAR'), which carried out an expert assessment of the HRA.[1] As Sir Peter Gross, the former Court of Appeal judge who chaired the panel, commented to the Justice Committee in February 2022, the government's consultation is not a response to his report.[2] For example, while IHRAR recommended modest clarificatory reforms to section 3 of the HRA, which requires courts to interpret legislation as far as possible to be compatible with human rights, the government's consultation proposes to radically weaken it and even raises the prospect of repealing it entirely. No compelling reasons, and sometimes no reasons at all, have been given for this divergence.[3]

While no government is bound by an independent commission, we would have expected more thoughtful reflection on IHRAR's proposals. Not least, the government itself appointed the panel and must have had confidence in their expertise and judgement. In addition, the panel was intellectually and politically diverse, not dogmatically representing any point of view on human rights matters. Finally, IHRAR held a series of roadshows in the summer of 2021 to encourage full discussion among claimants, government departments, public bodies and academics. Therefore, we would have expected the government to expressly outline where differences of view exist between the government and IHRAR and justify those differences. The government has yet to do so and there is no indication that it will do so.

Second, we are surprised that the consultation consistently seeks to justify major reforms by highlighting examples that do not represent the contemporary trends in the domestic case law. At several important points, this is a consultation about ex matters of controversy and past concerns, rather than current

[1] Independent Human Rights Act Review. Available at: https://www.gov.uk/guidance/independent-human-rights-act-review (accessed 1 February 2022).
[2] Monidipa Fouzder, 'Human Rights Act consultation not a response to my report – Gross' (1 February 2022, The Law Gazette). Available at: https://www.lawgazette.co.uk/news/human-rights-act-consultation-not-a-response-to-my-report-gross/5111359.article (accessed 3 February 2022).
[3] Tatiana Kazim, Mia Leslie and Lee Marsons, 'The government's Human Rights Act consultation: divergence, context and evidence' (27 January 2022, The Constitution Society). Available at: https://consoc.org.uk/the-governments-human-rights-act-consultation-divergence-context-and-evidence/ (accessed 1 February 2022).

problems. Two important examples are the plans to reform section 3 of the HRA and the use of Article 8 in deportation cases. At para. 121, for example, the government cites the case of *Ghaidan v Ghodin-Mendoza*[4] as evidence of the need to reform section 3. But this case is now almost twenty years old and does not reflect routine decisions in this area. The courts have already responded to concerns and have modified the approach. On Article 8 and deportation, while the government concedes that the Immigration Act 2014 has already produced their preferred legal position,[5] the government nevertheless advocates structural reform of Article 8 through excluding a whole class of individuals from protection (foreign national offenders) on the basis of merely two cases.[6]

Third, in other respects, the consultation only replicates in legislation the existing judicial practice. This is largely the case in relation to Q1 and Q2 on how the UK Supreme Court makes use of Strasbourg cases and other international precedents. However, in mandating the routine approach on the face of primary legislation, the intention appears to be to prevent the courts from exercising a residual discretion to do justice on the facts of rare cases where the routine approach is insufficient. Legislating only for the routine makes no room for the exceptional. This is so in relation to Q12 which seeks to reform section 3. While this may not change routine decisions using section 3, it would prevent the courts making use of a more powerful and robust remedy in rare cases where the routine approach is not adequate, appropriate or fair.

Fourth, there are important matters which require serious thought prior to major reform of the HRA but which appear to have been the subject of either no thought or arbitrary exclusion from the consultation.[7] At para. 269 the consultation rules out without reflection, for example, reforming the definition of a 'public authority' under section 6 of the HRA to include private bodies contracting with public bodies to carry out some functions. Given the extent of outsourcing in the contemporary public sector,[8] this exclusion is a serious gap in protection for the most vulnerable people which the consultation is indifferent about.

Further, the consultation is almost entirely focused on the application of the HRA in the senior courts and not on its wider use in and by public bodies. It does not consider, for example, how local authorities use the HRA in frontline decision-making when making care needs assessments, the HRA's use by ombudsmen when deciding whether a public body has acted in a way that is maladministration or how the police use the HRA before interfering with protected rights such as freedom of expression. The consultation artificially reduces the HRA only to decisions from the senior courts.[9] The HRA has a life well beyond this and this should have been reflected in the consultation.

Fifth, we are concerned by the lack of evidence for a number of the consultation's most radical suggestions. The government spends a significant portion of the consultation, for example, criticising the growth of positive obligations but provides no costings, even ball-park figures, for these supposedly gargantuan costs. Nor is any data provided on which rights these positive obligations protect and what

[4] [2004] UKHL 30.
[5] Pages 37-38 and 45 of the consultation.
[6] Page 38 of the consultation.
[7] Tatiana Kazim, Mia Leslie and Lee Marsons, 'The government's Human Rights Act consultation: omissions and opportunities' (27 January 2022, The Constitution Society). Available at: https://consoc.org.uk/the-governments-human-rights-act-consultation-omissions-and-opportunities/ (accessed 1 February 2022).
[8] Robert Thomas, 'Contracting out and administrative justice' (10 November 2020, UK Administrative Justice Institute). Available at: https://ukaji.org/2020/11/10/contracting-out-and-administrative-justice/ (accessed 4 February 2022).
[9] Tatiana Kazim, Mia Leslie and Lee Marsons, 'The government's Human Rights Act consultation – omissions and opportunities' (27 January 2022, The Constitution Society). Available at: https://consoc.org.uk/the-governments-human-rights-act-consultation-omissions-and-opportunities/ (accessed 3 February 2022).

individuals or groups are being most protected. The government's real dislike appears to be with one case,[10] which is then falsely extrapolated to justify structural change.

The same situation arises in relation to Q29 about data on protected characteristics, where instead of collecting and analysing data that government itself holds, the consultation asks others to provide evidence about the potential discriminatory and equalities impacts of the plans. This consultation will not be cited as the height of evidence-based policy.

Sixth, the consultation pays inadequate regard to whether these reforms would be compatible with the UK's international obligations in the ECHR. The introduction of a new human rights permission stage, for example, could exclude cases being litigated in domestic courts which will ultimately be successful in the Strasbourg Court. This would undermine access to justice for claimants as they could not litigate legitimate cases domestically and will increase long-term costs for public bodies as the process of litigation will be extended for a number of years. At a time of increasing international friction which calls into question the stability of the rules-based international order, it would be especially regrettable if the UK were to implement proposals that put at risk its compliance with international obligations.

Seventh, throughout the consultation, the government refers to a small number of failed – and plainly unmeritorious – cases to support its argument that a 'rights culture' has developed. In every area of law, one finds absurd cases that were always doomed to failure and which were thrown out at the first stage. But in no other area has that provided a justification for government-approved, structural reform of that area of law.

Moreover, if a 'rights culture' is to mean a public culture whereby individuals have accurate awareness of what their rights are alongside the limits to those rights and what duties modify them and an institutional culture whereby public bodies build human rights considerations into their initial decisions rather than having to be challenged in court, then a 'rights culture' is a good thing. In this consultation, the government shows no awareness of how losses in human rights cases can be self-inflicted wounds arising from too many poor quality and ill thought through initial decisions and exercises of power. The government and other public bodies would do better to focus on 'getting it right first time',[11] rather than focus on a fictional 'rights culture'.

Eighth, the consultation contradicts its own aims. The government claims to want to increase the protection given to Article 10 (freedom of expression) but simultaneously adopts proposals which would systemically undermine and weaken the principal remedies for enforcing rights – sections 3 and 4 in particular. For instance, the consultation criticises the statement in *DPP v Connolly*[12] that a person could use Article 10 and section 3 to argue that a criminal conviction for offensive expression is disproportionate and, therefore, unlawful. If this protection is removed, this would allow vague and broad statutory language to criminalise expression which is merely offensive to some, which the government claims to be opposed to. Wanting more robust rights protection while undermining the means of enforcing those rights is a contradiction in terms.

[10] Osman v United Kingdom (1998) 29 EHRR 245.
[11] Administrative Justice and Tribunals Council Annual Report 2009-10. Available at https://senedd.wales/Laid%20Documents/GEN-LD8280%20-%20Administrative%20Justice%20and%20Tribunals%20Council%20Annual%20Report%202009-10-03112010- 201569/gen-ld8280-e-Cymraeg.pdf (accessed 7 March 2022).
[12] [2007] EWHC 237 (Admin).

Ninth, there is a fundamental policy confusion at the heart of the consultation. The government does not appear to know what it wants. While sometimes the government suggests repealing the HRA,[13] in practice the words repeal, reform, revise, update and replace are used interchangeably. At times, the government envisages the HRA existing alongside a Bill of Rights and that the Bill of Rights would sometimes provide for additional rights (such a jury trial) and would sometimes merely amend HRA rights. One of the government's draft clauses, for example, states that: 'it is not necessary to construe a right or freedom in this Bill of Rights as having the same meaning as a corresponding right or freedom in the European Convention on Human Rights or the Human Rights Act 1998.' Having a Bill of Rights replicating the language of the HRA but interpreted differently would be absurd. It would be confusing for the public and claimants, it would promote dual litigation against public bodies and undermine the coherence of British human rights law.

Tenth, the consultation does not consider how its proposals would interact together and the aggregate consequences of these changes. Respondents are asked for comments on discrete and separate proposals in each question but not how each would interact and the broader implications of that interaction. For example, while the proposals to radically reduce the effectiveness of section 3 would inevitably lead to a greater number of section 4 declarations being made, there is no assessment of the consequences for the parliamentary timetable or the work of select committees. Each proposal is discussed and consulted on in isolation.

In general, this is a consultation which addresses ex-trends, fails to consider current problems, sidelines the proposals of an expert commission, fails to put forward satisfactory evidence, systemically weakens domestic remedies for human rights protection, undermines access to justice, weakens the accountability of public bodies, weakens the position of British judges vis-a-vis the Strasbourg Court, fails to put forward a coherent policy on human rights, and puts the UK's international reputation at risk for failing to comply with international law obligations. The government has failed on any serious measure to make an effective case for its proposals.

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 current approach of the UK Supreme Court

PLP agrees that especially when addressing novel and difficult human rights questions, the UK Supreme Court in particular should be able to take account of relevant foreign and international jurisprudence when the Justices regard it as helpful and appropriate. As Lord Reed, the current President of the UK Supreme Court, has argued in extra-judicial commentary, while never binding without the express implementation of Parliament, foreign and international precedents can promote healthy dialogue between courts addressing similar problems, strengthen the centrality and relevance of the UK Supreme Court in the common law world, provide salient guidance on the answer to a difficult point of law, grant greater awareness of practical concerns following a change of judicial approach, and give courts

[13] HC Debate, 8 February 2022, Col. 784. Available at: https://www.theyworkforyou.com/debates/?id=2022-02-08a.784.4#g784.6 (accessed 11 February 2022).

awareness of arguments which might not be raised in domestic submissions.[14] Therefore, in principle, we agree with the idea of the UK Supreme Court in particular considering foreign and international precedents in their judgments.

However, we do not believe that a case has been made for legislative action. Independent research has demonstrated that reference to foreign and international jurisprudence in human rights cases is a fairly common practice in the UK Supreme Court.[15] In 2017, Lord Reed observed the same thing himself, arguing that the Justices considered foreign and international material across a range of private and public law cases, including in human rights.[16] In 533 cases handed down in the Supreme Court's first eight years of operation, for example, reference was made to foreign jurisprudence in 157 cases. This is just under 30 per cent of the total. As Tyrell has put it, the Supreme Court neither overuses international material, nor underuses it.[17] Therefore, the Supreme Court already makes use of foreign and international material where it is considered relevant and appropriate.

In light of this judicial practice, we have considered the government's draft amendments. Subsection (5) of Option 1 in Appendix 2 reads that: 'The court or tribunal may have regard to a judgment or other decision of a judicial authority made under— (a) the law of a country or territory outside the United Kingdom, or (b) international law, so far as the court or tribunal considers that it is relevant to the question being decided.' At least in the UK Supreme Court where there is more abundant research evidence, this already represents the judicial practice. Therefore, we are not convinced that legislative intervention is required.

Risking findings against the UK at Strasbourg

The most fundamental problem with this proposal is that increased reliance on international and foreign cases, especially in lower courts, may nudge domestic decisions away from compliance with cases decided at Strasbourg, if other international or foreign jurisprudence makes use of different doctrines or has different outcomes. Unfortunately, this appears to be one of the intentions behind this proposal. At para. 197, the consultation states that:

> This would help to mitigate the incremental expansion of rights driven by the Strasbourg Court, and promote a more autonomous approach to human rights, in line with the UK's common law principles.

Consistently following other international or foreign cases instead of Strasbourg jurisprudence could produce material differences between domestic and Strasbourg jurisprudence. This could increase the likelihood of adverse judgments in Strasbourg with all the associated costs, time and resource implications. Requiring domestic courts to take account directly of Strasbourg jurisprudence also enables a British court to address head-on the question that Strasbourg will also eventually consider. This provides

[14] Lord Reed, 'Foreign precedents and judicial reasoning: American debates and British practice' (2008) 124 Law Quarterly Review 253.
[15] Helene Tyrell, 'Human Rights in the UK and the Influence of Foreign Jurisprudence' (Bloomsbury 2018).
[16] Lord Reed, 'Comparative Law in the Supreme Court of the United Kingdom' (13 October 2017, Centre for Private Law at the University of Edinburgh). Available at: https://www.supremecourt.uk/docs/speech-171013.pdf (accessed 3 February 2022).
[17] Helene Tyrell, 'Foreign jurisprudence as a persuasive authority: Judicial comparativism at the UK Supreme Court' (Law Research Briefing No. 15, February 2020). Available at: https://www.ncl.ac.uk/media/wwwnclacuk/newcastleuniversitylawschool/files/HT_Judicial%20Comparativism%20at%20the%20UK%20Supreme%20Court%20(Feb%202020).pdf (accessed 3 February 2022).

Strasbourg with direct reasoning from a British court and enhances the likelihood of success. Indeed, the UK rarely loses cases at Strasbourg, with only 4 adverse judgments against the UK in 2020-21.[18]

Therefore, in an indirect way, this proposal could increase the power of the Strasbourg Court vis-a-vis the domestic courts. After all, consistent consideration and following of non-Strasbourg jurisprudence means that domestic courts may not address the same question eventually addressed by the Strasbourg Court. This question would instead be left to the Strasbourg Court alone and Strasbourg's answer would be binding on the UK as a matter of international law given that Article 46 of the ECHR requires the contracting states to adhere to adverse Strasbourg judgments. As such, this proposal could implicitly shift legal power and influence from the domestic courts to the Strasbourg Court.

In addition, PLP believes that if the domestic courts are going to depart significantly from Strasbourg jurisprudence and follow a line of, say, Canadian jurisprudence instead, this should be decided at the highest level by the UK Supreme Court rather than a court or tribunal below this. Departure from a consistent line of Strasbourg jurisprudence would be a serious matter given the increased likelihood of an ECHR violation and only the UK's highest court should have this authority.

Ultimately, we consider that taking account of foreign and international precedents is a matter best left to organic development of judicial practice rather than legislative intervention. If any specific issues arise in particular cases, they can be legislatively addressed and, particularly in the UK Supreme Court, reference can be and is made to foreign and international jurisprudence where it is considered appropriate. But a compelling case has not currently been made for legislative reform.

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?

PLP does not accept that a case has been made for legislative action on this matter. Indeed, this question is an example of the consultation focusing on ex-trends that have already been addressed and even reversed by the courts for some time. Section 2 of the HRA requires domestic courts only to 'take account' of – not to *follow* – Strasbourg decisions, and there is now a substantial body of domestic jurisprudence where British courts decline to follow Strasbourg cases in a range of situations. Lord Rodger's famous comment in *R (AF) v Secretary of State for the Home Department (No 3)*[19] that 'Strasbourg has spoken, the case is closed' is now almost 15 years old and it is difficult, if not impossible, to reconcile this statement with the trends in the contemporary cases.

Indeed, on the contrary, domestic courts are now careful to prioritise a unique British common law approach and to utilise Strasbourg jurisprudence only where it is necessary because, for example, common law protection is inadequate to ensure Strasbourg compatibility. Put simply, the UK Supreme Court has proved itself to be 'the ultimate judicial arbiter of our laws in the implementation of human

[18] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038601/human-rights-judgments-2021-print.pdf (accessed 6 February 2022).
[19] [2009] UKHL 28.

rights' as the government wishes. The consultation concedes as much, when at para.190, it welcomes the Supreme Court's contemporary jurisprudence on section 2. Nevertheless, the consultation goes on to claim that 'there remains an over-reliance on Strasbourg case law'. We do not believe that this is correct and will demonstrate this with reference to domestic decisions. Domestic judges, especially in the UK Supreme Court, depart from Strasbourg jurisprudence in a wide variety of scenarios.

Repetition of existing jurisprudence

Appendix 2 offers a range of options which would add nothing to the current law and would simply replicate in statute what the courts already do. This is particularly so in relation to the following draft provisions:

- Option 1 subsection (6) The court or tribunal is not required to follow or apply any judgment or other decision of the European Court of Human Rights.
- Option 2 subsection (1) The Supreme Court is the judicial authority with ultimate responsibility for the interpretation of the rights and freedoms in this Bill of Rights.
- Option 2 subsection (6) The court or tribunal is not required by any enactment, rule of construction or other law to follow or apply any judgment or other decision of the European Court of Human Rights.

These clauses are statements of the obvious. That the ECHR has not been directly incorporated into domestic law, that domestic courts are not bound by the Strasbourg Court and that domestic courts remain ultimate arbiters of the HRA's operation has been expressly confirmed at the highest level. At para. 135 in *R v Lambert*[20], for instance, Lord Clyde concluded that: 'the Act did not incorporate the rights set out in the Convention into the domestic laws of the United Kingdom.' The point was made more fully by Lord Nicholls in *Re McKerr*[21] at para. 26, who insisted that there was a:

> distinction between (1) rights arising under the Convention and (2) rights created by the Human Rights Act by reference to the Convention. These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the Human Rights Act 1998 and they continue to exist. They are not as such part of this country's law because the Convention does not form part of this country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the Human Rights Act. The latter came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights, created as they were by the Human Rights Act, depends upon the proper interpretation of that Act.

Nor is it correct to claim that domestic courts 'over-rely' on Strasbourg jurisprudence. It is overwhelmingly the domestic approach that courts do not rely on Strasbourg cases unless a domestic common law interpretation would be inadequate to protect rights. In *Kennedy v Charity Commission*,[22] for example, Lord Toulson noted at para.133:

[20] [2001] UKHL 37.
[21] [2004] UKHL 12.
[22] [2014] UKSC 20.

> The growth of the state has presented the courts with new challenges to which they have responded by a process of gradual adaption and development of the common law to meet current needs. This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998, although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.

As the Independent Review of Administration Law (IRAL) confirmed,[23] nor is this turn to common law being used to exceed the appropriate limits of judicial power and to trespass into the prerogatives of the executive and the sovereignty of Parliament. Recent decisions of the Supreme Court confirm this powerfully. In *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department,*[24] for example, the Supreme Court was concerned with the lawfulness of delegated legislation which imposed a fee of £1,012 on children who wished to register as British citizens. Given that Parliament had granted the executive an unconditional power to charge fees, Lord Hodge, the Deputy President of the Supreme Court, decided at para. 51 that:

> 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 for whom the question is the much narrower one of whether Parliament has authorised the Secretary of State to set the impugned fee at the level which it has been set.

Therefore, the claim in this consultation that domestic judges 'over-rely' on the Strasbourg Court is an outdated one reflecting jurisprudence over ten years old. In fact, the domestic courts have taken conscious efforts to decide cases on a common law basis wherever possible. Moreover, even when cases are decided on a common law basis, there is no evidence of general judicial overreach. Therefore, we are not convinced of a case for statutory reform that merely reiterates the existing judicial practice. It would serve no practical function.

Flexible departure from the Strasbourg Court

The classic case illustrating the independence of the UK Supreme Court from the Strasbourg Court is *R v Horncastle*[25], where in a carefully reasoned judgment, the UK Supreme Court expressly declined to apply a series of rulings by the Strasbourg Court related to the standards of evidence admissible in criminal trials and their compatibility with Article 6 of the ECHR. At para. 11, Lord Phillips concluded that:

> The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision,

[23]Independent Review of Administrative Law at 2.77 and 3.19: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf (accessed 4 March 2022).
[24] [2022] UKSC 3.
[25] [2009] UKSC 66.

> giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.

This principle no longer appears to be limited to 'rare' cases. Independent research indicates that there are at least six scenarios where the domestic courts are prepared to expressly depart from Strasbourg case law. First is where the domestic court regards the Strasbourg case as being insufficiently factually similar to the British case before it. Second is where the domestic court does not regard the Strasbourg jurisprudence to be sufficiently consistent or constant, such that it would not be safe to rely on it. Third is where the domestic court regards Strasbourg to have misapplied or misunderstood a fundamental feature of UK law. Fourth is where Strasbourg jurisprudence is irrelevant to the outcome because the domestic position at common law or under some other statutory scheme is substantially the same. Fifth is where domestic courts consider Strasbourg cases as insufficiently well-reasoned or coherent to provide a good enough basis to alter a domestic outcome. Sixth is where domestic courts simply regard Strasbourg to be wrong on an important issue.[26]

A good example of the sixth option is *R (Hallam) v Secretary of State for Justice,*[27]where at para. 90 Lord Wilson concluded that: 'The context of the present appeals, to which the nature of this court's duty under section 2 is therefore specific, is a line of jurisprudence in the ECtHR which - in my respectful view - is not just wrong but incoherent.' At para. 85 he added that:

> I am, however, persuaded that, in its rulings upon the extent of the operation of article 6(2) of the Convention, the ECtHR has, step by step, allowed its analysis to be swept into hopeless and probably irretrievable confusion. An analogy is to a boat which, once severed from its moorings, floats out to sea and is tossed helplessly this way and that.

Thus, the approach of the courts to section 2 is increasingly flexible and not limited to rare or exceptional circumstances. As Lord Hughes said at para. 21 in *R (Haney, Kaiyam and Massey) v Secretary of State for Justice*[28]: 'The degree of constraint imposed or freedom allowed by the phrase 'must take into account' is context specific'. As such, the proposition that the UK Supreme Court in particular unduly relies on Strasbourg jurisprudence is no longer tenable. The Justices are prepared to sharply and strongly criticise the Strasbourg Court where they regard it as appropriate and the domestic approach to section 2 is increasingly independent and flexible.

The risks of increasing departure from Strasbourg even further

However, that domestic courts, particularly below the UK Supreme Court, regularly take account of Strasbourg decisions and follow a consistent line of Strasbourg authority is not surprising. The express purpose of the HRA was 'to make more directly accessible the rights which the British people already enjoy under the Convention…[i]n other words, to bring those rights home', as it was put in the White

[26] Lewis Graham, 'Hallam v Secretary of State: Under what circumstances can the Supreme Court depart from Strasbourg authority?' (UK Constitutional Law Association, 4 February 2019). Available at https://ukconstitutionallaw.org/2019/02/04/lewis-graham-hallam-v-secretary-of-state-under-what-circumstances-can-the-supreme-court-depart-from-strasbourg-authority/ (accessed 24 February 2022).
[27] [2019] UKSC 2.
[28] [2014] UKSC 66.

Paper which preceded the HRA.[29] Strasbourg is the tribunal tasked by the signatory countries, including the UK, with exercising a supervisory jurisdiction in interpreting and applying the ECHR and it is inevitable that there will be a strong correlation between domestic and Strasbourg jurisprudence. As Lady Hale put it at para. 76 in *Hallam v Secretary of State for Justice*:[30]

> In general, where it is clear that the European Court of Human Rights would find that the United Kingdom has violated the Convention in respect of an individual, it is wise for this court also to find that his rights have been breached. The object of the Human Rights Act 1998 was to "bring rights home" so that people whose rights had been violated would no longer have to go to the Strasbourg court to have them vindicated.

If the draft clauses are an attempt to encourage the courts to depart from Strasbourg cases even more regularly than they already do, this would merely result in more individuals pursuing their cases in Strasbourg and winning. This would lead to a denial of access to justice for individuals who would be forced to pursue lengthy and expensive cases in Strasbourg to vindicate rights that should have been vindicated at the domestic level.

This proposal could also reduce the influence of British courts in Strasbourg and increase the power of the Strasbourg Court vis-a-vis domestic courts. If material differences between domestic and Strasbourg jurisprudence came about, this would increase the likelihood of adverse judgments in Strasbourg with all the associated costs, time and resource implications. Requiring domestic courts to take account directly of Strasbourg jurisprudence also enables a British court to address head-on the question that Strasbourg will also eventually consider. This provides Strasbourg with direct reasoning from a British court and enhances the likelihood of success. Indeed, the UK rarely loses cases at Strasbourg, with only 4 adverse judgments against the UK in 2020-21.[31]

Therefore, in an indirect way, this proposal could increase the power of the Strasbourg Court vis-a-vis the domestic courts. After all, consistent consideration and following of non-Strasbourg jurisprudence means that domestic courts may not address the same question eventually addressed by the Strasbourg Court. This question would instead be left to the Strasbourg Court alone and Strasbourg's answer would be binding on the UK as a matter of international law given that Article 46 of the ECHR requires contracting states to implement adverse judgments. As such, this proposal could implicitly shift legal power and influence from the domestic courts to the Strasbourg Court.

The risks of limiting domestic reconsideration of cases following Strasbourg cases

To comment on Option 1 in Appendix 2 more broadly, its draft subsection (4) is a provision which would have negative consequences for domestic human rights protection and the UK's compatibility with Strasbourg jurisprudence. It reads as follows:

[29] Rights Brought Home: The Human Rights Bill, Cm 3782 (1997), para 1.19
[30] [2019] UKSC 2.
[31] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038601/human-rights-judgments-2021-print.pdf (accessed 6 February 2022).

> (4) The court or tribunal must follow a previous judgment or other decision given in relation to this Bill of Rights by— (a) that court or tribunal, or (b) any other United Kingdom court or tribunal, if the judgment or other decision is a precedent in relation to the question being decided.

This language would exclude a court from reconsidering decisions delivered prior to Strasbourg judgments which put those domestic decisions in doubt. If a domestic court cannot reconsider a decision, that would merely require a domestic claimant to pursue a case in the Strasbourg Court which they are likely to win because a domestic court is compelled to find against them by subsection (4). This would undermine domestic rights protection and increase the likelihood of adverse findings against the UK in the Strasbourg Court.

Question 3:

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

PLP does not believe that the case has been made to include a qualified right to trial by jury in a Bill of Rights. While we affirm the importance of the right of a criminal defendant to elect to be tried by a jury in either-way offences and support indictable-only offences being tried by juries, we have significant concerns about codifying this ability as a human right in the HRA or a new Bill of Rights.

If the right is intended to provide no additional protection to existing law, it will be a purely decorative right that in merely replicates existing criminal procedure and practice. The right to be tried by a jury is already robustly protected across the UK, particularly as a common law right of constitutional significance. As the then Lord Chief Justice put it at para. 10 in *R v T*[32] in relation to England and Wales:

> In this country trial by jury is a hallowed principle of the administration of criminal justice. It is properly identified as a right, available to be exercised by a defendant unless and until the right is amended or circumscribed by express legislation.

By virtue of Part 7 of the Criminal Justice Act 2003, a judge has the power to order a trial for an indictable offence to be conducted without a jury where, for example, jury tampering could occur. Even in these circumstances, the judicial protection of the right to trial by jury is robust and only in exceptional cases will the courts permit a denial of that right. As the then Lord Chief Justice in *R v J, S & M*[33] said forthrightly on behalf of the Court of Appeal:

> We must emphasise as unequivocally as we can that, notwithstanding the statutory arrangements introduced in the 2003 Act which permit the court to order the trial of a serious criminal offence without a jury, this remains and must remain the decision of last resort, only to be ordered when the court is sure (not that it entertains doubts, suspicions or reservations) that the statutory conditions are fulfilled. Save in extreme cases, where the necessary protective measures constitute an unreasonable intrusion into the lives of the jurors, for example, a constant police presence in or near their homes, day and night and at the weekends, or police protection, which means that at all times when they are out of their homes, they are accompanied or overseen by

[32] [2009] EWCA Crim 1035.
[33] [2010] EWCA Crim 1755.

> police officers, again day and night and at the weekend, with its consequent impact on the availability of police officers to carry out their ordinary duties, the confident expectation must be that the jury will perform its duties with its customary determination to do justice.

Given that the government has not suggested repealing Part 7 of the Criminal Justice Act 2003, it is difficult to see how a qualified right to trial by jury could achieve anything greater than these judicial statements. We cannot, therefore, see any serious case for reform if the intention is merely to replicate existing legislative and judicial protections for jury trials.

On the other hand, if the intention is to provide for a more robustly protected right in some way, this would require serious reflection and would need to be implemented in a careful way. Jury members also have rights, as do victims of crime, witnesses, lawyers, members of the public, members of the press and media, and judges. A provision that would inhibit a court from ordering a judge-only trial in rare, exceptional and dangerous cases would not be a sensible provision. It would undermine the rights of other parties and affected persons for no obvious increase in the fairness of the defendant's trial. There is, after all, no serious contention that a judge-only trial is an unfair one.

The government must also be especially mindful of the implications for Northern Ireland of codifying a legislative right to trial by jury. By virtue of section 1 of the Justice and Security (Northern Ireland) Act 2007, the Director of Public Prosecutions may issue a certificate requiring an indictable offence to be tried without a jury where he is satisfied that: the defendant is a member of a proscribed terrorist organisation; the offence was committed on behalf of that organisation; there has been an attempt made to prejudice the investigation or prosecution; and the offence was committed in connection with religious or political hostility towards another person or group. Nothing should be done that could undermine the ability of serious terrorist offences to be safely tried without harming or causing needless fear to members of the public who may be required to sit on a jury or litigate the case as professionals.

It is also important to remember the context in which this right is being legislated. Due to the coronavirus pandemic, jury trials in the Crown Court in England and Wales are subject to significant delays. As the National Audit Office has reported, by the summer of 2021, the backlog of cases in the Crown Court has increased by 48%, with over 60,000 cases awaiting trial and with a 302% increase in cases taking more than one year to reach trial.[34] On the Ministry of Justice's best estimate, the Crown Court backlog will remain at 53,000 cases by March 2025.[35] This is relevant as the legislative codification of jury trials as an express right may promote litigation about whether this right is being frustrated or denied due to such a lengthy delay. Consequently, we reiterate: if the right adds nothing, it is not needed. But if it creates avenues of litigation that do not currently exist, it would require serious thought and reflection beforehand.

Before the Justice Committee on February 2022, Minister Lord Wolfson of Trefgar suggested that the government's proposal to protect jury trials was a response to jurisprudence from the Strasbourg Court that the lack of reasons given by juries violated Article 6 of the ECHR. This is a reference to *Taxquet v Belgium*[36] decided in 2012. However, the effect of this case on Strasbourg's direction has been negligible.

[34] National Audit Office, 'Reducing the backlog in criminal courts' (Ministry of Justice and HM Courts and Tribunals Service, 22 October 2021, HC 732). Available at: https://www.nao.org.uk/wp-content/uploads/2021/10/Reducing-the-backlog-in-criminal-courts.pdf (accessed 3 February 2022).
[35] https://hansard.parliament.uk/commons/2021-11-09/debates/3721FE47-BFD6-48CC-BC11-453BFD3C22A3/CrownCourtBacklog (accessed 3 February 2022).
[36] (2012) 54 EHRR 26.

In the case of *Legillon v France*[37] in 2013, for example, the same argument was rejected. Indeed, as the Strasbourg Court's guide to Article 6 written on 31 December 2021 states:

> The Convention does not require jurors to give reasons for their decision and Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict.[38]

Consequently, there are no compelling reasons for a qualified right to trial by jury to be codified in a Bill of Rights. If the right provided no additional protection to that granted at present, it would be a merely decorative right. If the right provided greater protection and promoted avenues of litigation currently unavailable, it would be undesirable. In any event, there is no serious threat of jury trials being undermined by jurisprudence from the Strasbourg Court. Recent statements from the Court repudiate that idea.

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?

In PLP's view, the current level of protection for publication under section 12 of the HRA is appropriate. Q4 is vague, but if 'amending' section 12 would mean raising the threshold of the test under section 12(3), as suggested at para. 214 of the consultation document, PLP would not support this.

Section 12 protects publication in a number of ways. First, under section 12(2), a party whose right to freedom of expression would be affected by a court order must be present or represented in court – unless the court is satisfied that the applicant has taken all practical steps to notify him or there were compelling reasons not to take that step. This means that such an order cannot ordinarily be made in the absence of the journalist or other person whose right to freedom of expression it would constrain. Second, under section 12(3), an interim order to stop publication before trial must not be made "unless the court is satisfied that the applicant is likely to establish that publication should not be allowed". In other words, an interim order must not be made unless the applicant shows that they are likely to succeed at trial. Third, under section 12(4), the courts must "have particular regard" to the importance of freedom of expression where proceedings concern "journalistic, literary or artistic material".

It is notable that other Convention rights do not generally have specific clauses within the HRA devoted to their protection; the only other right to enjoy this kind of protection is freedom of thought, conscience and religion, to which section 13 of the HRA relates. In this respect, freedom of expression already enjoys special protection under the HRA.

[37] (2013) ECHR 277.

[38] https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf (accessed 3 February 2022), page 38.

Section 12(4)

The government claims that section 12(4) has "not had any real effect" (see para. 213). However, no evidence is presented for this claim. And there is evidence to the contrary; that is, evidence to suggest that section 12(4) has influenced judicial decision making – even outside contexts to which it strictly applies.

For example, the recent case of *Griffiths v Tickle*[39] concerned the publication of a family court judgment identifying Andrew Griffiths (former MP) as someone who had been coercive and controlling towards his wife. At para. 40 the judge referred to, and went on to apply, the test under section 12(4) – even though the case was not strictly concerned with the publication of "journalistic, literary or artistic material", as stipulated by section 12(4). The Court of Appeal upheld the High Court's decision to publish the judgment, including identifying details, even though this would interfere with the Article 8 rights of the former couple's young child. This counts against the government's suggestion that there is an undue regard for the right to private life in preference to the right to freedom of expression (expressed, for example, at para. 206).

The requirement to have regard to section 12 was also recently emphasised by the Supreme Court in *ZXC v Bloomberg*[40] (see further below, in answer to Q5).

More broadly, in the family courts there has recently been a shift towards allowing greater media access. Sir Andrew McFarlane, President of the Family Division, made a statement to this effect on 18 October 2021.[41] This may be indicative of section 12, and the HRA more generally, working to foster a valuable 'rights culture' when it comes to free publication.

At paras. 207 to 210, the government raises specific concerns about freedom of expression in the contexts of social media and higher education. They appear to suggest that judges could be using section 12(4) to do more to protect free speech in these contexts. However, it should be noted that free speech on social media and in higher education is to a large extent a social issue about which there has been limited litigation.

Where courts have been required to decide cases in these contexts, they have taken pains to emphasise the importance of freedom of expression. This was true of both the High Court and the Court of Appeal in *Miller v College of Policing,*[42] which concerned tweets by a former police officer regarding proposed reforms to the Gender Recognition Act 2004 (see further below, in answer to Q5). Far from injuncting speech on social media, the Court of Appeal in this case held that police guidance requiring "perception-based recording of non-hate crime incidents" was an unlawful interference with freedom of expression, due to the likely chilling effect.

[39] [2021] EWCA Civ 1882.
[40] [2022] UKSC 5.
[41] https://www.judiciary.uk/wp-content/uploads/2021/10/Confidence-and-Confidentiality-Transparency-in-the-Family-Courts-final.pdf
[42] [2021] EWCA Civ 1926, on appeal from [2020] EWHC 225 (Admin).

Section 12(3)

The courts are required to apply the test set out at section 12(3) to every application for an interim injunction restraining publication.

The threshold for restraining publication under section 12(3) is already high. The applicant must show that they are likely to succeed at trial. If the threshold were raised even higher, this would almost inevitably mean that interim injunctions are refused in more cases where the applicant would have succeeded at trial. If an interim injunction is not granted, there will be nothing to prevent the information from entering the public arena. And any harmful dissemination of information that follows will, in effect, be irreversible. As noted by the House of Lords in *Cream Holdings v Banerjee*[43] at para. 18, "Confidentiality, once breached, is lost forever."

The government does not appear to have given adequate consideration to the implications of amending section 12(3). Given the irreversible harm that is likely to result from more refusals of applications for interim injunctions and, given that the test under section 12(3) is already demanding, PLP would not support the raising of the threshold.

The failure to think through the implications of vague proposals for strengthening freedom of expression is suggestive. We find it difficult to accept the seriousness of such proposals, especially when they are made in the context of a consultation document which would significantly weaken protection for human rights in general (see, for example, our answers to Q1, Q8, Q12, Q15, and Q16). In our view, the proposals in the consultation, when taken together, would reduce the overall protection for freedom of expression.

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?

PLP does not consider that the courts need clearer guidance about the importance attached to Article 10.

The special importance of freedom of expression

The special importance of freedom of expression is well-established in existing case law. In *ex parte Simms*,[44] the House of Lords explained the importance of freedom of expression by reference to the three values of self-fulfilment, truth and democracy:

[43] [2004] UKHL 44.
[44] [1999] UKHL 33.

> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Mr. Justice Holmes (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market."… Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.

Lord Nicholls in *Reynolds v Times Newspapers*[45] said:

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

The protection for freedom of expression extends to offensive speech. In the recent case of *Miller v College of Policing,*[46] Mr Justice Julian Knowles, sitting in the High Court, opened with a quote from the unpublished introduction to Animal Farm (1945) by George Orwell:

> If liberty means anything at all, it means the right to tell people what they do not want to hear.

He went on to quote Sedley LJ in *Redmond-Bate v DPP*:[47]

> Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative… Freedom only to speak inoffensively is not worth having.

This case law gives clear guidance to the courts. The courts recognise that, as well as having intrinsic importance (in common with other Convention rights), freedom of expression also has special instrumental importance in a democratic society.

Balancing competing human rights

Even so, Article 10 is not a 'trump card'. When it is invoked in disputes between private parties, there can be weighty human rights considerations on both sides. This was the case in *Lee v Ashers Bakery,*[48] in which Mr Lee, challenged the refusal on the part of a Christian-run bakery to fulfil his order for a cake inscribed with the slogan "Support Gay Marriage". Ultimately, the Supreme Court held that the McArthurs, who owned and managed the bakery, could not be compelled to inscribe a message on the cake that ran contrary to their religious beliefs, though this would not extend to the provision of services to Mr Lee more generally. Mr Lee's recent appeal to Strasbourg was unsuccessful, leaving the Supreme Court's

[45] [1999] UKHL 45.
[46] [2020] EWHC 225 (Admin).
[47] [1999] EWHC 733 (Admin), at [20].
[48] [2018] UKSC 49.

decision intact. However, it was not a foregone conclusion that the McArthurs' Article 10 argument should 'win'.

Lee v Ashers Bakery illustrates two important points. First, the choice between Article 8 and Article 10 is a false dichotomy. In some contexts, they pull in the same direction. The fact that both rights were invoked by both parties in *Lee v Ashers Bakery* shows how they can be mutually reinforcing. A legislative provision that sets up Article 8 and Article 10 rights in opposition, or rests on an assumption that they are fundamentally opposed, would be unhelpful.

Second, there is no general answer to conflicts between rights-holders. The case of *re S*[49] established that neither Article 8 nor Article 10 has precedence over the other; where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case; the justifications for interfering with or restricting each right must be taken into account; and the proportionality test must be applied: the so-called ultimate balance. Because the relative weight to be attached to the rights of each party is deeply context dependent, the careful balancing exercise currently undertaken by the courts is appropriate.

Such a balancing exercise was undertaken in the recent case of *Bloomberg v ZXC.*[50] The claimant was a US citizen under criminal investigation by UK law enforcement. Bloomberg had published details of a confidential letter sent by the law enforcement body, including details of the matters in respect of which the claimant was being investigated. Nicklin J, in the High Court,[51] applied the well-established two-stage test for the tort of misuse of private information. Stage one is whether the claimant objectively has a reasonable expectation of privacy. If so, stage two is whether that expectation is outweighed by the publisher's right to freedom of expression. This involves balancing the claimant's Article 8 right to privacy and the publisher's Article 10 right to freedom of expression, having due regard to section 12 of the HRA. He held that the claimant (the US citizen under investigation) had a reasonable expectation of privacy in relation to the published information, and that the Article 8/10 balancing exercise came down in his favour. The Court of Appeal and Supreme Court upheld this decision. Key factors in the balancing exercise included: the public interest in maintaining the confidentiality of criminal investigations; the distinction between information that a person is under criminal investigation, and the details of the allegations; and the police policy that identification of suspects prior to charge risks causing unfair damage to reputation, particularly if they are not subsequently charged.

If the Bill of Rights were to weight the balance in favour of freedom of expression, this could lead to unjust results. It may mean that *Bloomberg v ZXC* could not be decided in the way that it was. Perhaps more fundamentally, this is not an area that would benefit from legislative intervention. The nuanced balancing exercise is not suitable for codification.

Article 10 and the criminal law

Despite the professed desire to strengthen protection for Article 10, the proposal to define the circumstances in which Article 10 can be interfered with may actually weaken existing protections.

[49] [2004] UKHL 47.
[50] [2022] UKSC 5.
[51] [2019] EWHC 970 (QB).

Currently, Article 10 can be used as a limited defence in criminal prosecutions. This was recently confirmed by the Supreme Court in *DPP v Zeigler*.[52] The Supreme Court held that, to convict for obstruction of the highway under section 137 of the Highways Act 1980, the trial court must be sure that the interference with the protestors' Article 10 (and 11) rights is proportionate. Lord Hamblen and Lord Stephens recognised that "there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly."[53]

The consultation paper does not acknowledge the importance of Article 10 as a limit on criminalisation and prosecution. Instead, there is criticism of the case of *Connolly v DPP*[54] (at para.118), where Article 10 was held to limit the offence under the Malicious Communications Act 1988 of sending indecent or grossly offensive communications. This is surprising, not least because the Law Commission recommended reform of this offence due to its potential to disproportionately interfere with the right to freedom of expression, and the government recently accepted this recommendation.[55] Further, the consultation paper emphasises the criminal law as a limit on Article 10. This may suggest that, in a departure from the current position, the government intends for the relationship between criminal law and Article 10 to be one-way: criminal law should limit Article 10 rights, but Article 10 should not limit criminalisation or prosecution. This would be contrary to their stated ambition of strengthening protection for freedom of expression.

In summary, PLP considers that Article 10 is appropriately protected within the current human rights framework, and the case has not been made for reform. Further, we are concerned that the overall effect of the proposals in the consultation – and especially the proposal to make Article 10 subject to more rigid limits – would be to weaken the protection of Article 10, as well as other human rights (see, for example, our answers to Q1, Q8, Q12, Q15, and Q16).

Question 6:

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

Our answer to this question is, to a large extent, contained in our answers to Qs 4, 5 and 7, which outline our general approach to Article 10: the current law already provides adequate protection and need not be substantially reformed.

In the particular context of protection for journalists' sources, Article 10 works in conjunction with section 10 of the Contempt of Court Act 1981, which provides that "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime." Together with Article 10, this provision offers robust protection.[56]

[52] [2021] UKSC 23.
[53] Ibid, at [68].
[54] [2007] EWHC 237 (Admin)
[55] The Government's Interim Response to the Law Commission's 'Modernising Communications Offences' report, 4 February 2022, available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/02/eCase-01666-Lewis.pdf.
[56] See, for example, *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101.

Further, this issue – to the extent it is a legitimate concern – does not warrant reform of the entire human rights framework. If any reform is required (and we are not convinced it is), it should be of a more targeted kind. A suitable vehicle might be the Official Secrets Acts, for example, the reform of which was proposed by the Law Commission in their 2020 report, 'Protection of Official Data'.[57] In general, we are concerned that the discrete issues raised in connection with Article 10 throughout the government's consultation paper do not warrant special provisions within a 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?

As explained in answer to Q5, PLP does not consider that the courts need clearer guidance about the importance attached to Article 10. Nor do we consider that other protective steps within a Bill of Rights are necessary or desirable.

Article 10 applies in a diverse range of contexts, as illustrated by the examples given in answer to Q4 and Q5. It applies offline as well as online, and to individuals and public authorities as well as the media. Wholesale reform of Article 10 or its role within the overall human rights framework would have consequences in all of these contexts and beyond. It could generate considerable uncertainty. The specific concerns raised in the consultation do not warrant an overhaul with such far-reaching implications. Issues such as the regulation of online speech are better addressed through targeted reforms, such as the Online Safety Bill and modernisation of the communications offences.[58]

The strong protection for Article 10 within the existing human rights framework is illustrated by the cases referred to in Q5.

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 agree with this suggestion for ten reasons.

First, the government has failed to identify what it means by 'genuine human rights matters'. Given the constitutional importance of the right of access to a court, legislation to exclude the right of individuals to such access requires compelling justification. In this consultation, all that has been provided is a small number of cases in Chapter 3 that were in any event excluded from the courts via the permission stage for

[57] Law Commission, *Protection of Official Data* (Law Com No 395, 2020).
[58] As recommended by the Law Commission in *Modernising Communications Offences* (Law Com No 399, 2021).

judicial review proceedings. The government provides no examples of successful cases where it regards the consequences for the individual as either too trivial or banal to have been litigated.

Second, at para. 222 the government justifies this proposal on the basis that similar case management systems exist in the Strasbourg Court and the German Federal Constitutional Court. The Administrative Court is not in a comparable position to either of these courts. The Strasbourg Court is an international court with a secondary and supervisory jurisdiction. It deals only with cases that have remained unresolved after domestic litigation. It also deals with a population of 820 million people in the Council of Europe. By definition, it could not hear cases from all these individuals and there are, therefore, special reasons to require strict case management systems. Moreover, the German Federal Constitutional Court is the sole tribunal which can determine the most major, important and contested questions of constitutionality in Germany. It is a court specifically designed only to hear rare cases. By contrast, the Administrative Court is a first-instance court in judicial review. The more appropriate comparison to those two courts would be the UK Supreme Court, which, indeed, already has legal restrictions on the nature of cases it hears based on general public importance.

Third, there is already a mandatory permission stage in ordinary judicial review proceedings in s.31(3) of the Senior Courts Act 1981 and Part 54 of the Civil Procedure Rules. Judicial review proceedings are where many human rights issues are claimed and litigated. Independent research has demonstrated that there are around 2000 applications for judicial review each year and around half of those will fall at the permission stage.[59] The vast majority of even this modest number do not relate to human rights but relate only to basic questions about statutory interpretation.[60] As such, the permission stage for judicial review is already proving an adequate filter and no additional filter is needed.

Nor is the judicial review permission stage a mere formality that is easily overcome. Cases about highly important matters for the individual and society have been refused permission. Recent examples include: *R (Hotta) v Secretary of State for Health and Social Care*[61] where the Administrative Court refused permission for a challenge on HRA grounds (Article 5, right to liberty) to the government's policy on mandatory coronavirus-related hotel quarantine for international travellers, and a challenge to the government's mandatory vaccinations policy for healthcare workers in *R (Peters) v Secretary of State for Health and Social Care*.[62] While recognising the importance of the issue, the judge decided in each case that the claimant had no realistic prospect of success and refused permission.

Fourth, this proposal would complicate even further the Pre-Action Protocol for Judicial Review. Both claimant and defendant solicitors would have to consider not only the judicial review permission stage but also a new human rights permission stage too. This would create overlap and duplication of effort as many of the same issues would apply in both permission stages.

Fifth, there would be a need for significant litigation on what 'significant disadvantage' even means, which, once again, is not defined in the consultation. This would raise costs for public bodies and claimants for several years post-enactment, all in an environment where there are very few HRA cases in any event.

[59] Civil Justice Statistics Quarterly: July to September 2021. Available at https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-july-to-september-2021/civil-justice-statistics-quarterly-july-to-september-2021 (accessed 1 March 2022).
[60] Varda Bondy, Lucinda Platt and Maurice Sunkin, 'The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences' (October 2015, Nuffield Foundation). Available at https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Value-and-Effects-of-Judicial-Review.pdf (accessed 1 March 2022).
[61] [2021] EWHC 3359 (Admin).
[62] [2021] EWHC 3182 (Admin).

Sixth, this proposal would be a denial of access to justice as claims that could succeed at the Strasbourg Court may be struck out in a domestic court. This would undermine the very purpose of the HRA to prevent individuals being forced to pursue expensive and lengthy litigation in the Strasbourg Court when they have a legitimate case that could have been resolved and litigated in a British court. This will also increase costs for the taxpayer as the government would be required to defend a case they may lose in the Strasbourg Court.

Seventh, we firmly reject the assertion that, to be worthy of litigation, a human rights violation must cause 'significant disadvantage' to the individual. What might be regarded as a minor harm that violates rights is still a violation of rights. If a person is fined £100 after an unfair trial, this is still an unfair and unlawful trial and the individual should be able to access a court to defend their property rights and rights to fair procedure.

Eighth, this proposal will lead to perverse incentives. Claimants will merely be encouraged to pursue claims via conventional non-human rights grounds of judicial review rather than via the HRA. There will be conscious efforts by claimant solicitors to make a human rights claim fit into a conventional ground of review, rather than pursue litigation via the HRA. If a Bill of Rights was adopted instead of the HRA, this would also delay the development of the new Bill of Rights as there would be much rarer litigation as to its meaning and effects. It would be a paper Bill of Rights only occasionally interpreted or considered by a court in practice.

Ninth, there is already a higher legal threshold for individuals to argue human rights matters. Section 7(1) of the HRA provides that a person may argue a human rights matter only where he or she is or would be a victim of the unlawful act. This is much stricter than the test for standing in judicial review, which requires only a 'sufficient interest' in the matter under s.31 of the Senior Courts Act 1981. An example of this is *R (Reprieve, David Davis MP and Dan Jarvis MP) v Prime Minister*[63], where the Court of Appeal found that the claimants were not "victims" for section 7 HRA purposes and, therefore, could not challenge the Prime Minister's decision not to hold a public inquiry into allegations of illegal rendition and torture following the war on terror via Article 3 of the ECHR. Therefore, it is already more difficult to pursue human rights challenges than ordinary judicial review challenges and an additional barrier has not been justified.

Tenth, there has been insufficient consideration of the procedural logistics of this requirement. A human rights claim may often be pursued via judicial review. However, this is not the only option to raise a human rights issue. Such an issue could be raised, for example, as a defence to criminal proceedings in the Crown Court, as a ground of appeal in a statutory appeal to the Court of Appeal or in a damages claim in the county court. This means that, for example, a judge sitting in a Crown Court, prior to permitting a defendant to argue a defence, would need to carry out a separate procedure to consider the human rights issue and whether the individual has been significantly disadvantaged. Put simply, an entirely new procedure would need to be added alongside all of the existing legal procedures to be followed. This would increase complexity, raise costs and promote satellite litigation that would extend the time it takes to resolve already complicated legal disputes.

[63] [2021] EWCA Civ 972.

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.

For the reasons given in Q8, PLP opposes the principle of a new human rights permission stage. Therefore, we also believe that a standard of 'highly compelling reason' providing an exception to the exclusion of individuals raising human rights issues would set the threshold far too high and would be a denial of access to justice. Instead, if this proposal is pursued, the relevant standard should be where there is a realistic prospect that the claimant would succeed in the Strasbourg Court. At the very least, the factors taken into account by a court when deciding whether to admit a claim under the 'highly compelling' standard should include whether there is a realistic prospect that the individual would succeed in a claim before the Strasbourg Court.

Question 10:

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

As in our answer to Qs 8-9, we note that the government has failed to define 'genuine human rights abuses' or identified a single successful case where they regard the claimant's success to have been too trivial or banal to have been litigated. This is no basis for a policy which excludes individuals from access to justice. Therefore, for the reasons given in Qs 8-9, PLP rejects the implication behind this question and does not believe further action is required or warranted.

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 consultation provides no sound evidence or data for its claim that the HRA has promoted 'costly human rights litigation' through 'the imposition and expansion of positive obligations'. Rather than provide specific costings or even ball-park figures, the consultation makes generic assertions with reference to a small number of academic works that also provide no specific costs assessments. Even assuming that positive obligations come with a cost, there is no exploration of the importance of the rights being defended, by which public bodies, for whom, and in what situations.

Reference is made only to one form of positive obligation, the protection of Article 2 (the right to life) in the context of *Osman* warnings,[64] rather than a serious exploration of the advantages and disadvantages

[64] (1998) 29 EHRR 245.

of positive obligations more generally across a variety of protected rights. Prior to any major reforms to positive obligations, the government should undertake a systemic review of the jurisprudence related to positive obligations and make inquiries across a range of public bodies to calculate the actual costs. Only thereafter can reform be said to be evidence-based.

The government also makes no reference to alternative cases under Article 2 which would attract considerable public support, and which would not be possible without the HRA. An example is the Supreme Court decision in *Michaels v Chief Constable of South Wales Police*[65], where the Justices decided that, where the police had failed to sufficiently protect a victim of domestic abuse from being murdered, there could depending on the specific facts be an Article 2 claim against the police. This was important because there could be no negligence claim at common law against the police.

Contrary to the perspective adopted in the government's consultation, there is no binary distinction between a negative obligation and a positive obligation. The right to a fair trial under Article 6, for example, can be categorised as negative (the state should not impose an unfair trial on a person) or positive (a duty to provide an independent court, including a paid, professional and well-qualified judge). The two facets complement each other and are inevitable parts of the same right. Merely criticising positive obligations without appreciating how they inevitably form part of a negative obligation is insufficiently serious and nuanced.

A classic illustration is the judgment of the Strasbourg Court in *Malone v United Kingdom*[66], which found that the failure of the UK to establish a system of law which regulated the powers of the police to conduct serious interferences with privacy, such as the interception of letters and telephone calls, was a violation of Article 8. Here, the positive obligation, to enact a regulatory system of law controlling police powers, was an inevitable corollary and even a necessary starting point to prevent violation of the negative obligation not to interfere unreasonably with privacy. Indeed, without the positive obligation, the right to privacy would have been theoretical and illusory rather than practical and effective because it could have been intruded upon arbitrarily at the whim of the executive.

The government criticises the incremental expansion of rights through the judiciary. However, as the IHRAR report noted at p.50, the domestic courts have been cautious in the development of rights, taking a nuanced approach to rights protection based on the strength of the public interests at stake, the importance of the right in issue, the degree of interference and any interfere with the rights of others.[67]

In human rights adjudication, the courts adopt a cautious and nuanced approach to decision-making based on their expertise and experience in the matter, the democratic legitimacy of judicial resolution of the question, the fact that they are not the primary statutory decision-makers and the importance of the separation of powers. This means that, particularly in matters of national security, social welfare policy, economic policy and immigration, they will be reticent before finding against the executive or legislature.[68]

In any country which recognises judicial independence, human rights protection and the rule of law, the government will lose cases. That is inevitable and healthy and reasonable people can disagree on the merits and demerits of those individual contested cases. But there is no evidence that in general the

[65] [2015] UKSC 2.
[66] [1984] ECHR 10.
[67] See also the judgment of Lord Sumption in *Bank Mellat v Her Majesty's Treasury* (No 2) [2013] UKSC 39.
[68] See, for example, *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 and *R (Lord Carlile) v Secretary of State for Home Department* [2014] UKSC 60.

courts are seeking to intrude upon areas reserved to the executive or legislature. If anything, the domestic jurisprudence demonstrates a cautious and nuanced approach by domestic courts.

The judicial approach has been especially cautious in the field of positive obligations. In practice, it has been limited to protecting the most basic and fundamental rights – such as the rights in Articles 2, 3 and 4 – in modest ways where there would otherwise be a violation of those rights. The jurisprudence is expressly developed on the understanding that courts should not impose unrealistic, expensive and disproportionate burdens on public authorities, especially where those obligations would be politically and socially contestable.

In practice, positive obligations tend to be limited to very serious violations of absolute or near absolute rights, such as Articles 2, 3 and 4 which protect the right to life, the right not to be tortured and the right not to be subjected to slavery, servitude or forced labour. In *Smith v Ministry of Defence*, for example, the Supreme Court considered whether to strike out a possible claim by the families of British soldiers who had been killed by friendly fire and a bomb hitting their Land Rover. The claim was that the Ministry of Defence had failed to adequately protect their right to life. Even in this context, at para. 76 the Supreme Court noted that: '[T]he court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate.' And at para.100: 'The court must be especially careful...to have regard to the public interest, to the unpredictable nature of armed conflict and to the inevitable risks that it gives rise to when it is striking the balance as to what is fair, just and reasonable.'[69]

Indeed, in practice a violation of a positive obligation to protect life is limited to very serious circumstances. In *Van Colle v Chief Constable of Hertfordshire Police*[70], the House of Lords put the test as follows:

> [T]he court must be satisfied that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party. If they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk, the positive obligation will have been violated.

Therefore, given the cautious nature of the development of positive obligations, if excessive and disproportionate costs do arise in any instances, these are likely to be from over-cautious implementation by public bodies rather than because of legal necessity from the jurisprudence. As former Supreme Court Justice, Lord Carnwath, noted in a lecture in February 2022, it is not clear what measures have been taken by public bodies to ensure that administrative action and duties are exercised in line with these modest comments, rather than in an unduly cautious or expansive way.[71]

For these reasons, we do not believe that statutory reform to positive obligations is needed or justified by the evidence. The courts are expressly cautious and mindful of avoiding the imposition on public bodies of unrealistic and expensive positive obligations. The government's proposals again merely replicate existing judicial practice with no obvious benefits accruing from merely codifying that practice.

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[69] [2013] UKSC 41.
[70] [2008] UKHL 50.
[71] Lord Carnwath, 'Is it time for a new British Bill of Rights?' (9 February 2022, Constitutional Law Matters). Available at: https://constitutionallawmatters.org/2022/02/lord-carnwath-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights/ (accessed 10 February 2022).

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.

No compelling case has been made for the outright repeal of section 3 (Option 1) and PLP does not support this proposal. IHRAR explicitly rejected the repeal of section 3 after careful consideration of the relevant case law. By contrast, the government's justification for their proposals is largely based on a misreading of, and overemphasis on, a case that is almost two decades old: *Ghaidan v Godin-Mendoza.*[72] Nor do we support section 3's repeal and replacement (Option 2). Both illustrative clauses set out at Appendix 2 have serious flaws; flaws which are probably inevitable given the ambition of making an ordinary reading of the words a hard constraint.

The government's argument

Section 3(1) provides that, "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."
The government's stated view is that section 3, in combination with section 4, has led to a shift "too far towards judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament" (para. 233). At para. 121, the government states:

> In applying section 3 in various cases, the courts have held the following: (1) the phrase 'so far as is possible' can be interpreted as meaning 'unless it is plainly impossible'; (2) section 3 can be used even where there is no ambiguity in the legislation; (3) even if the legislation is very clear, section 3 can be used to require that the legislation be given a different meaning; and (4) section 3 can be used to adopt an interpretation of legislation which 'linguistically may appear strained' and that the courts may 'read in' additional words to the legislation, or may 'read down' so as to apply a narrow interpretation of the legislation and render it compatible with Convention rights [*numbering added*].

Three authorities are cited for these propositions. The authority cited for the first proposition is paragraph 44 of *O'Donnell v Department for Communities*.[73] For the second, third and fourth propositions, *Ghaidan* is cited, together with *R v A (No.2)* (*R v A*)[74] in the case of the fourth proposition. *Ghaidan* is also cited as

[72] [*2004*] *UKHL 30.*
[73] [2020] NICA 36.
[74] [2001] UKHL 25.

authority for a fifth proposition, at para. 236, namely that "section 3 has resulted in an expansive approach with courts adapting legislation."

Ghaidan: going with the grain of the legislation

Given the reliance placed on *Ghaidan* by the government, the case is worth discussing in some detail.

Mr Juan Godin-Mendoza had been living with his partner, Mr Hugh Wallwyn-James, for almost 30 years. In 1983, they had moved into a flat rented by Mr Wallwyn-James under a protected tenancy. In 2001, Mr Wallwyn-James died and the landlord brought possession proceedings. The question was whether Mr Godin-Mendoza could claim succession to the protected tenancy under the Rent Act 1977 as a person "living with" Mr Wallwyn-James "as his or her wife or husband." By a majority, the House of Lords held that he could. Section 3 allowed for the phrase to be read to include unmarried same-sex couples. This interpretation was a vindication of Mr Godin-Mendoza's rights under Articles 8 and 14 of the Convention.

There are two important points to note. First, it is not clear that this interpretation was as 'linguistically strained' as sometimes thought. On one view, it is no great stretch to say that Mr Godin-Mendoza had been living with Mr Wallwyn-James "as his… husband" i.e. in a same-sex relationship analogous to a marriage. If linguistic strain is the government's main concern, then *Ghaidan* may not be an especially strong example.

Second, and more importantly, *Ghaidan* is authority for the proposition that interpretations under section 3 must "go with the grain of the legislation". The key passage in *Ghaidan* is at para. 121. Lord Rodger said (and Lord Nicholls agreed):

> If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.

Lord Rodger went on, at para. 122, to say:

> The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights, the implication is a legitimate exercise of the powers conferred by section 3(1).

Contrary to the government's claims, this makes clear that section 3 interpretations cannot contradict the essential principles and scope of the legislation; they cannot amend the legislation and change its overall design.

Before *Ghaidan* and since

The government sometimes appears to conflate *Ghaidan* with *R v A.* However, *Ghaidan* represents an important step away from the position in *R v A,* which was decided shortly beforehand. In *R v A,* the question for the court was whether a prior sexual relationship between a defendant and complainant could be relevant to the issue of consent, making its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial under Article 6. The House of Lords held that the exclusion of such evidence would be unlawful; however, section 41 could be interpreted in a Convention compatible way. This was despite the fact that section 41 only allowed for the admission of evidence of past sexual history in narrow and clearly defined circumstances. Arguably, the court in *R v A* rewrote the legislative scheme, contrary to Parliament's intention in passing the Youth Justice and Criminal Evidence Act 1999. It is not just that the 'interpretation' was linguistically strained; it went against the grain of the legislative scheme in a way that *Ghadian* and subsequent cases would not permit.

It is for good reason that *R v A* is widely considered to be a high watermark. It was superseded by *Ghaidan,* and it is now well-established that the interpretative powers of the courts under section 3 are weaker than was suggested in *R v A.* This was IHRAR's finding, and it was also the view put forward by Lord Mance and Professor Young in their evidence to the JCHR on 26 January 2022.[75] In PLP's view, *R v A* could no longer be decided in the way it was. The legal position under section 3 has shifted significantly since then.

In recent years, the passage at para. 121 of *Ghaidan* has since been cited with approval in a line of cases, including by the Court of Appeal in 2018 in *WB v W District Council.*[76] The lasting influence of *Ghaidan* is that interpretations under section 3 must go with the grain of the legislation. In PLP's view, the courts show a consistent commitment to this approach.

At para. 119, the government discusses the 2019 case of *Gilham v Ministry of Justice*,[77] in which the word "worker" was held to include a district judge for the purposes of whistle blower protections under the Employment Rights Act 1996. Together with *O'Donnell,* this is the only modern case given as an example of the courts "expansive" approach to interpretation under section 3. However, the Supreme Court in *Gilham* did not go against the grain of legislation. At para. 42, Lady Hale said:

> The respondent argues that to do this [i.e. to hold that a judge is a "worker"] would "cut across a fundamental feature" or "go against the grain" of the 1996 Act. But it is hard to see why that should be so. To interpret section 230(3)(b) so as to include judicial office-holders would not afford them all the rights afforded to "workers" under the 1996 Act, but only those rights afforded to "limb (b)" workers, most of which are inapplicable to judges.

Later in the paragraph, Lady Hale agreed with the Court of Appeal that "It does not seem that the definition of a worker by reference to the existence of a contract, so as to exclude a 'mere' office-holder, is a fundamental feature of the legislation." Commenting on this case extra-judicially, Lord Carnwath recently said that the court "bore in mind… that there was no evidence that Parliament or the executive had addressed their minds to the exclusion of the judiciary from such protection, nor had any legitimate

[75] Joint Committee on Human Rights, *Oral evidence: Human Rights Act reform* (HC 2021-22 1033).
[76] [2018] EWCA Civ 928.
[77] [2019] UKSC 44.

aim been suggested for such exclusion."[78] In short, the interpretation in *Gilham* took full account of Parliament's overall purpose in enacting the legislation and strove to be consistent with it. The judges were careful not to overstep their proper role.

Research by lawyers at JUSTICE further supports the view that judges are not making excessive or radical use of section 3. Between 2013 and 2020, they found just 25 cases where courts or tribunals had used section 3 to interpret legislation that would otherwise have been incompatible with Convention rights. In the majority of cases mentioning section 3, it was not used. A leading reason was that to do so would go beyond the court's institutional competence.[79]

Even if there were some other examples of courts going beyond what is appropriate under section 3, this would not point to a fundamental problem with the provision itself. On the contrary, in PLP's view, section 3 is part of a healthy, functioning human rights framework that upholds fundamental constitutional principles including the separation of powers.

If section 3 were repealed without replacement, there would be new gaps in human rights protection which, at least in the short term, would probably result in more declarations of incompatibility and/or more cases being taken to Strasbourg. This would defeat the HRA's original objective (apparently shared by this government) of 'bringing rights home'. It would also reduce access to an effective remedy: instead of legislation being read and given effect in a way that vindicates claimants' rights, claimants would have to wait until Parliament acts on the declaration of incompatibility or go through the lengthy process of appealing to Strasbourg.[80]

In the longer term, the courts may attempt to fill these gaps by developing the common law – especially the principle of legality (see further below).[81] But, in the meantime, the change would generate considerable uncertainty not least because, as it stands, there is no clear or definitive list of common law fundamental rights.[82] People will not know whether and which Convention rights will be protected by the principle of legality. In our view, this uncertainty would be entirely unjustified given that the government's concerns in relation section 3 turn out to be poorly founded.

In summary, section 3 does not permit interpretations that go against the grain of the legislation. The courts understand the difference between interpreting and amending; they understand that they must not frustrate the will of Parliament. This is reflected in their current approach under section 3. PLP does not, therefore, think the case has been made for repeal of section 3, and we do not support this proposal.

[78] The Rt. Hon. Lord Carnwath of Notting Hill, 'Lord Carnwath lecture on Human Rights Act reform – is it time for a new British Bill of Rights?' (9 February 2022, Constitutional Law Matters). Available at https://constitutionallawmatters.org/2022/02/lord-carnwath-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights/#_ftn1 (accessed 15 February 2022).
[79] Florence Powell and Stephanie Needleman, 'How radical an instrument is Section 3 of the Human Rights Act 1998?' (24 March 2021, UK Constitutional Law Association). Available at: 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 14 February 2021).
[80] In early 2021, the ECtHR published a new case management strategy, acknowledging that processing times are currently five to six years: https://www.echr.coe.int/Documents/Court_that_matters_ENG.pdf
[81] See, for example, Mark Elliott, 'The common law and the European Convention on Human Rights: Do we need both?' (11 February 2022, Constitutional Law Matters). Available at: https://constitutionallawmatters.org/2022/02/the-common-law-and-the-european-convention-on-human-rights-do-we-need-both/ (accessed 14 February 2021).
[82] See, for example, the evidence of Professor Alison Young to the JCHR, Joint Committee on Human Rights, *Oral evidence: Human Rights Act reform* (HC 2021-22 1033), page 23.

Option 2 of Q12

Option 2 is for the repeal and replacement of section 3. The government invites comments on the illustrative clauses in Appendix 2, namely:

Option 2A
(1) Where the words used in a provision of legislation can be given more than one interpretation which—

(a) is an ordinary reading of the words used, and
(b) consistent with the overall purpose of the legislation, the interpretation to be preferred is one that is compatible with the rights and freedoms in this Bill of Rights.

Option 2B
(1) Legislation must be interpreted in a way that is compatible with the rights and freedoms in this Bill of Rights, but only if that interpretation is both—

(a) an ordinary reading of the words used in the legislation, and
(b) consistent with the overall purpose of the legislation.

PLP rejects the proposal to replace section 3 with either Option 2A or Option 2B.

An ambiguity trigger

The main difference between the two clauses is that Option 2A more clearly requires ambiguity before the interpretive obligation is triggered.

During the period when the UK was a signatory to the ECHR, but before Convention rights were 'brought home' by the HRA, Convention rights could influence the interpretation of legislation – but only in cases of ambiguity. Lord Bridge in *ex parte Brind*[83] summarised the position as follows:

> … [I]t is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.

Option 2A, in particular, would mean a return to something like this position. It would straightforwardly weaken human rights protection. For example, it could mean that cases such as *Ghaidan* would have to be decided differently, if there was not considered to be any ambiguity in the phrase "living with the original tenant as his or her wife or husband". This would be retrograde.

[83] [1991] UKHL 4

A dual precondition

Both draft clauses would create a dual precondition of a) consistency with an ordinary reading of the words and b) consistency with the overall purpose of the legislation. Only if both preconditions are met will the duty (and power) to interpret legislation compatibly with human rights be triggered.
Often, the ordinary words, overall purpose, and human rights compatibility of a piece of legislation will converge. Hence, in many cases, the enactment of one of these two draft clauses may not have any real impact on the approach taken by the courts. However, in cases where these three features come apart, the draft clauses could cause serious issues.

Tension between ordinary words and overall purpose

One problem with the dual precondition stems from the tension that can arise between the ordinary meaning of words used in legislation and its overall purpose. Sometimes, draftsmen make plain errors. It is well-established at common law that courts are free to correct those errors – even when there is no ambiguity in the language.[84]

Even aside from plain errors, draftsmen cannot always find words that will give effect to the legislator's intention in all relevant scenarios. Sometimes, a chosen word applies awkwardly in an unforeseen situation. This was so in the US case of *Bailey v United States,*[85] in which the US Supreme Court held that to 'use' a firearm in a drug-related offence meant to actively employ the weapon. Trading a firearm to buy drugs was not within the legislature's intended meaning, though it was the ordinary reading of the words. Further, it is particularly difficult to future-proof legislation against technological or social developments. Accordingly, the Court of Appeal recently held that 'first class post' includes signed-for delivery for the purposes of deemed service provisions under CPR 6.26.[86]

For this reason, the draft clauses are likely to give rise to considerable uncertainty. Sometimes, there will be no interpretation that is both compatible with the ordinary meaning of the words and consistent with the overall purpose of the legislation; let alone an interpretation that is both of those things and also Convention compatible. Options 2A and 2B are poorly equipped to handle such situations. At worst, a clause of this kind could have the bizarre implication that, if the ordinary words and the overall purpose conflict, a human rights compatible interpretation is not permitted. At best, implementation would likely require a raft of new case law, giving additional guidance to ensure that the worst-case outcome is avoided.

Tension between ordinary words and human rights compatibility

Leaving aside situations where the ordinary words and the overall purpose clearly conflict, a dual precondition of the kind proposed is unduly restrictive. The precise meaning of the draft clauses is not entirely clear. At its most restrictive, the 'ordinary words' precondition could refer to the literal meaning of each word in a statutory provision. If the 'ordinary words' precondition is taken seriously as a hard

[84] Lord Nicholls in *Inco Europe Ltd v First Choice Distribution* [2000] UKHL 15 said, "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words."
[85] 568 U.S. 186 (2013)
[86] *Diriye v Bojaj* [2020] EWCA Civ 1400.

constraint, the government's proposals would offer significantly less protection to human rights than section 3 as it currently stands. Perversely, it may also mean that rights enshrined in the proposed Bill of Rights receive less protection than common law rights.

It is common ground between the government's proposals and the current position under section 3 that any statutory interpretation must be consistent with the overall purpose of the legislation (see above). The divergence is over whether to prioritise the ordinary meaning of the words or the protection of human rights. Suppose that, for a given piece of legislation, there are two possible interpretations: one is consistent with the overall purpose of the legislation and the ordinary meaning of the words, but is not human rights compatible; the other is consistent with the overall purpose of the legislation and is human rights compatible, but is in tension with the ordinary meaning of the words. Options 2A and 2B would rule out the latter interpretation. In PLP's view this would considerably weaken the protection of human rights; is regressive; and does not further the aim of protecting Parliamentary sovereignty.

Under the so-called 'principle of legality', the courts will adopt an interpretation consistent with fundamental common law rights unless there are express words or a necessary implication indicating a clear Parliamentary intention to legislate contrary to those rights.[87] This is so that important rights and constitutional principles are not undermined only by general statutory words, where Parliament could not clearly anticipate that interference. The proposed reforms, in prioritising an ordinary reading of the words over interpretations that protect human rights, could produce a result where rights in a Bill of Rights receive less protection than common law rights. This contradicts the government's stated objective to protect certain rights – particularly jury trial and freedom of expression – to a greater degree than at present.

Parliamentary sovereignty

Turning, finally, to Parliamentary sovereignty: it is far from clear that this important principle is best served by holding Parliament to words potentially ill-chosen by the draftsman, in preference to a serious and intentional commitment to human rights, whether in the form of the HRA or a Bill of Rights. The HRA is, of course, an Act of Parliament, just as a Bill of Rights would be. And not just any Act but one of clear constitutional significance. It would be strange if words that happen to appear in run-of-the-mill legislation were considered a better reflection of Parliamentary will than fundamental values enshrined in human rights legislation.

Under the existing human rights framework, Parliament could – if they considered that the courts had abused the interpretative obligation under section 3 – enact legislation to amend the reinterpreted legislation. That they have never done so[88] suggests that Parliamentary sovereignty is not undermined by the current scheme and would not be well-served by the proposed reforms.

Notably, a dual precondition of the kind proposed is absent from the international examples given by the government at paras. 88 to 94. Two of the examples are Australian. The Australian Capital Territory's Human Rights Act requires their Supreme Court to interpret legislation consistently with the rights in it "so far as it is possible to do so consistently with [the law's] purpose". Something similar is true in the

[87] *R v Home Secretary, ex parte Simms* [1999] UKHL 33.
[88] IHRAR, Chapter 5, paragraph 114.

jurisdiction of Victoria. And yet, as explained above, the overall purpose of the legislation already defines the limits of the possible when it comes to rules of statutory interpretation under section 3.

In summary, PLP rejects both Option 1 and Option 2. Expert submissions to IHRAR disclosed "a broad and strongly argued view from the evidence that there was no basis on which to amend section 3 or 4 of the HRA" and "[t]here was a strongly held view that the evidence supported the conclusion that UK Courts had not abused the use of section 3".[89] PLP respectfully agrees with these views. We see nothing in the consultation to usurp IHRAR's conclusion that no substantive amendments should be made to section 3.

Question 13:

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

PLP considers that the JCHR could be more active in scrutinising section 3 judgments. One effective way to facilitate this would be through a database of the kind proposed at Q14 (see our answer below).

We also consider that there could also be an enhanced role for the JCHR beyond section 3, in conducting periodic inquiries and holding evidence sessions with claimants, public bodies and others to supervise the implementation of the HRA and how effective it is in promoting the protection of rights. Effective human rights protection in a liberal democracy requires more than judges. Equally important is an informed and engaged legislature.

To make these proposals a reality, it would be necessary for the JCHR to be adequately resourced. Adequate resourcing would also ensure that the JCHR is able to effectively perform its existing role of scrutinising government Bills for human rights compatibility.

Question 14:

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

PLP considers that this proposal has merit. This is a rare instance of the government taking up one of IHRAR's recommendations. We regret that most of IHRAR's other recommendations have been ignored. As a general matter, we note that much of the evidence-gathering on the functioning of the HRA has been left to civil society. With regard to section 3 in particular, the most comprehensive research we know of was carried out by JUSTICE (see above, in answer to Q12).

It would be a significant improvement if, instead, the government maintained a comprehensive and transparent record of all judgments where the courts have relied on section 3 to interpret legislation so as to render it compatible with Convention rights. In order to contextualise this information and avoid giving a skewed impression of the extent of the use of section 3, it may also be useful for the database to record cases in which a section 3 argument was raised but did not succeed.

[89] IHRAR, Chapter 5, paragraph 118.

A database of this kind could enable better analysis of the use of the interpretative power under section 3 HRA and would provide an evidence base for any need for reform; an evidence base which is currently lacking.

It would likely help to dispel harmful misconceptions about the HRA, and the extent to which it facilitates judicial overreach. As we explain in answer to Q12, the use of section 3 in the last two decades has been modest and restrained.

It would also improve Parliament's ability to consider the appropriateness of judicial decisions under section 3 and, if necessary, to take remedial action. However, as noted above (in answer to Q12), Parliament has not taken any such remedial action to date, and we do not anticipate that a database would result in a sudden deluge.

This proposal should not, however, be implemented in isolation. We consider that there is a need for the collection and publication of data on the protection of human rights more generally. It should not be limited to section 3 judgments, nor to judicial activity. Rather, a database of the kind proposed should be part of a broader governmental commitment to transparency in relation to human rights.

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?

As well as extending the scope of section 4 HRA to make declarations of incompatibility available in relation to all secondary legislation, the consultation also considers making declarations of incompatibility the only remedy available to courts in relation to some secondary legislation (para. 250). We note that there is no specific consultation question in relation to the latter proposal, so we respond to it here. PLP does not consider that a case has been made for these proposals and we reject them.

Declarations as the standard remedy

The motivation for these proposals appears to be an objection to the courts quashing or disapplying secondary legislation on human rights grounds. However, the power to do so is rooted in the common law, not the HRA. It is a variation of a long-established remedy available to courts in judicial review claims, which can be granted when secondary legislation is outside the power (*ultra vires*) of the minister responsible for issuing it. And the courts very rarely use this power, instead preferring their existing power to simply declare a breach of human rights.

PLP researchers[90] found that, of the 14 successful challenges to secondary legislation on HRA grounds between 2014 and 2020, the courts quashed or otherwise disapplied the offending provisions in just four of them[91] – leaving thousands of statutory instruments untouched.[92] The consultation does not mention

[90] 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?' (22 February 2021, UK Constitutional Law Association). Available at: https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/ (accessed 8 February 2022).

[91] For a table summarising these four cases, see the Appendix.

[92] House of Commons Library, 'Acts and Statutory Instruments: the volume of UK legislation 1950 to 2016' (21 April 2017). Available at: https://commonslibrary.parliament.uk/research-briefings/cbp-7438/ (accessed 14 February 2022).

these statistics, although the IHRAR report did.[93] PLP has continued to collect data on this and, for the year 2021, we have not identified any new cases where secondary legislation was quashed or disapplied on human rights grounds. In other words, there have been just four cases in seven years.

Much more commonly, where a court finds that secondary legislation violates human rights, they make a declaration to that effect. They have the power to do this, even though section 4 does not apply. For example, in *R (TD) v Secretary of State for Work and Pensions* the Court of Appeal declared that the appellants' rights under Article 14 ECHR had been violated by the implementation of certain aspects of the Universal Credit (Transitional Provisions) Regulations 2014 and left it to the Secretary of State to decide how to respond to this declaration.[94]

PLP's data on the tendency of courts to declare a breach of human rights, rather than quash or disapply secondary legislation, is corroborated by the experience of practitioners. For example, in their submissions to IHRAR, Bindmans said,

> Public Law Project's research... accords with our own experience. Generally conventional declarations are made, allowing the Government time to amend the legislative scheme and avoid a lacuna. Quashing Orders are far more commonly granted when subordinate legislation is challenge on conventional public law grounds...[95]

As Bindmans' submission indicates, such declarations do not affect the continuing validity of the legislation. The legislation remains in force and the government can respond to the adverse decision as they see fit. Given that these declarations work in much the same way as declarations of incompatibility, we do not consider it necessary to extend the scope of section 4.

Justifying the power to quash

Further, we reject the proposal that declarations of incompatibility should be the only remedy available to courts in relation to secondary legislation. We consider that the power of the courts to quash or disapply secondary legislation on human rights grounds is appropriate and should not be legislated out of existence or attenuated.

Secondary legislation is not like primary legislation. It cannot in any meaningful way be described as giving effect to the will of Parliament. It is made by ministers rather than by Parliament. The majority of secondary legislation made is not laid in Parliament and therefore is not scrutinised at all.[96] Furthermore, the majority of the delegated legislation that is laid in Parliament is subject to the negative resolution procedure which presumptively means it does not receive a debate in Parliament.[97] The Supreme Court in *R (on the application of Public Law Project) v Lord Chancellor*[98] described delegated legislation as: 'subject to much briefer, if any, examination by Parliament'. Most delegated legislation is also not subject to

[93] IHRAR, Chapter 7, paragraph 14.
[94] [2020] EWCA Civ 618.
[95] IHRAR, page 315.
[96] Ruth Fox and Joel Blackwell, *Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014), 5.
[97] Ibid.
[98] [2016] UKSC 39, [2016] AC 1531,

minimum consultation requirements meaning public participation in its preparation or passage is minimal.[99]

Although there is some Parliamentary oversight of delegated legislation subject to the affirmative resolution procedure, these instruments can be long and complex and tend not to be debated for enough time to give proper scrutiny. The Aviation Safety (Amendment etc) (EU Exit) Regulations 2019 are 146 pages long and were debated for 21 minutes in the House of Commons. The Product Safety and Metrology etc (Amendment etc) (EU Exit) Regulations 2019 are 619 pages long and were debated in the Commons for 52 minutes. The average length of debate of an SI in the 2013-2014 parliamentary session was 26 minutes but one instrument was debated for only 22 seconds.[100] Furthermore, secondary legislation cannot, be amended and is virtually never voted down.[101] It is described by commentators as being 'virtually invulnerable to defeat'.[102] The inadequacy of the scrutiny procedures described above in replicating the scrutiny that primary legislation receives is why delegated legislation is seen by some commentators as on a 'legitimacy precipice'.[103] Simply put, secondary legislation does not have the democratic legitimacy of primary legislation. So the quashing powers of courts in the UK are quite unlike, say, the strike down powers of courts in the US. The closer analogy is between secondary legislation and an action or decision by a minister. Just as quashing powers apply to unlawful ministerial acts, so too do they apply to unlawful secondary legislation.

Of course, one important exception is cases where primary legislation necessitates the incompatibility with human rights. In such situations, the courts cannot quash the secondary legislation. They are instead limited to issuing a declaration of incompatibility – as they would otherwise do in respect of Acts of Parliament that were incompatible with Convention rights.[104] The purpose of this arrangement is to preserve parliamentary sovereignty. It is a good example of the careful balance struck by the existing human rights framework, so as to be consistent with the separation of powers and the rule of law.

The sparing use of quashing orders

When the courts do use their power to quash secondary legislation, it is with ample justification. One of the rare cases in which the courts exercised this power was *R (British Medical Association) v Secretary of State for Health and Social Care*.[105] In this case, the British Medical Association challenged some of the provisions in the National Health Service Pension Schemes, Additional Voluntary Contributions and Injury Benefits (Amendment) Regulations 2019 (the Regulations). The amendments gave the Secretary of State the power to suspend NHS pension payments when someone was charged with – but not convicted of – a criminal offence. There was no avenue for appeal and suspension did not terminate automatically upon acquittal.

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[99] Ruth Fox and Joel Blackwell, *Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014), 182.

[100] Ruth Fox and Joel Blackwell, *Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014), 80.

[101] Only 17 SIs have been voted down in the last sixty five years and the House of Commons has not rejected an SI since 1979. Between 1950 and 2017, the rejection rate of SIs was 0.01%. See Philip Loft, *Acts and Statutory Instruments: The volume of UK legislation 1950 to 2019*, House of Commons Library, Commons Briefing Papers (CBP-7438 2019) and Jeff King, 'The Province of Delegated Legislation' in Liz Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020) 162.

[102] Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), Parliament and the Law (Hart Publishing 2018) at 359.

[103] Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (Hart Publishing 2018) 351-352.

[104] IHRAR, Chapter 7, paragraph 45.

[105] [2020] EWHC 64 (Admin).

The amendments were quashed by the High Court on the basis that they violated Article 1 Protocol 1 read with Article 14. The suspension power subjected retired NHS employees to an immediate financial detriment which was not imposed on NHS employees who faced similar criminal charges.[106] Further, this breach was "compounded by an absence of appropriate procedural safeguards" required by Article 6.[107] Simply put, the provisions meant that a retired NHS worker falsely accused of a crime could be deprived of their pension payments, potentially for a number of years. This put them at an unfair disadvantage compared with current NHS employees, in a way that "offends against the presumption of innocence" and "infringes the basic rules of natural justice".[108] And it went much further than necessary to achieve the legitimate aim of ensuring the effectiveness of forfeiture orders following a criminal conviction.

It is important to note that the offending provision could simply be excised without disrupting the overall scheme of the Regulations. A measure of this kind – which was not enacted by a sovereign Parliament but issued by a minister; was incapable of being interpreted to render it compatible with human rights; was liable to have a serious harmful impact; was inherently unfair and manifestly without reasonable foundation; and which was capable of being quashed without disrupting the overall scheme of the regulations – warrants a quashing order.

In our view, this case is representative of the judicious use of quashing orders. Another example is *RF v Secretary of State for Work and Pensions*,[109] discussed in detail in answer to Q16. We summarise all four cases between 2014 and 2020 in which secondary legislation was quashed or disapplied in the table below. See the appendix for a full list of the relevant cases.

In summary, quashing orders are used sparingly – especially when it comes to secondary legislation. Normally, the remedy is a declaration stating that the impugned instrument violates human rights. In that sense, the government's proposals are addressing a non-problem. However, the power to grant a quashing order in respect of secondary legislation is an important one. Sometimes, this will be the appropriate remedy. PLP does not consider that this power should be removed.

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.

At para. 252, the consultation reads that:

> Clause 1 of the Judicial Review and Courts Bill will (if enacted) allow courts making quashing orders in judicial review proceedings in England and Wales to include provision suspending the effects of the order for a limited period of time, or removing or limiting any retrospective effect of the quashing. The clause sets out a presumption that these powers will be exercised if it appears to the court that including such provision would, as a matter of substance, offer adequate redress. It specifies a number of factors to which the court is required to have due regard.

[106] Ibid, at [88].
[107] Ibid, at [7].
[108] Ibid, at [81].
[109] [2017] EWHC 3375 (Admin).

This is all correct. However, later at para. 252, the consultation adds that: 'The IHRAR Panel recommended that these powers should be made available in all proceedings where secondary legislation is challenged under the Human Rights Act.' This is a partial reading of the report. The report makes no reference to favouring a presumption; indeed, the word 'presumption' is not used at all in this context in the report. The only references made are to granting a court the *option* of suspended or prospective-only quashing orders.

Unless very significant changes are made to the Judicial Review and Courts Bill, PLP would oppose the extension of clause 1 to all proceedings where a court has found that secondary legislation is incompatible with a human right. Clause 1(1) of the Bill empowers a court to suspend or make a prospective-only quashing order where a public body has made an unlawful decision. Put simply, this would mean that, despite being unlawful, the act would not be quashed – that is, set aside or invalidated – immediately. Instead, the act would only be quashed at some point in the future, after the public body has been given time to remedy the illegality, take action to alleviate the consequences of the court's finding or take protective measures for third-parties who have relied on the government's illegal decision.

A suspended or prospective-only order, therefore, removes a significant degree of practical 'bite' and consequence following the court's finding of illegality. The court's finding will have no compulsory legal effects until some point in the future. Clause 1(9) of the Bill further creates a presumption that a court *must* issue this weaker form of remedy if it 'offer[s] adequate redress in relation to the relevant defect' and unless the court 'sees good reason not to do so.'

Quashing orders are important because they give courts the ability to nullify the illegal decisions of government. The alternative is that illegal public decisions will continue have serious consequences for people's rights and lives, despite violating the law. For this reason, PLP has consistently opposed the measures in clause one of the Judicial Review and Courts Bill. These measures followed the Independent Review of Administrative Law (IRAL), which made modest recommendations for reform of judicial review. While IRAL recommended granting judges a *discretion* to issue suspended quashing orders, the panel did not recommend a *presumption* in favour of either them or prospective-only orders.[110] In that respect, the government's Bill goes beyond IRAL's recommendations. On top of that, the chair of the panel, Lord Faulks, has noted that the government's framing - that judges had developed a pattern of overreach - was not compatible with IRAL's findings, which had found no such pattern.[111]

In the context of human rights, the proposals are even more problematic and serious. The suggestion is that, despite a court finding that a public body has violated a human right, that finding should have no immediate practical consequences for the public body. This would be a serious reduction in domestic human rights protection.

We offer an example of this. In *RF v Secretary of State for Work and Pensions*[112], PLP represented the claimant in a challenge to the DWP's Personal Independent Payment (PIP) policy. The High Court found that the rules were "blatantly discriminatory against those with mental health impairments" and quashed aspects of the policy. A prospective-only remedy would have denied thousands of people with mental health conditions the financial support to which they were entitled. While some of the individuals may

[110] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf (accessed 4 February 2022).
[111] https://rozenberg.substack.com/p/faulks-defends-judicial-review (accessed 4 February 2022).
[112] [2017] EWHC 3375 (Admin).

have, with assistance from support workers or advisers, sought to have their claim re-assessed by the DWP in light of the judgment, this would have been out of reach for many and would in any case not have rectified the past discriminatory denial of benefit based on the unlawful regulations. In cases such as these, it is entirely proper that the state take the necessary action to address its own previous wrongdoing. Moreover, and as the Institute for Government has noted, the problems with the PIP scheme were well known within the DWP prior to the judgment but political factors meant that it had not taken action.[113]

In addition to this, PLP believes that it is too early to extend the provisions in clause one to additional areas. The Judicial Review and Courts Bill has yet to even complete its parliamentary stages and receive Royal Assent, let alone be interpreted by the senior courts. Therefore, there has also not been adequate time to assess the practical consequences of clause one. Better to be cautious, gather evidence of what consequences the reforms have and make a judgement in future.

Conditions on granting suspended or prospective-only orders

If the government does pursue this option, it should be subject to three conditions. First and most critical is the removal of any presumption or mandatory condition in favour of weakened quashing orders in human rights cases challenging secondary legislation. If these orders are to be used, they should be subject to no presumption or mandatory requirement. They should be at the discretion of the court only, which should be able to consider all the facts and circumstances of the case.

Second is the removal of the court's ability to grant prospective-only orders. While suspended orders might sometimes be appropriate, with prospective-only orders even if a claimant succeeds, they will not receive a remedy personally and only future individuals whose rights are violated would. This is because the order only applies to future conduct. This would create an entirely hollow victory which would both be unfair to the claimant and would discourage legitimate future claimants from challenging violations of their human rights, as they would know that they could not obtain a reliable or effective remedy. In turn, this could decrease culture of legal compliance in ministers.

Third is that any provisions should expressly protect collateral challenges. A collateral challenge is when, without pursuing a judicial review and the associated remedies in the High Court, an individual invokes the illegality of an administrative act as a defence in criminal proceedings or to resist a decision in civil proceedings.[114] Clause 1(6) as it is currently drafted would remove the ability of individuals to raise collateral challenges. That subsection states that: "Where…an impugned act is upheld by virtue of subsection (3) or (4), it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect."

Imagine that one of the statutory instruments issued by the Health Secretary during the coronavirus crisis which created imprisonable criminal offences was declared illegal by a court on human rights grounds. If a court granted one of the new remedies, this subsection would make it as though that imprisonment were always legal, despite unlawfully violating human rights. Therefore, a person could not argue in the magistrates or Crown Court that the statutory instrument was invalid as a defence – because this

[113] Catherine Haddon, Raphael Hogarth and Alex Nice, "Judicial Review and policy making: the role of legal advice in Government" (Institute for Government, 2021), available at https://www.instituteforGovernment.org.uk/publications/judicial-review, p.15.
[114] Lee Marsons and Yseult Marique, 'What is the place of collateral challenge in the contemporary administrative justice landscape?' (18 March 2021, The Local Government Lawyer). Available at: https://localgovernmentlawyer.co.uk/litigation-and-enforcement/311-litigation-features/46531-collateral-challenges (accessed 4 February 2022).

subsection requires a judge to act as if it had been valid. As IRAL noted at 3.66 of its report: 'We readily acknowledge that the law would be in a radically defective state if such collateral challenges to the validity of administrative action were impossible.' We agree and believe that collateral challenges should be expressly preserved in the Bill.

Judicial and parliamentary scrutiny of secondary legislation

Fundamentally, there is no evidence of a material problem to be addressed. The courts are already cautious before issuing a quashing order in relation to secondary legislation, including in human rights cases. Research has demonstrated that of the 14 cases in which human rights challenges to delegated legislation succeeded in the last six years, the court quashed or otherwise disapplied the offending provisions in just four of them.[115] Relying on this research, IHRAR agreed with the conclusions at p.309: 'The UK Courts' approach to the question whether to quash subordinate legislation that is held to be incompatible is also nuanced, demonstrating judicial restraint.'

There is also an important constitutional point related to parliamentary sovereignty. If suspended or prospective-only orders became the norm or even mandatory in challenges related to secondary legislation, this would undermine and frustrate the practical effect of human rights that Parliament itself has legislated to provide to individuals. It would mean that even if a court were to find that secondary legislation is unlawful, the court could or would not invalidate the unlawful secondary legislation that violates human rights. This would significantly undermine the practical enforceability of rights that Parliament has created. As Lord Reed said in *R (Public Law Project) v Lord Chancellor*[116]:

> [An executive act] will be held by a court to be invalid if it has an effect... that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring [an executive act] to be invalid…the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned.

And in the specific human rights context, Lady Hale noted in *RR v Secretary of State for Work and Pensions*:[117]

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

As IHRAR put it at p.303:

[115] 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?' (22 February 2021, UK Constitutional Law Association). Available at: https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/ (accessed 4 February 2022).
[116] [2016] UKSC 39.
[117] [2019] UKSC

> In doing so [the court] is, consistently with the Rule of Law, giving effect to Parliament's intention in the Act of Parliament by ensuring that Government makes subordinate legislation within the power granted to it under that Act of Parliament.

The government claims that because secondary legislation is subject to parliamentary scrutiny, weaker judicial scrutiny and protection is appropriate. However, this is a wholly unrealistic understanding of parliamentary scrutiny of secondary legislation. The Hansard Society has reported that the standard ratio is that 80% of SIs are passed using the negative resolution procedure and 20% are passed with the affirmative resolution procedure.[118] This means the vast majority of the statutory instruments made in the United Kingdom are never debated at all and are subject to virtually no parliamentary scrutiny.

Moreover, statutory instruments are laid on a take it or leave it basis, reducing further the scope for meaningful engagement through the laying and debating of amendments. The result is that statutory instruments are rarely rejected by either House, being limited to around once in a lifetime.[119]
In any event, as previously indicated, the courts do not take an interventionist approach towards secondary legislation. In the case of *MA (Somalia) v Secretary of State for Home Department*,[120] Sir John Dyson (as he then was) said the following:

> [a] factor that is relevant to the intensity of the court's review of the scheme is that the Regulations were approved by affirmative resolution in both Houses of Parliament. That is not a bar to judicial review, but it is a factor which must be firmly borne in mind. When a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful.

Therefore, a case has not been made to extend clause one of the Judicial Review and Courts Bill to all challenges involving human rights and secondary legislation. On the contrary, the evidence is opposed to such an extension at this stage.

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.

PLP's preference is for a modified and extended option (b) in this question. While, for the reasons we give, we can see a compelling case for a ministerial power to make a remedial order under the HRA, we equally see a case for reform of that power so that its conditions of exercise enhance parliamentary scrutiny. In particular, PLP supports the recommendations adopted by the Joint Committee on Human Rights ('JCHR')

[118] Hansard Society, "Westminster Lens: Parliament and delegated legislation in the 2015–16 session" (2017) at p.4, which showed 19% of SIs were affirmatives in the 2015-2016 parliamentary session.
[119] The Strathclyde Review: Statutory instruments and the power of the House of Lords (Eighth Report of Session 2015-16, HC 752). Available at https://publications.parliament.uk/pa/cm201516/cmselect/cmpubadm/752/752.pdf (accessed 1 March 2022).
[120] [2010] UKSC 49.

in its Seventh Report of 2001 specifically on remedial orders under s.10 of the HRA.[121] We further support the proposal to limit the use of section 10 so that a remedial order cannot be used to amend the HRA itself or a future Bill of Rights.

In paras. 3 to 5 the JCHR provided a helpful outline of how section 10 currently operates:

> Under the Human Rights Act a Minister has power, in specified circumstances, to make a remedial order in order to remove an incompatibility between domestic law and a Convention right...The trigger for the making of such an order is either a declaration made by a UK court, or where it appears that a decision of the European Court of Human Rights has highlighted an incompatibility in UK law....The Act sets out the procedure for making such remedial orders.

As the JCHR put it at para. 32, from first principles it can be difficult to justify a ministerial power to amend primary legislation:

> As a matter of general constitutional principle, it is desirable for amendments to primary legislation to be made by way of a Bill. This is likely to maximize the opportunities for Members of each House to scrutinize the proposed amendments in detail. It would allow amendments to be made to the terms of the proposed amendments to the law during their parliamentary passage. It many cases it may be easy to remove an incompatibility by means of a short Bill which could be drafted quickly and passed speedily through both Houses. Such a Bill may often be politically uncontroversial.

Equally, however, we recognise that there are compelling reasons for a ministerial power to amend primary legislation in the very specific context that the power is used to remedy a violation of human rights. This power cannot be used to violate rights, only remedy such a violation. Therefore, we would not support option (d) of abolishing the power entirely. At para. 33, the JCHR set out these reasons in detail to prefer a remedial order rather than a Bill:

- Where the amendment relates to a body of legislation which is under review with a view to major legislative reform, it might be difficult or inappropriate to find time in the legislative timetable for an earlier Bill covering just part of the field to be dealt with later by the larger Bill.
- The legislative timetable might be fully occupied by other important, or even emergency, legislation.
- The need to remedy incompatibilities with ECHR rights should be given a high priority. If waiting for a slot in the legislative timetable might cause significant delay and the remedial order would be likely to cause less delay, the minister should be entitled to consider using section 10.
- The need to avoid undue delay is particularly pressing when the incompatibility affects, or might affect, the life, liberty, safety, or physical or mental integrity of the individual. In such cases, we consider that there would be compelling reasons for using the remedial order procedure in order to secure even a small acceleration in the speed with which an incompatibility could be removed.

We would also not support option (c) of limiting the section 10 remedial order to urgent cases. It is important to remember that this ministerial power only arises where a court has found there to be a violation of human rights and this power is used to prevent a continuing violation. Therefore, it is not

[121] https://publications.parliament.uk/pa/jt200102/jtselect/jtrights/58/5803.htm (accessed 5 February 2022).

necessarily as problematic as other delegated powers might be and there is a compelling case for giving it greater scope and effect.

Another important point is that the use of section 10 is already subject to controls. As the JCHR explained at para. 5 of their report:

> There are essentially two routes: the non-urgent, which requires a Minister first to make a proposal for an order and consult upon it, before laying an order in draft before Parliament which is then subject to affirmative resolution procedure; and the urgent procedure, under which the order may be made and laid but ceases to have effect if not approved by both Houses within a specified period.

Put simply, even where the minister uses the urgent procedure and need not consult, lay a draft order before Parliament and get that order affirmatively approved, Parliament must still approve the order if it is to have long-term effect. The current controls on section 10 are, therefore, stronger than those for most secondary legislation.

Nevertheless, we consider that there is a case for enacting in legislation a list of factors to which the minister must have regard before issuing an urgent or non-urgent section 10 order. The minister should also be obliged to explain in writing and publish why he or she has chosen to use the urgent procedure if that option is chosen. At para. 37 its report, the JCHR noted the following factors that go into a decision about use of the urgent and non-urgent procedures and we agree with them as reasonable starting points:

- The significance of rights which are, or might be, affected by the incompatibility.
- The seriousness of the consequences for identifiable individuals or groups from allowing the continuance of an incompatibility with any right.
- The adequacy of compensation arrangements as a way of mitigating the effects of the incompatibility.
- The number of people affected.
- Alternative ways of mitigating the effect of the incompatibility pending amendment to primary legislation.

To these, we would add: the desirability of obtaining early parliamentary debate on the order and the degree to which the order is likely to be contested or opposed in Parliament.

In addition to this, we also agree with four other recommendations made by the JCHR, namely:

- At para. 40, that section 10 should be amended to stop the statutory period running when either House is adjourned for more than four days.
- At para. 43, to allow a draft remedial order to be approved at any time after being laid before Parliament and amending the Standing Orders of the House of Commons to ensure that no resolution for approval could be moved in that House until the JCHR had reported.
- At para. 45, that the Standing Orders of the House be amended so that if the JCHR recommends, a section 10 order would be taken on the floor of the House, and that if the JCHR recommended against the approval of a remedial order, the House would first have to resolve to disagree with the recommendation.

- At paras. 26 and 28, that the minister should be under an obligation to inform the JCHR of adverse Strasbourg judgments within one month of the decision and an adverse domestic section 4 declaration in 14 days.

Draft clauses are available in Annex B of the JCHR's report.[122]

Finally, we agree that the section 10 power should be amended to prevent the amendment of the HRA itself. While a section 10 order can only be used to enhance rights protection rather than undermine them, it is more constitutionally appropriate that amendments to the HRA are achieved through Parliament via a Bill rather than executive action given the constitutional significance of that legislation.

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.

At para. 261, the consultation claims that:

> There is a debate as to whether section 19 strikes the right constitutional balance between government and Parliament, particularly in relation to ensuring human rights compatibility whilst also creating the space for innovative policies.

There is no evidence provided for this claim. We are not aware of any instances where a section 19 statement has prevented innovative policy from being introduced. Indeed, at para. 259, the consultation reminds us that, even if an innovative policy did violate human rights in the minister's opinion, the government could make clear under section 19(1)(a) that it wished to proceed with the Bill anyway. Parliament, being sovereign, could also approve that Bill. Therefore, there is no evidence of a need to weaken or undermine the section 19 obligation.

If anything, we believe that there is a case for strengthening the section 19 obligation by requiring a minister to lay written reasons before Parliament as to why the Bill is compatible with human rights in his or her opinion. This would be a logical extension of the current practice whereby the government often produces a so-called "Human Rights Memorandum" for important Bills.[123] If this would impose a disproportionate burden for each Bill, the obligation could be limited to when the Joint Committee on Human Rights requests that such a statement be produced.

[122] https://publications.parliament.uk/pa/jt200102/jtselect/jtrights/58/5805.htm (accessed 5 February 2022).
[123] Judicial Review and Courts Bill: Human Rights Memorandum. Available at https://publications.parliament.uk/pa/bills/cbill/58-02/0152/JRandCourtsBillECHRmemo.pdf (accessed 1 March 2022).

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?

While PLP has a specific Wales lawyer and is increasingly active in the public law sphere in Wales,[124] we are predominantly an organisation that litigates in the context of England. In addition, while our research deals in matters with UK-wide effects in that it deals with reserved issues such as social security and immigration, we have no specific litigation and research activity in Scotland or Northern Ireland. Moreover, we only rarely carry out policy work in devolved administrations, our policy activity being predominantly Westminster-focused. Therefore, we prefer to make no substantive comments on this question.

However, the obvious option would be to consult widely the devolved administrations and legislatures prior to enacting any new legislation, as well as seek the approval of the devolved legislatures through legislative consent motions where necessary. Moreover, the government should consult with organisations expert in public law in each devolved nation, such as Public Law Wales, the Law Society of Scotland and the Bar Council of Northern Ireland. It would also be wise to consult with the legal officers of each devolved nation, particularly the Advocate-General for Scotland, the Counsel General for Wales and the Attorney-General of Northern Ireland.

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 are disappointed that the government has arbitrarily excluded consideration of whether a greater range of private bodies should be covered by the section 6 definition of a public authority, which includes 'any person certain of whose functions are functions of a public nature' (section 6(3)(b)). Indeed, without justification or explanation, at para. 269, the consultation reads that: 'Such a definition should not add new burdens for private sector bodies and charities.'

This is especially important with the growth of outsourcing whereby companies such as G4S and Serco carry out core state functions including immigration detention and prisons, as well as important social services on behalf of public bodies with statutory functions, such as care homes and schools.

We are, however, pleased that the government does not intend a narrowing of the definition so that it includes a smaller number of public bodies. At para. 266, for example, the consultation makes clear that: 'The government believes that the range of bodies and functions to which the obligations under the Human Rights Act currently apply is broadly right, and we intend to maintain this approach.' Instead, the core problem identified at para. 267 is that: 'It can be difficult, however, to predict with certainty whether particular functions are of a public nature, given the inherent difficulty of finding an exact dividing line

[124] For example, on 17 February 2022 PLP held a specific event on the implications for Wales of this consultation: https://publiclawproject.org.uk/events/the-human-rights-act-government-consultation/ (accessed 4 February 2022).

between the public and the private spheres.' At para. 269, the government wonders whether 'alternative drafting could set out a clearer definition of whether a body is a public authority or a function is of a public nature.'

In PLP's view, it is difficult to see what language could be dispositive of a question of whether a function is of a public or private nature and what drafting could entirely resolve these problems. Given the growth of outsourcing, there will inevitably be contested questions at the margins. As Lord Bingham put it at para. 5 in *YL v Birmingham City Council*: 'The draftsman was wise to express himself as he did, and leave it to the courts to decide on the facts of particular cases where the dividing line should be drawn.'[125]

Equally, at paras. 7 to 10, Lord Bingham set out a number of factors which could help the courts make such a judgment, including: the extent of state involvement in that field historically; the nature and scope of any statutory intervention in that field; the degree to which the state directly or indirectly regulates, supervises or inspects performance in that field; whether the state is the payer of the service directly or indirectly; and the degree to which rights could be violated by the service.

This analysis drew on similar comments in *Aston Cantlow v Wallbank* at paras. 7 to 12 by Lord Nicholls, where his Lordship also identified the following factors: whether the body concerned had possession of special powers to carry out their functions; whether the body was subject to democratic accountability; whether the body had an obligation to act in the public interest; whether the body was established by statute; and the degree of connection with a core public service.[126]

Therefore, while no provision is likely to be dispositive, PLP believes that it would be reasonable to amend section 6 so that it provided greater guidance for the courts by setting out indicative factors to consider when assessing whether a body is performing a function of a public nature. While none of these factors could or should be conclusive, this could encourage and facilitate greater certainty, as all parties and the public would be aware of various factors that courts could take account of. Naturally, the courts should also be able to take account of any factors not identified in the section should it appear relevant to the court.

[125] [2007] UKHL 27.
[126] [2003] UKHL 37.

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.

PLP disagrees with both Option 1 and Option 2, each of which would substantially reduce the protections provided by the HRA. With these suggested provisions, there would be almost no basis on which an individual could challenge the decision of a public body on a human rights basis.

Option 1 of Q21

On Option 1, at para. 274 the consultation reads as follows:

> The effect of this would be to allow any public authority lawfully acting, enforcing, or giving effect to provisions of or made under primary legislation, in the way Parliament clearly intended, to do so without attracting litigation. As a result, public authorities would always be able to give effect to or enforce the will of Parliament provided they were otherwise acting lawfully and in accordance with wider public law principles. This would not remove all accountability. Public authorities would continue to be bound by other legal rules. It would, however, recognise that if Parliament has passed clear laws leading to incompatibility with the Convention rights, then Parliament rather than the public authority should bear the responsibility for addressing any declaration of incompatibility by the courts.

The proposal appears to be for a provision which would prevent litigation ('without attracting litigation') but would equally somehow permit a court to make a section 4 declaration of incompatibility ('Parliament rather than the public authority should bear the responsibility for addressing any declaration of incompatibility by the courts.'). It is difficult to see how these two claims can work together. If an individual could not pursue human rights litigation, there could be no consideration of a human rights issue by a court and, therefore, no section 4 declaration for Parliament to act on. There would simply be no consideration of a human rights matter at all. The consultation concedes as much by adding that the decision could still be challenged on ordinary public law principles, recognising that there could be no challenge on human rights principles.

Even if there was no express exclusion of litigation, the same result would follow. In *R (Richards) v Environment Agency*[127], the Court of Appeal determined that unless a court finds a violation of human

[127] [2022] EWCA Civ 26.

rights on the facts of the case, it cannot grant a remedy. Therefore, if according to this new provision a public body cannot act unlawfully and violate human rights if it acts under primary legislation, there is no basis for a court to find a violation and grant a remedy under section 4. Again, there would no basis for Parliament to become involved by virtue of a declaration of incompatibility. In this respect, the consultation is confused and must be substantially rethought before it would amount to a serious policy. The phrase 'giving effect to provisions of or made under primary legislation' in Option 1 is especially problematic. This implies that, even where the provision promoting a violation of human rights is contained in secondary legislation made under a parent Act, there could be no human rights challenge. This aspect of Option 1 is presumably an attempt to remove the important protection provided by the Supreme Court in *RR v Secretary of State for Work and Pensions*[128], where the Justices found that it was lawful for courts, tribunals and public bodies to disapply a provision of delegated legislation which violates human rights.

It is difficult to see what purpose and function human rights could serve in such a system. There is almost no basis on which a public act could be challenged on a human rights basis. Almost all public bodies, unless acting through prerogative powers (such as HM Passport Office), act according to primary legislation or secondary legislation. These provisions would in effect turn human rights into paper rights that served no practical function. The rights would be entirely illusory and theoretical, rather than practical and effective.

Option 2 of Q21

Option 2 raises the same problems as we have discussed in our answer to Q12. The government's proposals for section 3 would radically reduce the protection afforded to human rights by limiting its application only to cases of ambiguous statutory language, rather than permitting courts to give the most rights-protective interpretation possible in the circumstances.

Take *Ghaidan v Ghodin-Mendoza* as an important illustration, which the government reserves particular criticism for at p.34. The government's proposals would have directly prevented the successful outcome for the claimant. *Ghaidan* concerned a person in a same-sex relationship who was unable to inherit the tenancy of his deceased partner from the landlord because the language of the statute exclusively protected couples 'living together as husband and wife'. That is, the protection implicitly excluded same-sex couples, no matter how long the couple had been living together. In this case, the House of Lords used section 3 to provide equal protection to same-sex couples by reading 'living together as husband and wife' to mean 'living together as if they were husband and wife'.

Given that this legislation was not ambiguous, the court could not have used section 3 under the government's plans. Instead, the only remedy would have been a section 4 declaration of incompatibility. Such a declaration would not have assisted the claimant in *Ghaidan*. It would mean that the discrimination remained valid and legal unless and until Parliament decided to change the law. Parliament may not have done this for years and had no obligation to include the claimant retrospectively in this protection. Therefore, the government's proposals for section 3 would have directly led to discrimination against a same-sex couple, who would have been left without an effective remedy.

For these reasons, PLP cannot support either Option 1 or Option 2.

[128] [2019] UKSC 52.

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.

This question falls-outside of our organisational expertise and thus, we wish to endorse the findings of the IHRAR and comment no further.

The IHRAR expressed concerns that unilateral alteration to the extra-territorial application of the Convention is likely to create an unsatisfactory gap between the application of Convention rights by the UK Courts and the ECtHR.[129] Such reforms would also risk damaging vital UK interests such as in the military and intelligence spheres.[130] As Sir Peter Gross clarified to the Justice Committee, narrowing the jurisdiction of domestic legislation on this matter will have concerning unintended consequences and would"

> '[E]xpose our armed forces, agencies and police to Strasbourg proceedings without the benefits of closed material proceedings and other procedures available in the UK courts'. Which he warned, could be 'disastrous for the agencies or the armed forces'.[131]

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

[129] IHRAR Report, page 372 at para 80.
[130] IHRAR Report, page 337 at para 5.
[131] Justice Committee, *Human Rights Act Reform,* 1 February 2022 (HC 1087 2022, Q67)

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

The consultation does not provide compelling support for its position that the principle of proportionality gives rise to problems under the HRA. The evidence base to support this view is weak for two main reasons; little, if any, consideration is given to the IHRAR's findings and the handful of cases referred to is not logically connected to the view advanced.

The impetus for the proposed draft clauses appears to be a concern that proportionality assessments allow courts to 'exercise broad powers' when undertaking assessments of public authority actions,[132] which provides the court with an opportunity to 'override Parliament's intention',[133] and interfere with the constitutional balance.

Yet this does not align with the expert assessment of the IHRAR. 'Judicial deference', which pre-dates the HRA but has particular relevance in this context, describes the process by which the courts may restrict the extent of their judgment on particular matters. Under this doctrine, the judiciary recognise in certain circumstances that it is more properly for the democratically elected legislature, or in some cases executive as the expert decision maker.[134]

In the consultation, it is asserted that that 'where Parliament has expressed its clear will on complex and diverse issues relating to the public interest, this should be respected [by the courts]'.[135] The articulation of preferred circumstances has a striking similarity to current approaches to judicial deference. Looking at the practical application and exercise of judicial deference, the IHRAR found that the UK Courts have taken a careful approach to deciding on issues relating to the public interest.[136] In its submission to the panel, The Law Society of England and Wales gave evidence of the sensitivity of domestic courts '…to the limits of their competencies' providing that they 'do frequently defer to the executive and legislature'.[137]

Furthermore, the IHRAR presents substantial evidence in support of the court's willingness to defer to Parliament or Government on matters that fall outside of its area of responsibility. The examples clearly portray routine deference from the judiciary in decisions on financial matters,[138] economic and social matters,[139] national security,[140] and where moral or political judgments would be subject to consideration[141] - a position that that has been emphasised consistently by the House of Lords and UK Supreme Court over the last twenty years.[142]

The consultation inflates the extent to which the principle of proportionality plays a significant part in judicial decision making, specifically at the Supreme Court. Twenty-five cases were decided by the

[132] 'Human Rights Act Reform: A Modern Bill of Rights' (Ministry of Justice 2021) 79 para 284.
[133] 'Human Rights Act Reform: A Modern Bill of Rights' (n 1) 49 para 162.
[134] UK Government, *Submission to the Independent Human Rights Review Call for Evidence*, at [22].
[135] 'Human Rights Act Reform: A Modern Bill of Rights', page 80 at para 291.
[136] IHRAR, paragraph 28.
[137] The Law Society of England and Wales, *Submission to the Independent Human Rights Review*, at [32].
[138] *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6; [2015] 3 All ER 1.
[139] *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542 [2021] 1 WLR 1151.
[140] *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39; [2014] AC 700 at [21].
[141] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52; [2008] 1 AC 719; *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428.
[142] IHRAR, page 110 at para 29.

Supreme Court in the period 2020 to 2021, and only five of these involved matters relating to the HRA and Convention rights.[143] Of the five relevant cases, a proportionality assessment constitutes the basis on which the judgment was reached in only one case, *Ziegler*.[144] Even here, the appropriateness of appellate courts undertaking a proportionality assessment in respect of a statutory defence of lawful excuse in a criminal matter was contested up to, and by, the Supreme Court. Deference to the legislature and executive is also supported by the ECtHR, which operates on a subsidiary basis and thus, cases are only admissible once the applicant has exhausted domestic remedies and six months have passed. Even where the Court allows a case to be admitted, it follows the doctrine of the margin of appreciation, in which it balances individual rights with national interests. As explained by Eva Brems, appreciation tendencies and national interests may be ambiguous, and if there is a majority and a minority view, the national government is likely to express the views of the majority.[145] That being said, the system of undertaking proportionality assessments in line with national interests is already a central tenet of the European human rights framework and is followed by domestic courts in relation to Parliament's view of what is in the public interest, as articulated in legislation.

It is also important to note that in cases concerning the deportation of foreign nationals specifically, the days of independent judicial proportionality assessments were brought to an end with the passing of the 2014 Immigration Act. The Act introduced a new Part 5A into the Nationality, Immigration and Asylum Act 2002 (NIAA), which included a legislative mechanism requiring courts and tribunals in deportation appeals to undertake Article 8 proportionality assessments with reference to Parliament's view that deportation is in the public interest, as expressed in the legislation.[146] Whilst the government concedes that the above amendment made progress in confronting the use of the HRA to prevent the deportation of FNOs, it nonetheless advocates further curtailment of judicial proportionality assessments to tackle the 'expanding scope for challenging deportations orders'.[147] The consultation seeks again to justify major reforms by highlighting judicial trends that do not represent the actual contemporary trends in the domestic case law.

Before the 2014 amendments, proportionality assessments in immigration cases followed *Huang*,[148] and appellate authorities were therefore able to undertake open-textured evaluative judgments. In assessing proportionality, courts and tribunals were to address the question of whether the refusal of leave to enter or remain prejudices the family life of the applicant in a manner 'sufficiently serious to amount to a breach of the fundamental right protected by article 8'. If found to be the case on the facts presented, the House of Lords explained that a refusal (of leave to enter or remain) would be 'unlawful, and the authority must so decide'. [149]

However, when the 2014 Act inserted a statutory codification of 'public interest', it curbed the availability of independent judicial proportionality assessments and replaced it with a codified approach which centred on Parliament's expressed view and raised the threshold for finding interference of Article 8. From here, refusals would be deemed proportionate unless appellate authorities found 'exceptional

[143] *MS (Pakistan) (Appellant) v Secretary of State for the Home Department* [2020] UKSC 9; *AM (Zimbabwe) (Appellant) v Secretary of State for the Home Department (Respondent)* [2020] UKSC 17; *Director of Public Prosecutions (Respondent) v Ziegler and others (Appellants)* [2021] UKSC 23; *In the matter of T (A Child) (Appellant)* [2021] UKSC 35*; Kostal UK Ltd (Respondent) v Dunkley and others (Appellants)* [2021] UKSC 47.
[144] [2021] UKSC 23 [80]-[87].
[145] Eva Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 Heidelberg Journal of International Law 230.
[146] Nationality, Immigration and Asylum Act 2002, Part 5A s 117B(1).
[147] Page 45 of the consultation.
[148] [2007] UKHL 11, [2007] 2 AC 167.
[149] *Ibid*, para. 20.

circumstances' which would indicate that the refusal of the application would result in 'unjustifiably harsh consequences' for the appellant. As articulated by Lord Reed at para. 46 in *Agyarko v Secretary of State for the Home Department*[150], the amended framework for such considerations is based on:

> [T]he Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests. They are designed to operate on the basis that decisions taken in accordance with them are compatible with article 8 in all but exceptional cases.

In acknowledging that 'immigration control is an intensely political issue', Lord Reed conveys that:

> 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.[151]

In expressing the respect held by the Judiciary for the constitutional balance and its commitment to judicial deference in politically sensitive issues, Lord Reed effectively reiterates the Government's definition of the principle and illustrates the consultation's focus on ex-trends that have already been addressed and upheld by the courts for some time.

That being said, PLP is of the view that the 'margin of discretion' and 'judicial deference' are suitable concepts that ensure the Branches of the State sit within their respective constitutional spheres of action and the division between the decision-making powers of courts and Parliament is applied in an appropriate way for the United Kingdom. Where Parliament wishes to prescribe specific considerations for the courts'to proportionality assessments in given subject matters, it has shown that it is able to do so through focused legislative amendments.

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; and/or

[150] [2017] UKSC 11, [2017] 1 WLR 823.
[151] *Ibid*., para 46 (emphasis added).

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.

PLP contests the framing of this question as it is not objective the consultation provides insufficient evidence to justify the proposed options for reform.

The government acknowledges that the amendments made to the immigration system by the 2014 Immigration Act have already produced their preferred legal position, rendering further reform unnecessary. Examination of the domestic jurisprudence demonstrates a cautious and nuanced approach by the courts. At present, appeals against deportation must overcome significant procedural hurdles and be able to demonstrate personal circumstances that meet a high threshold to outweigh the broad statutory codification of 'public interest' and be successful.

A substantial body of domestic jurisprudence has developed over the eight years since the 2014 Act and structured, clear approaches have emerged. Further reforms are likely to create immediate legal uncertainty and reignite the need for litigation to allow for judicial interpretation to establish the application of new provisions. In our view, this uncertainty would be unjustified given that the proposals aim to address an ex-problem and infer very little substantive change to the current position.

The consultation does not provide an accurate picture of the development of the law

The framing of the question assumes that deportations that are in the public interest are frustrated by human rights claims. However, the consultation provides little to no evidence to support the assertion. An anonymised case given the pseudonym *'X'*, occupies a sizeable part of the government's illustration of the issue posed by Article 8 to the deportation of FNOs. By anonymising the case, the government have prevented consultation respondents from being able to analyse the case, identify whether it was decided before or after the 2014 amendments, or ascertain whether it was subsequently appealed.

Besides the difficulties in scrutinising *Case X*, the facts and the Tribunal's decision as presented in the consultation contrast with those found in most comparable cases. It is worth nothing that whilst the following inferences must remain hypothetical due to the omission of a case reference, *Case X* appears to be an anomaly amongst identifiable caselaw. If this case pre-dates the 2014 amendments, it would no longer be the authority for the undertaking of proportionality assessment within deportation appeals on human rights grounds, as it would be superseded by the current legislative framework . Alternatively, if the case was decided post-2014, it plausible that a subsequent appeal would have been lodged (and have been successful) as it is difficult to find compatibility with the decision and post-2014 authority.

The consultation's cavalier approach to evidence continues into the figures presented by the government to illustrate that 'the UK courts have expanded the scope for challenging deportation orders under Article 8'. Internal Home Office figures are cited, indicating that within the twelve-year period from April 2008 to June 2021, 21,521 appeals against deportations were lodged by FNOs – of which around 11% were allowed at the First Tier Tribunal on human rights grounds.

It should be noted that the vast majority of appeals are not human rights based at all: Home Office figures indicate that around 89% of the appeals lodged by FNOs against deportations were allowed at the First Tier Tribunal on grounds *other* than human rights. Further, 'human rights grounds' does not refer only to rights

protected under the HRA. It is an aggregate term for appeals brought under the Convention, as well as those lodged under various international rights-based provisions, such as the UN Convention Relating to Refugee Status.[152]

Focussing more narrowly, the consultation asserts that in the period from 1 April 2016 to 8 November 2021, of 1,011 appeals against deportation by FNOs that were allowed on human rights grounds at First Tier Tribunal, an estimated 70% were allowed *solely* on Article 8 grounds (page 45). The figure is cited as an estimate based on the review of a random sample of less than 300 of the 1,011 relevant cases, of which 206 were allowed solely on Article 8 grounds. Whilst the figures provided are numerically sound, it is less certain whether the self-selected, small sample size is reflective of the success rate of appeals made by FNOs solely on Article 8 grounds.

The consultation also overlooks the routes of appeal open to the Home Office to reinstate deportation orders. Data is omitted on the number of cases in which the Home Office is granted permission to appeal to the Upper Tribunal. Further, no consideration is given to the practical availability of appeals for FNOs, particularly in light of the so-called 'deport first, appeal later' policy, introduced via the 2014 and 2016 Immigration Acts.[153] The 2014 and 2016 changes gave the Home Office the power to deport FNOs before they have a chance to appeal. Out of country appeals are permitted, but research shows that the geographic separation of the applicant from the tribunal has consequences: applicants are less likely to appeal[154]and, even if they do try to appeal, establishing access to a tribunal can prove difficult from certain locations.[155] In effect, the 'deport first, appeal later' policy significantly narrows the scope for challenging deportation orders under Article 8 – contrary to the message of the consultation.

That being said, where a FNO is able to lodge an appeal, the tribunal must assess the claim as set out by the 2014 Immigration Act. The 2014 Act brought an end to independent judicial proportionality assessments with the insertion of Part 5A into the NIAA. The new provision included a legislative mechanism requiring courts and tribunals appeals to undertake Article 8 proportionality assessments with reference to Parliament's view that deportation is in the public interest, as expressed in the legislation.[156]

Whilst the government concedes that the above amendment made progress in confronting the use of the HRA to prevent the deportation of FNOs,[157] it maintains that the discretion left to the courts was used to dilute the intended impact of Parliament. The consultation relies on *AD (Turkey)*,[158] to demonstrate this point. However, this case better illustrates the rarity of individuals meeting the high threshold required for a judge to view their human rights claim as outweighing the public interest in their deportation.

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[152] 'Does the Human Rights Act Prevent Us Deporting Serious Criminals?' (Free Movement, 26 May 2015) <http://www.freemovement.org.uk/does-the-human-rights-act-prevent-us-deporting-serious-criminals/> accessed 10 February 2022; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[153] Joe Tomlinson and Byron Karemba, 'Tribunal Justice, Brexit, and Digitalisation: Immigration Appeals in the First-tier Tribunal' (2019) 33(1) Tottels Journal of Immigration Asylum and Nationality Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3314110> accessed 16 February 2022.

[154] Joe Tomlinson and Byron Karemba, 'Tribunal Justice, Brexit, and Digitalisation: Immigration Appeals in the First-tier Tribunal' (2019) 33(1) Tottels Journal of Immigration Asylum and Nationality Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3314110> accessed 16 February 2022.

[155] John Vine CBE QPM, 'An Inspection of The-Suspensive Appeals for "Clearly Unfounded" Asylum and Human Rights Claims' (Independent Chief Inspector of Borders and Immigration, 1 July 2014) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546976/NSA-report_July_2014.pdf> accessed 22 February 2022

[156] Nationality, Immigration and Asylum Act 2002, Part 5A s 117B(1).

[157] Page 38 of the consultation.

[158] Page 38 of the Consultation; Upper Tribunal (Immigration and Asylum Chamber), Appeal Number: HU/01512/2019 (V).

Throughout her reasoning, the Upper Tribunal Judge undertakes the proportionality assessment as set by the 2014 amendments and makes explicit that the threshold for an individual to meet is a high one:[159]

> '[T]he public interest in his deportation will only be outweighed by the existence of very compelling circumstances over and above those described in the exceptions to deportation at 1 and 2 of s.117C of NIAA 2002'.[160]

While holding that AD's human rights under Article 8 did outweigh the public interest in this instance, Judge Lindsley is clear that the claimant presented rare and very compelling circumstances. AD had been married to a British citizen for 31 years, whom was at this time nearly 60 years old, had lived in Leicester all her life, and was dependent, both emotionally and financially, on AD. Evidence supported the submission that AD provided real, effective and committed support to an adult son, and was uniquely able to assist him when he was in a parlous physical and psychological condition. At para. 45, Judge Lindsley is unequivocal in affirming that the circumstances presented by AD made this;

> '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'…[161]

A decision that diverges from the norm that to this extent is not the soundest basis for the government to rest its proposals.

The plausibility of the position is further undermined where the consultation makes reference to its second and final case, *OO (Nigeria)*.[162] At face value this case was an example of where a human rights claim was held to outweigh the strong public interest in the deportation of a FNO. However, this was again, a case with very compelling circumstances. Specifically, the UT considered of OO's rehabilitation: the offences committed by him were in 2013 and in the subsequent seven years, OO had secured two employed roles which at para. 41, were said to be an 'achievement not reached by all those released from serving four year sentences of imprisonment', a recognition that amounting 'very compelling circumstances' of his rehabilitation.[163]

Despite finding such strong evidence to suggest the individual's rights under Article 8 outweighed the public interest in his deportation, Judge Smith made clear throughout his reasoning, at paras. 28 and 30, that 'not all judges' would have reached the conclusion in the same way First-tier Tribunal (FtT) Judge Buckwell had done so. Whilst distinguishing the FtT's approach from his own, Judge Smith makes clear that allowing the appeal at first instance was not a decision made in error of law. Thus, the FtT had not diluted Parliament's intention as articulated through the 2014 amendments, or mistakenly or erroneously applied the law, as evidenced by the Upper Tribunal's dismissal of the appeal on these grounds.

Ultimately, the caselaw relied on by the government to support the above proposals is at best, an oversimplification of the law and at worst, a voluntary misrepresentation. The above cases are self-

[159] Upper Tribunal (Immigration and Asylum Chamber), Appeal Number: HU/01512/2019 (V), para. 33.
[160] *Ibid*., para. 19.
[161] *Ibid*., para. 45 (emphasis added).
[162] Upper Tribunal (Immigration and Asylum Chamber), Appeal Number: HU/16908/2018 (V).
[163] *Ibid,* para. 43.

professed exceptional and rare instances in which an individual's rights under Article 8 met the high threshold (as set by the 2014 amendments) to outweigh the public interest in their deportation.

The recent case of *SSHD v Starkey* further demonstrates this point.[164] Again, the individual was subject to a deportation order, which he appealed under Article 8. At para. 66, the CA endorsed the position of the UT, that the test set out in Part 5 NIAA 2002 is 'an extremely high threshold', and 'an extremely demanding test'. It was also recognised that the requirement of 'compelling circumstances' 'means circumstances that have a "powerful, irresistible and convincing effect"' and that 'only the most extreme consequences' could justify allowing the appeal.

Creation of two-tier system of rights

The options for reform, as presented in the consultation, essentially propose a two-tier system in which the enjoyment and of rights would be limited in certain circumstances and for certain individuals. This would risk incompatibility with the Convention. The Convention entails a system of absolute and qualified rights, with each category of right allowing varying degrees of lawful interference by the State.

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 government has not defined what is meant by, nor has it provided evidence to support the notion that there are 'impediments' arising from the Convention and the HRA to the effective management of its borders. Likewise, the consultation fails to include a satisfactory evidence base to illustrate what 'challenges' are posed by illegal and irregular migration. It is on this basis that PLP rejects the implication behind this question, and instead would like to reiterate the government's commitment to the Convention and upholding its international obligations, including that of *non-refoulement,* to all individuals that are under its jurisdiction.

The government suggests that the options provided as part of the above question could be applied to asylum removals and those who enter the UK legally but overstay their right to remain.[165] Yet these proposals run contrary to the government's assertion at para. 132 of the consultation that 'the ability to challenge public authorities before the domestic courts is not something [they] propose to change'. To suggest a framework in which deportation orders cannot be overturned unless 'obviously flawed', with no further explanation , amounts to an effective removal of appeal routes in all but extremely limited (and unspecified) circumstances. Such proposals are concerning and if given effect, would significantly undermine access to justice and weaken the accountability of public bodies.

[164] [2021] EWCA Civ 421.
[165] Para. 297 of the consultation

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.

PLP would not be opposed to a legislative provision setting out the factors which a court may consider when deciding whether to award damages following a successful human rights claim and, if so, the quantum of damages. However, this provision should make clear that no factor alone should be decisive and that a court should retain the discretion to make a global assessment based on all factors relevant in the court's view. Any statutory factors should be a guide, not a straitjacket.

We are of this opinion because when in 2000 the Law Commission and the Scottish Law Commission carried out research into damages under the HRA, the report highlighted that there is ambiguity in the Strasbourg Court's approach to awarding damages: 'Perhaps the most striking feature of the Strasbourg case-law, to lawyers from the United Kingdom, is the lack of clear principles as to when damages should be awarded and how they should be measured.'[166] This ambiguity was reiterated as recently as 2021 *In the matter of an application for judicial review by Omar Mahmud*[167], where Friedman J. sitting in the Northern Ireland High Court noted at para. 14 that: 'Twenty years after the HRA coming into force section 8 damages still lie somewhere between stranger, afterthought and makeweight in most judicial review proceedings.' However, the award of damages in a human rights action is already tightly regulated by the HRA. Section 8 contains a number of limiting provisions, particularly subsections (2) and (3):

> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including— (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

Therefore, a court is already required to take account of all factors in the case, including the consequences of any action by the court on the harm suffered by the claimant (3(b)) and any other remedies which could be granted (3(a)).

[166] Law Commission and Scottish Law Commission: Damages under the Human Rights Act 1998 (October 2000, Cm 4853). Available at https://www.scotlawcom.gov.uk/files/3012/7989/6877/rep180.pdf (accessed 6 March 2022) p.17.
[167] [2021] NIQB 37.

This was confirmed by the UK Supreme Court in *R (DSD and NBV) v Commissioner of Police of the Metropolis*[168], which concerned the positive obligation on a state to investigate and prosecute serious crimes of violence and sexual assault. At para. 63 the court concluded that, even in these serious cases: 'Compensation is by no means automatically payable for breaches of the article 3 duty to investigate and prosecute crime.' The issue of damages, then, simply does not arise in the vast majority of challenges, even in some cases where there is a serious breach of rights.

However, at para. 30 in *Omar Mahmud*, Friedman J. highlighted a non-exhaustive list of factors for a court to consider:

1. A finding of a violation of a human right does not automatically provide a right to damages.
2. A clear causal link must be established between the actions of the public body and a human rights violation.
3. Where a court is considering a monetary loss suffered by a claimant, the court will normally award that amount in damages so that the individual can recover their monetary loss.
4. Where the court is not considering a monetary loss, the court may order what is equitable in the circumstances.
5. The purpose of damages is to compensate the individual for their loss at the hands of the state and not punish the state.
6. The overall context and all relevant circumstances must be considered.
7. The court must consider the state's conduct on the facts of the case, including any mitigating or aggravating features.
8. The court must consider the applicant's conduct on the facts of the case, including any mitigating or aggravating features.

Similarly, in their 2000 report on damages under the HRA, the Law Commission and Scottish Law Commission recognised the following eight factors in the Strasbourg Court's approach to just satisfaction in the award of damages:

1. Any other measures taken in response to a violation.
2. The finding of a violation can normally amount to just satisfaction itself.
3. The degree of loss suffered by the claimant.
4. The seriousness of the violation committed by the public body.
5. The conduct of the public body on the facts of the case.
6. Any broader offensive conduct by the state in question, such as attempts to circumvent a previous court order.
7. A record of previous and similar violations by the state which have gone unremedied.
8. The conduct of the claimant on the facts of the case.[169]

Therefore, in the interpretation of the courts, section 8 is already a provision which permits a court to take account of all relevant factors. Nothing in the existing law in principle excludes factors (a)-(c) identified in Q26.

[168] [2018] UKSC 11.

[169] Law Commission and Scottish Law Commission: Damages Under the Human Rights Act 1998 (October 2000, Cm 4853). Available at https://www.scotlawcom.gov.uk/files/3012/7989/6877/rep180.pdf (accessed 10 February 2022) pp.24-33.

That said, given the consistent reference to ambiguity in both official reports and the jurisprudence and the lack of overt factors and guidance in section 8 itself, we would not be opposed to clarifying those factors in legislation.

However, we add a note of caution in relation to factor (a) identified in Q26. This mentions the effect on public services of an award of damages. We are sceptical that this factor is needed because awards of damages under the HRA are modest and are not likely to negatively affect public services. At para. 41 in his judgment in *DSD and NBV*,[170] Green J. commented that:

> It has regularly been stated that the awards will generally be "modest"...The exhortation to modesty is, in truth, more a reflection of the principle that the Strasbourg Court has long endorsed which is that the paramount object of the law is to bring violations to an end and that compensation is a secondary factor. It is manifestly not the intention of the law to create a "get rich quick" litigation culture.

We also reiterate that, even if a list of factors is codified, it is important that no factor is decisive. In no case should negative effects on public services prevent an award of damages where it is otherwise appropriate. It is essential that a court's powers reflect the totality of the case and not a single factor that is not representative of the whole case, especially when that single factor is weighted in favour of a public body and not an individual whose right has been violated. At para. 41 in *DSD and NMV*,[171] Green J. noted:

> When all individual factors are taken into account the final stage in the quantum exercise is to consider "totality" i.e. whether – standing back – the final sum arrived at is a reasonable one in all the circumstances. The notion of "totality"...is a safeguard to ensure that a court does not apply an overly mechanistic approach by totting up relevant considerations adding values to each and arriving at a final figure which may then be divorced from the overall context.

For this reason, while we are not entirely opposed to this proposal and we see some merit in setting out the factors expressly, we would add an important note of caution on factor (a) - taking account of the negative effects on public services. Damages being an inconvenience and burden on public bodies can never be a sufficient reason to deny an individual what they would otherwise be entitled to.

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

[170] [2014] EWHC 436 (QB).
[171] Ibid.

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.

While this question refers generally to the remedies system, the two options provided refer only to damages. Therefore, before turning to damages specifically, as an introductory comment, all remedies in judicial review – the forum for most HRA challenges - are and have always been discretionary. That is, even a claimant who wins a claim is not entitled to a remedy following a successful judicial review that raises human rights issues. Even where a court believes that a human rights violation may or is likely to occur in future, it cannot grant a remedy. As the Court of Appeal in *R (Richards) v Environment Agency*[172] concluded, where a court finds no violation of rights on the facts, it cannot order a remedy.

Turning specifically to the issue of damages and the conduct of claimants, both Options 1 and 2 are reflected in the jurisprudence of the Strasbourg Court. In practice, Option 1 is reflected to a greater degree than Option 2, though both are certainly present and have been recognised in high quality independent research on the jurisprudence. At para. 37 in his judgment in *DND and NMV*,[173] for example, Green J. expressly discussed how the Strasbourg Court takes account of the claimant's conduct:

> First, the conduct of a claimant may be relevant to causation. To the extent that the Claimant has contributed to the loss for which he is claiming the responsibility of the State is diminished. Secondly, determining whether it is "equitable" to award "just satisfaction" the Court takes account more generally of a claimant's conduct.

This was also recognised by the Law Commission and the Scottish Law Commission at 3.55 in their 2000 report on damages under the HRA:

> However, even where not contributing directly to the loss, the applicant's conduct or character may be taken into account, in the same way as the conduct of the respondent State, in determining whether or not to award just satisfaction. This is most likely where the applicant has been engaged in reprehensible conduct at the time of the breach, though it has also been suggested that the criminal character or record of the claimant is more generally considered to be relevant by the Strasbourg Court.[174]

At 3.57, the report added that: 'the Court seems more willing to deny damages and hold that the judgment provides just satisfaction where the applicant is a criminal or a suspected criminal.'[175] And as Shelton (1999) has concluded in the leading empirical consideration of damages awarded by the Strasbourg Court to people convicted or suspected of criminal offences:

> The Court seems close to the view that those accused or convicted of crimes should receive no damages for procedural violations unless they can demonstrate actual innocence. The conduct of

[172] [2022] EWCA Civ 26.
[173] [2014] EWHC 436 (QB).
[174] The Law Commission and the Scottish Law Commission, 'Damages under the Human Rights Act 1998' (October 2000, Cm 4853). Available at https://www.scotlawcom.gov.uk/files/3012/7989/6877/rep180.pdf (accessed 10 February 2022).
[175] Ibid.

> the government appears to be much less significant, although severe government misconduct sometimes can overcome the bias against prisoners.[176]

Therefore, the jurisprudence essentially reflects Options 1 and 2 suggested by the consultation. However, it is easy to see how Option 2 could operate especially problematically if it was made an absolute rule that, for example, a criminal record should prevent an individual from being awarded damages. That an individual has committed criminal offences, even serious criminal offences, does not mean that they have not suffered a violation of their human rights. Further, an award of damages may also encourage public bodies to improve their conduct and decision-making for other members of the public who do not have criminal records.

Therefore, it is difficult to see how these factors could be decisive. As Green J. added at [40] in *DSD and NBV*,[177] there are many factors which are equally as important as the claimant's individual or general conduct:

> The sorts of factors of potential relevance here would be: whether the violation was deliberate and/or in bad faith; whether the State has drawn the necessary lessons and whether there is a need to include a deterrent element in an award; whether there is a need to encourage others to bring claims against the State by increasing the award; whether the violation was systemic or operational.

As for temporal limitations, it is difficult to see how offences, even if serious, committed many years ago could be relevant to an award of damages, especially when wholly unconnected to the violation. Having stolen a bike and having one's home seized without compensation have no natural connection and should not result in a lowering or exclusion of an award of damages. It is also difficult to see if the offence has no connection with the violation, how this could justify a reduction in an award of damages. Being an armed robber does not make police misconduct any less serious or worthy of damages. Any reform in this area should not impose on courts absolute rules excluding or limiting damages for certain persons just because of current or past criminal conduct.

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.

The draft clause at para. 11 of Appendix 2 would do two principal things. The first is make clear that parliamentary sovereignty remains undisturbed by any adverse judgment against the UK in the Strasbourg Court. The second is to increase the duties on a minister to inform Parliament of any such adverse judgment against the UK. While we are not opposed to the first idea, we are unconvinced that it is needed. On the second idea we find it acceptable in principle, on the condition that the new mechanism is not used to consistently invite Parliament to decline to legislatively remedy a violation of human rights as found by the Strasbourg Court.

[176] Diane Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999) 209.
[177] [2014] EWHC 436 (QB).

So far as idea one, subsection (1) reads as follows:

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

This is clearly a statement of the obvious and adds nothing to existing law. It is worth returning to two cases we mentioned in our answer to Q2. At [135] in *R v Lambert*, for instance, Lord Clyde concluded that: 'the Act did not incorporate the rights set out in the Convention into the domestic laws of the United Kingdom.'[178] Lord Nicholls made the same point more strongly in *Re McKerr*[179] at para. 26 where he insisted that there was a:

> distinction between (1) rights arising under the Convention and (2) rights created by the Human Rights Act by reference to the Convention. These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the Human Rights Act 1998 and they continue to exist. They are not as such part of this country's law because the Convention does not form part of this country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the Human Rights Act. The latter came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights, created as they were by the Human Rights Act, depends upon the proper interpretation of that Act.

This draft clause would simply restate the existing law for no obvious purpose. At least in Q20 the codification of factors already identifiable in case law could provide guidance in practical disputes that actually arise as to whether a body has functions of a public nature. However, there is no evidence that the provision in para. 11 of Appendix 2 could resolve any practical dispute. A similar provision is found in section 38(1) of the European Union (Withdrawal Agreement) Act 2020: 'It is recognised that the Parliament of the United Kingdom is sovereign.' There are no cases that have relied on this clause for an outcome. Therefore, as a very simple and basic reiteration of the obvious existing legal position, we would not strongly oppose such a clause but we are not convinced it would have any practical effects in any real-world dispute.

The classic example of how Parliament clearly remains sovereign following an adverse judgment from the Strasbourg Court is the political and parliamentary debate following the Strasbourg Court's decision in *Hirst v United Kingdom (No 2)*,[180] where the court found a violation of Article 3 Protocol 1 (the right to free and fair elections) based on the UK's ban on prisoners voting. Despite this finding, the House of Commons declined to support granting prisoners the right to vote in May 2015.

For the second idea, subsection (2) of the draft clause in para. 11 of Appendix 2 reads that:

> If the European Court of Human Rights finds, in its final judgment in a case to which the United Kingdom is a party, that the United Kingdom has failed to comply with an obligation arising under

[178] [2001] UKHL 37.
[179] [2004] UKHL 12.
[180] (2005) ECHR 681.

> the Convention (the 'adverse judgment'), the Secretary of State must lay notice of the adverse judgment before each House of Parliament during the notification period.

The notification period provided for is 30 days and the clause further permits a minister to schedule a debate on the adverse judgment. In principle, this is an acceptable proposal. It seems a reasonable way to require ministers to keep Parliament informed of activity at the Strasbourg Court, promote political debate on human rights matters and on the importance of the Strasbourg Court in protecting human rights in the UK. We hope that this mechanism would not be used to invite Parliament consistently to decline to act on an adverse judgment of the Strasbourg Court and decline to remedy a violation of human rights through legislative action. This would seriously undermine the UK's international reputation as a rule of law state. However, in principle, if used to keep Parliament informed and to debate human rights matters, this proposal is acceptable.

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

We begin this answer by noting that it is disappointing that the collection of evidence as to the equalities impact of these proposals is being outsourced to civil society, academia and respondents to this consultation. The government has a pattern of refusing to collect, publish and analyse data as to the equalities impacts of important policies. In January 2022, for instance, the Independent Chief Inspector of Borders and Immigration expressed regret that the Home Office had declined to collect and use data on protected characteristics in the operation of the EU Settlement Scheme.[181] It is regrettable that this reticence is continuing.

Prior to publishing any draft Bill, the government should carry out its own detailed equalities impact assessment of its proposals and publish that assessment. Indeed, the most useful and important data for Q29 will be uniquely accessible by the government rather than non-government respondents to this consultation. Questions such as: the protected characteristics of people who bring judicial review claims on human rights grounds; how many tribunal appeals are won on human rights grounds; and how the HRA is used in government departments in initial decisions and policy formulation to avoid violations of human rights, are uniquely answerable by government.

[181] Independent Chief Inspector of Borders and Immigration, 'A further inspection of the EU Settlement Scheme: July 2020 to March 2021' (13 January 2022). Available at: https://www.gov.uk/government/news/inspection-report-published-a-further-inspection-of-the-eu-settlement-scheme-july-2020-march-2021 (accessed 11 February 2022).

Beyond that, an obvious place to begin to assess the equalities impacts of this policy is examining the case law related to Article 14 of the HRA, which protects the right to non-discrimination of treatment on certain bases where that discrimination interferes with the protection of another human right. Given that many, if not all, the government's proposals would weaken the remedies available to claimants and courts for protecting human rights, it is worth reflecting on how the weakened remedies advocated in this consultation would have implications for real decided cases. Drawing on the case law, we provide some examples in relation to sexuality, race and disabilities below.

As to sexuality, we refer again to the case of *Ghaidan v Ghodin-Mendoza* as discussed in Q21. The government's proposals for section 3 would have directly led to a court being incapable of remedying effectively discrimination against a same-sex couple.

As to race, in *R (Vanriel and Tumi) v Secretary of State for the Home Department*, the Administrative Court was concerned with victims of the Windrush scandal. These claimants had been in the UK since the 1960s and had established a family and livelihood in that time. However, they decided to return to their country of origin for a period of time. Under the British Nationality Act 1981 Schedule 1 paragraph 1(2)(a), the Secretary of State argued that she had no discretion to accept their applications for citizenship because of their time abroad. The Administrative Court used section 3 of the HRA to interpret the legislation to provide a discretion (but not a duty) on the Secretary of State to accept their citizenship applications nevertheless. The judge, Bourne J., decided that although the statute was not ambiguous, section 3 granted the power to achieve an interpretation that was compatible with rights nevertheless.[182] Without such an ability to interpret a statute in a rights compatible way where there is no ambiguity in the language, the rights of these Windrush victims would have been violated.

As to disabilities, in *RR v Secretary of State for Work and Pensions*, the UK Supreme Court was concerned with a man living with a severely disabled partner in rented social housing for which he claimed housing benefit. The case related to the legality of the so-called 'bedroom tax' when applied to persons who were disabled and who reasonably needed a separate, spare bedroom to store medical equipment. The Supreme Court had already found that the 'bedroom tax' was unlawful when applied to this claimant, as it violated Article 14 taken with Article 1 Protocol 1 and Article 8. In this case, the Supreme Court decided that it was lawful for a court, tribunal or public body to disapply a provision in secondary legislation if it violated a human right. This was because section 6 of the HRA made it unlawful for a public body to violate a human right.[183] The consultation suggests that, for statutory instruments, the only remedy available to a court should be a section 4 declaration, rather than the remedy granted in this case – disapplying the unlawful provision. Once again, the government's proposals would have directly led to a human rights violation.

[182] [2021] EWHC 3415 (Admin).

Appendix

Table showing the four decisions in which the power under s4 HRA to quash or disapply secondary legislation was exercised, 2014-2020

Name	Reference	Human rights	Quashed/disapplied provision
R(TP) v Secretary of State for Work and Pensions	[2020] EWCA Civ 37	A1P1, Art 14	Quashed: transitional provisions which meant that severely disabled people, i.e. people who had previously been entitled to receive the Severe Disability Premium in Legacy Benefits, lost £180 per month when they were moved onto Universal Credit. Universal Credit (Transitional Provisions) Regulations 2014
R(British Medical Association) v Secretary of State for Health and Social Care	[2020] EWHC 64 (Admin)	A1P1, Art 6, Art 14	Quashed: provisions providing for the suspension of NHS pension payments when someone was charged with, but not convicted of, a criminal offence. National Health Service Pension Schemes, Additional Voluntary Contributions and Injury Benefits (Amendment) Regulations 2019
R(Elmes) v Essex County Council	[2018] EWHC 2055 (Admin)	A1P1, Art 14	Disapplied: the requirement that, in order to be eligible for a survivor's pension, a person must be a 'nominated cohabitor'. Note that there was no quashing order in this case.

			Local Government Pension Scheme (Benefits, Membership Contributions) Regulations 2007
R(RF) v Secretary of State for Work and Pensions	[2017] EWHC 3375 (Admin)	A1P1, Art 8, Art 14	Quashed: a provision modifying the mobility component for personal independence payment to exclude those who, for reasons of psychological distress, cannot plan or follow a journey. Social Security (Personal Independence Payment) (Amendment) Regulations 2017