Human Rights Act Reform: A Modern Bill of Rights
The Bar Council's Submission
March 2022

Introduction

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice's Consultation on Human Rights Act Reform: A Modern Bill of Rights published in December 2021.

The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society.

The Bar makes a vital contribution to the efficient operation of Criminal and Civil Courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The General Council of the Bar is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Summary

1. The Bar Council welcomes the opportunity to respond to this Consultation. We recognise that some of the issues raised in the Consultation are essentially political questions. The Bar Council is not a political organisation, and we have attempted to confine our response to questions which raise Rule of Law issues, and questions which raise legal issues.

2. We have drawn on the views of practitioners who have considerable first-hand experience of the practical operation of the Human Rights Act 1998 (HRA), acting for a range of stakeholders on all sides of disputes involving a variety of legal and advocacy issues.

3. We note and welcome two important features of the Government's position:

    a. The proposed Bill of Rights will contain a schedule which in essence replicates that to be found in the HRA and contains the text of Convention rights.

b. The second is the Government's commitment that the United Kingdom (UK) will remain a signatory to the European Convention on Human Rights (ECHR) and that individual rights of petition will continue unchanged. The same commitment was included in the terms of reference for the Independent Human Rights Act Review chaired by Sir Peter Gross (the Gross Review[1]).

4. The background to the original enactment of the HRA included an emphasis on the importance of 'bringing rights home' and facilitating the ability of individuals to enforce their rights directly in domestic UK Courts. This was seen as an important objective for two reasons: it provides for cheaper and speedier enforcement without the need for the individual to incur the costs and delays involved in an application to the European Court of Human Rights (ECtHR). It also ensured that domestic Courts and the ECtHR were engaged in the same exercise of construing Convention rights. They were concerned with the same text. As Baroness Hale has said, they were speaking the same language. The UK domestic Courts were able to be fully involved in the application and interpretation of the rights in the domestic legal and constitutional context. This involvement also facilitated a UK perspective in the evolution of the ECtHR case law. It facilitated dialogue between the Strasbourg and domestic Courts.

5. The Bar Council made it clear in its response to the Gross Review that it strongly supported the objective of bringing rights home. This is not a political issue but a Rule of Law issue. A key element of the Rule of Law is that legal rights can be effectively vindicated. This is best achieved if this is achieved in UK domestic courts. It is therefore important to ask whether the proposals in the Consultation paper on reforming the HRA assist with this objective.

6. A litmus test is whether the remodelled Bill of Rights will provide coherent, readily applicable remedies or, conversely, whether it will introduce an element of uncertainty which will require extensive, further litigation before the picture becomes clear.

7. There is a real danger that the enactment of what will be, in places, a new statutory code will require litigation to examine the extent to which that new code produces different practical answers, and this could lead to the conclusion that the position has not changed significantly, if at all. The fact that the Bill of Rights will contain the same Convention rights, expressed in the same text, and that the individual right of petition will remain, reinforces these risks. The enactment of a new code is likely to encourage or possibly even compel parties to litigation to probe whether anything has changed, creating legal uncertainty and increasing the burdens on the courts and costs to parties. While at the same time, the rights remain in the same language and the ECtHR will continue to produce judgments in response to UK applications.

[1] Please note that throughout this response, reference in quotations is made to the Gross Review under the acronym – 'IHRAR'.

8. Whether or not there should be new Bill of Rights at all seems to us to be at least in part a political question, but we think that it also raises issues on which the Bar Council can appropriately express a view.

9. As an ordinary Act of Parliament, a Bill of Rights would not entrench rights because they could be taken away again by another Act of Parliament.

10. There are various problems with attempting to formulate rights, which are well-established and well understood, into language appropriate for a statute. A key problem arises because some rights, which are widely acknowledged, to be of fundamental importance, may nevertheless not be absolute. A good example of this is the right to jury trial in England and Wales. For reasons which we explain in detail below, this critically important right is not absolute and once it is written down in legislation like a Bill of Rights, the legislation must specify the exceptions to which it is subject if it is to have any substantive meaning. Some might think that a heavily caveated legislative formulation of the right to jury trial is less attractive and less effective than the present position, in which there is widespread understanding, based on centuries of history and practice, and the development of common law.

11. The HRA strikes a delicate constitutional balance domestically and at the international level by enabling a common language on human rights. The Gross Review emphasises that there is no real evidence that the HRA is not working and needs to be significantly reformed or abolished. This Consultation does not reflect the recommendations in the Gross Review, for example, the recommendation in chapter one as follow:

    "The panel recommends that serious consideration is given by Government to developing an effective programme of civic and constitutional education in schools, universities, and adult education. Such a programme should, particularly, focus on questions about human rights, the balance to be struck between such rights, and individual responsibilities".

12. The apparent need for the proposed changes in the structure, content and application of the HRA and its proposed replacement with a Bill of Rights do not appear to be reflected by the practical functioning of the HRA in domestic Courts.

13. We note that there was no manifesto commitment to a new Bill of Rights. The Conservative Party manifesto stated: "After Brexit we also need to look at the broader aspects of our constitution… We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective Government"[2].

[2] The Conservative and Unionist Party Manifesto 2019, 'Get Brexit Done: Unleash Britain's Potential' (2019) https://www.conservatives.com/our-plan/conservative-party-manifesto-2019 p.48.

Part I. Restoring a sharper focus on protecting fundamental rights

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

Q1. 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.

14. The Gross Review conducted a thorough assessment of the working of the HRA since its commencement. The only proposal it made in respect of Section 2 was one for giving statutory effect to the position developed in *Osborn v The Parole Board* [2013] UKSC 61 [2014] AC 20 and *Kennedy v Charity Commission* [2014] UKSC 20 [2015] AC 455 therefore applying UK domestic statute and common/case law first, and before (if proceeding to interpret a Convention right) considering ECtHR case law. It made no suggestion for a change to Section 3, stating: "The UK Courts have over the first twenty years of the HRA developed and applied an approach that is principled and demonstrates proper consideration of their role and those of Parliament and Government"[3].

15. The Bar Council considers that domestic case law on the central provisions of the HRA has matured over time and has now settled into a position which is indeed principled and properly respects the constitutional position of the Courts, Government, and Parliament. Although the interval since commencement has been used in support of an argument that the machinery of the HRA must be ripe for review, it is possible to view things from an opposite perspective (i.e., that domestic Courts have now arrived at a reasonable and pragmatic balance). The question inevitably arises as to whether the proposed changes to Section 2 will deliver the Government's stated objectives of producing greater clarity and certainty in its operation. To answer that question, it is necessary to examine some of the detail of the proposals.

16. The starting point is that it is open to the domestic Courts, and in particular the Supreme Court, to consider whether the approach of the Courts of other jurisdictions provides any assistance or insights. It needs no specific statutory authority to do so, and when the Courts consider the work of Courts in other jurisdictions, they will be aware that the precise provisions will not be identical to those in our domestic Courts. The authorities of the other jurisdictions can provide insights into the problems that are common to both jurisdictions, but Courts in other jurisdictions do not act as an authority in the conventional sense.

17. This Consultation sets out two illustrative options (1 and 2) for a new version of Section 2. The Bar Council finds it difficult to predict what practical effect the

[3] The Gross Review, p.95.

enactment of a provision in either of these forms would have. They both contain a set of detailed provisions (i.e., a new code) with the dangers that follow from this. It would seem inevitable that the enactment of a new code in either of these forms would require litigation in the Supreme Court to establish the effects of the new code; and identify precisely what changes had been made to the practical effect of the existing case law. This does not produce greater certainty.

18. The Bar Council considers it difficult to make any further predictions and suspects the consequences would be to emerge from a period of litigation only to find that nothing much had changed. The basic context of a continued commitment to the Convention and the ability to apply to the ECtHR would remain the same.

19. Looking at the content of some of the Sub-Clauses, many of them are truisms. Domestic Courts are indeed bound by domestic precedent on the basis of stare decisis; the Supreme Court is already and inevitably the final arbiter in the UK for these purposes. Furthermore, domestic Courts can already have regard to the case law of other Constitutional Courts if they find it illuminating; and domestic Courts are not bound to follow ECtHR case law, although the practical considerations inherent in the context will strongly point to the place the existing case law finds itself in; and domestic Courts will have particular regard to the text of the particular Convention right.

20. Some aspects of the drafting are more troublesome. For example, options 1 and 2 read: "In particular, it is not necessary to construe a right or freedom as having the same meaning as a corresponding right or freedom in (a) the European Convention on Human Rights, or (b) the Human Rights Act 1998." It is not clear what a domestic Court should or could do with this provision. It would be enacted in a context where the Convention was enacted as a Schedule to the Bill of Rights; where accordingly the rights enacted in the Bill of Rights were in the exactly the same language as the Convention rights; where the individual right to apply to Strasbourg remained; and where there is already a sizeable body of existing domestic case law on the meaning of the Convention rights. It may be that the enactment of a provision in these terms would have little practical effect because of the practical constraints of the context. Domestic Courts might try to remain in touching distance of the ECtHR case law whilst ensuring that the dialogue between the two Court systems continued. However, if the Supreme Court was persuaded to give a different meaning to a right contained in the Bill of Rights from that given to the identically worded Convention right, there would be an obvious difficulty in maintaining the objective of bringing rights home.

21. There is plainly a risk that an enactment of either of the options (proposed by the Consultation) for a replacement of Section 2 would have radical and unwieldly effects incompatible with the litmus test of providing coherent and readily

enforceable rights. One way of reading options 1 and 2 is that it is an invitation to the Courts to disregard all the accumulated case law (both domestic and ECtHR) on the meaning of the Convention rights and start again, drawing on a whole range of sources from countries all around the globe and on international law, with no steer on the priority to be given to any particular source. Lord Carnwath has said:

"I confess that, as a judge trying to interpret the will of Parliament, I would come close to despair. Nor can I see how offering that degree of choice to the Courts is expected to curb the judicial activism of which the paper complains, still less to advance the stated objective of promoting greater certainty."[4]

22. Accordingly, the Bar Council would not support the enactment of either option proposed in the Consultation.

The position of the Supreme Court

Q2: 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?

23. The position of the Supreme Court as the Court whose decisions bind all lower Courts is already clear. No amendment is required. We agree with the position taken on this issue by the Gross Review.

Trial by Jury

Q3: Should the qualified right to jury trial be recognised in the Bill of Rights? Please provide reasons.

24. If there were to be a new Bill of Rights, then the right to jury trial would be a prime candidate for incorporation. However, careful consideration would need to be given to the way in which it was expressed, and it might ultimately be thought that the present position, with the idea of jury trial so firmly entrenched in the common law tradition, is a better guarantee of the right than an attempt to make legislative provision for it.

25. The Bar Council's firmly supports the system of trial by jury. The jury system in England and Wales is centuries old and the Bar Council considers it to be of fundamental constitutional importance. The system has our unqualified support.

26. It is a system that the country is right to be proud of. The existing (qualified) right to trial by jury for serious criminal offences is one of the most iconic, and important,

[4] 'Lord Carnwath lecture on Human Rights Act reform – is it time for a new British Bill of Rights?' (2022) https://constitutionallawmatters.org/2022/02/lord-carnwath-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights/

features of the criminal justice system of England and Wales. It represents a point of distinction between the approach of this jurisdiction and that of many others to the determination of a criminal charge. It is profoundly emblematic of the way in which the exercise of the power of the State against individuals through the Criminal Justice System is both scrutinised and legitimised.

27. The diversity of the jury is one of its most important strengths. A detailed study of verdicts across England and Wales, published in 2010, found that BAME and White defendants were convicted at very similar rates, including in cases with all White juries. It concluded that "one stage in the Criminal Justice System where BAME groups do not face persistent disproportionality is when a jury reaches a verdict."[5] A trial by a jury of one's peers promotes public confidence in the Criminal Justice System.

28. The system is part of the long-established expectation of citizens of England and Wales, as evidenced by this extract from Blackstone's Commentaries:

    "The trial by jury, or the country, per patriam, is also that trial by the peers of every Englishman, which, as the great bulwark of his liberties, is secured by the great charter … So that the liberties of England cannot but subsist, so long as this palladium remains sacred and inviolate; not only from open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial"[6].

29. The jury trial system, and its inclusion within any new Bill of Rights, was not dealt with in the Gross Review, which noted that it would: "say nothing about the possibility or merit of varying the Convention rights to provide for specific domestic rights, such as a right to trial by jury"[7].

30. Some of the HRA reform proposals are illustrated by draft Clauses, which are intended to give an indication of how some of the options might appear in the Bill of Rights but there are no draft Clauses in relation to jury trials. It is unclear, therefore, whether any new right to a trial by jury is intended to add anything to the current legal and statutory position, and if so, how the new provisions would be drafted or would be intended to operate in practice. The Consultation is silent about this, and, without such specifics, it is difficult to provide further comment. The Bar Council would welcome more detailed proposals with a subsequent opportunity to respond.

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[5] Ministry of Justice research series, 'Are juries fair?' (2010) https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf

[6] *Blackstone's Commentaries* (9th edn, vol IV, 1783) pp.349-350.

[7] The Gross Review, p. 29.

31. In the absence of any specific proposals or draft Clauses, the Bar Council highlights the following matters for consideration:

    a. The Consultation is silent as to the procedural aspects which would be guaranteed by the right to a trial by jury. At present, the composition of a jury is rarely the subject of challenge during criminal proceedings in England and Wales. By contrast, it may be that the creation of a new right to jury trial opens the possibility of extensive challenges to the composition and decisions of juries.

    b. It is easy to foresee that any new right to jury trial would attract argument as to the meaning of that right. There are unanswered questions arising from the creation of the right. For example, what would the composition of the jury be? Would the right guarantee a minimum number of jurors? How would the right address the composition of the jury? In the same way that the shape of the right remains, at present, unclear, so would the means of enforcing the right.

    c. There is a risk that the creation of the right will lead to renewed litigation concerning the composition, diversity, and representative nature of juries. In order that these issues can be properly raised, the extent to which it is proper to question the jury (or individual jurors) before trial as to their race, gender, sexuality, and political leanings, and possibly post-trial as to the basis of their verdict[8].

32. It may be of use, in this regard, to note the recent experience in Canada. In September 2019 Section 663 of the Canadian criminal code was amended. Whereas previously jurors could be directed by the trial judge to stand by "for reasons of personal hardship or any other reasonable cause", the 2019 amendment provided that jurors may be directed by the trial judge to stand by "for reasons of personal hardship, maintaining public confidence in the administration of justice, or any other reasonable cause". Ultimately, as subsequent appellate litigation demonstrated, the amendment gave "rise to many questions about its implementation"[9].

33. Whilst the issues considered in the Canadian example may be different to those that may arise in England and Wales, the case law is illustrative of the potential for uncertainty and litigation if the right is not drawn up with sufficient clarity.

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[8] This is not currently a requirement under the convention, provided the verdict itself can be understood.
See *Taxquet v. Belgium* [2012] 54 EHRR 26 at Paragraph 90.
[9] See *R v. Smith* (2021) ONSC 8405 at Paragraph 139.

34. The Convention itself does not provide for a right to trial by jury and so it would not be appropriate to add a right to jury trial to the end of the list of Convention rights.

35. A better option would be a separate part to any relevant statute, which could provide for the right to jury trial (and any other rights which are not provided for in the Convention). This part could contain a declaration as to the importance of trial by jury. It might also contain statutory provisions to further enshrine this right, for example:

> Section 1: Trial by jury
>
> Any person charged with a criminal offence has the right to be tried by a jury in accordance with the laws made by Parliament, and, where applicable, devolved legislatures.

36. Any new legislation would need to define the circumstances in which trial by jury is available. At present, any definition would not include:

    a. Those charged with summary only offences.

    b. Those under the age of 18.

    c. Those who are unfit to plead or stand trial.

    d. Those who face a trial in which the number of counts included in the indictment is such that it is likely that a trial by jury would be impracticable[10].

    e. Those for whose trial there is a real and present danger that jury tampering would take place which is so substantial that it is necessary in the interests of justice for a trial to take place in the absence of a jury[11].

37. Furthermore, those charged with indictable only offences have no choice in the matter. A jury trial is mandatory.

Freedom of Expression

Q4: 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?

38. The two Sub-Sections in Section 12 of the HRA that have been contentious are as follows:

    a. Section 12(3): This allows prior restraint injunctions against media publications where the claimant persuades the Court that they are likely to

[10] See/Per Sections 17 and 18 of the Domestic Violence, Crime and Victims Act 2004.
[11] See/Per Section 45 of the Domestic Violence, Crime and Victims Act 2004.

succeed at trial. Prior restraining injunctions are effectively unavailable in defamation claims so this Section applies principally to claims of privacy and confidentiality.

b. Section 12(4): The enhanced protection for journalistic, literary, and artistic free speech has been diminished in the privacy and confidentiality cases to the extent that the ECtHR and domestic Courts have since decided that Article 8 and Article 10 rights are to be balanced starting with a presumption that both are of equal value. The balancing becomes a purely fact sensitive exercise. Also, the intended protection for speech where the material has already become available to the public[12] has been eroded by the Supreme Court in *PJS v. News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081. when UK media outlets were injuncted even though the material was widely available on the internet, including on news websites in other jurisdictions.

39. The objective of restoring the enhanced protection could be achieved via legislation by:

a. Articulating a more demanding statutory threshold requirement for a pre-publication injunction (e.g., at its simplest and most unsophisticated this could be a very likely to succeed test rather than a likely test).

b. Making clear that, in the balancing of Article 8 and Article 10 rights, there is a presumption in favour of freedom of expression in all cases where there are reasonable grounds for the publisher (usually in practice an editor) to believe that publication is in the public interest.

40. A stronger version of the presumption in favour of freedom of expression in all cases would be the provision for a presumption where the publisher believes (i.e., subjectively and in good faith) that it would be in the public interest to publish. Although this is more contentious. The first formulation broadly reflects the protections set out in the Data Protection Act 2018 for journalistic, literary, and artistic free speech; and the public interest speech defence under Section 4 of the Defamation Act 2013.

Q5: The Government is considering how it might confine the scope for interference with Article 10 (freedom of expression) 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?

[12] Under Section 12(4)(a)(i) of the HRA.

41. Question 5 is somewhat confusing. If domestic legislation were to draw on international models to achieve this, it would not be emphasising the utmost importance be attached to Article 10 principles because these have been developed over the years by the ECtHR taking into account other international instruments.

Q6: What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?

42. The only existing statutory protection is contained in Section 10 of the Contempt of Court Act 1981. This is out of date and should be repealed. It should be replaced with a clearly drafted provision that reflects the principles in the source protection case law (both here and in Strasbourg) developed since the seminal case of *Goodwin v. United Kingdom* (17488/90) [1996] 22 EHRR 123. These are both substantive and procedural and require a properly informed decision of a judicial authority in respect of any override of the presumptive source protection right. This protection under the ECHR now goes beyond merely protecting confidential journalistic sources and extends to all confidential journalistic material in the possession of journalists. This is understood as a form of journalistic privilege under Article 10. The new legislation should reflect this.

43. To strengthen freedom of expression, the new provision should also make clear that it applies in all circumstances where the State is considering overriding journalistic privilege. For example, *Norwich Pharmacal Co. and Others v. Customs and Excise Commissioners* [1973] UKHL 6, [1974] AC 133. Any new protections should cover applications, witness orders, police production orders and the use of covert investigatory powers.

Q7: Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?

44. There are further steps that the Bill of Rights could take to strengthen the protection for freedom of expression. There should be provision to prevent or limit Strategic Lawsuits Against Public Participation (SLAPPs) and protections should apply in cases where a claimant is seeking to restrict free speech through litigation.

45. These measures are procedurally valuable to journalists because (if the US procedure is used) they allow journalists to apply to dismiss and/or stay the proceedings at an early stage. Provided the journalist shows the speech is a matter of public concern, the burden then shifts to the claimant to show why the claim should be allowed to continue. This should be accompanied by a one-way costs shifting provision so that the journalist is not penalised in costs (but can get their costs) by making an application.

46. The critical issue is similar to the one that arises under HRA Section 12(3). This relates to asking: what is the statutory threshold the claimant has to cross at this early

stage (though in this context it would be here to keep their claim in play rather than to get a prior restraint injunction)?

47. The value of the anti-SLAPP provisions in the US is that, in most States, the plaintiff must show a likelihood that the claim would succeed given the strong First Amendment defences available to the journalist. We do not have such strong defences here either in law or by using Article 10. Enshrining stronger defences in law for journalists would be valuable protections for free speech, journalism, and the public interest.

48. These changes are likely to protect journalists more effectively if other adjustments are made to the law. This could include amending the HRA Section 12(4) to strengthen the existing provision (as above) and also by strengthening the Defamation Act 2013 both Section 3 (i.e., on honest opinion) and Appendix 4 (i.e., on public interest speech defences).

II. Restoring a sharper focus on protecting fundamental rights

A permission stage for human rights claims
Judicial Remedies: Section 8 of the Human Rights Act

Q8: 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.

Q9: 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.

Q10: How else could the Government best ensure that the Courts can focus on genuine human rights abuses?

49. The Bar Council considers it is helpful to address Questions 8, 9 and 10 together. These are not issues that the Gross Review was asked to consider or seek evidence about.

50. The suggestion implied in the Consultation appears to be based upon a premise that the Courts are regularly required to hear cases or that Court time is taken up needlessly with claims where claimants bring challenges which are not based upon "genuine" human rights breaches or if so, have not suffered any or any real prejudice thereby.

51. The Bar Council is not aware of any data or evidence that suggests Courts' time and resources are burdened by meritless human rights challenges.

52. The Bar Council does not support the introduction of a new and specific permission stage for human rights-based claims for challenges not brought by way of Judicial Review (JR) or appeals which require permission to proceed (i.e., non-JR claims); nor would the Bar Council support the introduction of a new and specific permission stage for human rights-based JR claims beyond the existing permission stage.

53. Regarding the former, such a new stage for non-JR cases would add unnecessarily to the Courts' burden and potentially give rise to satellite litigation. Regarding the latter, the existing filter at permission stage is already robust. There is no suggestion from the Independent Review of Administrative Law (IRAL), or the Government's response to IRAL, or the Judicial Review and Courts Bill that a further or separate test or higher hurdle is warranted.

54. There is no good basis in law, nor any evidence, that would support a test which requires the sort of hurdles proposed (i.e., the need for claimants to show they have suffered a "significant disadvantage" in order to bring a claim, even if they can show there has been a breach of their human rights or a requirement to show that in the circumstances there is an "overriding public importance" in considering a claim where the breach is accepted).

55. There is no advantage or benefit for the Courts or public bodies, at the point of being challenged via a JR, to be subjected to a different test that goes beyond the existing test at permission stage. Once again, this would be likely to lead to additional satellite litigation and appeals.

56. The Gross Review was not asked to consider a permission stage for human rights claims, and therefore the Government has not received the benefit of the Gross Review panel's expertise on this topic.

57. We recognise the Government's concern to ensure that trivial or unmeritorious cases are filtered out at an early stage, and that the burden should not lie on public bodies to apply to Courts to strike out such a claim. However, we are very doubtful about the effectiveness and workability of the current proposals in practice.

58. A "significant disadvantage" threshold would be directed at the harm a claimant has suffered rather than the merits of the claim itself. Accordingly, it appears to be contemplated that unmeritorious cases could pass the permission stage, if what is alleged amounts to a significant disadvantage, whereas meritorious ones would not pass if there was no significant disadvantage.

59. A threshold based on "significant disadvantage" is unlikely to have the effect of filtering out unmeritorious cases. The addition of a second "overriding public importance" limb is unlikely to make a significant difference, as an unmeritorious claim which has no real prospect of success may raise points which are of public importance, and vice-versa.

60. It is not clear how a permission stage would work in practice, particularly outside the context of JR claims. A permission stage already exists for JR claims, which can incorporate human rights claims. Permission will be granted only where the Court is satisfied there is an 'arguable' ground of review which has a realistic prospect of success and there is no bar to a remedy. This works well in practice because JR claims are 'front loaded', in the sense that the claimant must file a detailed statement of facts and grounds for bringing the claim together with any written evidence it relies on when filing the claim form. The defendant public authority has the opportunity to file an acknowledgement of service setting out a short summary of its grounds for contesting the claim. The defendant is also under a duty of candour, requiring it to place any relevant information before the Court at the permission stage. This means that the Administrative Court is well placed to reach a view as to the as to the merits of any claim for JR at the permission stage.

61. It is not clear whether a JR claim incorporating a human rights claim would be required to satisfy both a test of argument as well as significant disadvantage. Furthermore, it is not clear how a permission stage would work in civil claims where there is not the same front-loading as in JR, and where there is no duty of candour on the defendant.

62. How is the Court to assess whether the claim satisfies the threshold for permission in circumstances where a civil claim is commenced with only a claim form and particulars of claim? Is it anticipated that a permission stage will apply to all civil claims, or only those relying on human rights in some way; and if the latter, how is that to be determined, by whom and with what resource? Is it anticipated that defendant public authorities will be required to respond at the permission stage? If so, then defendant public authorities will be placed under an additional burden which no other defendant in a civil claim currently faces.

63. There does not appear to have been any consideration given to cases which rely on human rights in other contexts, such as defences to civil or criminal proceedings or in appeals to Courts and Tribunals. If a defendant relies on human rights to defend a claim or criminal charge, is it anticipated that such a defence will be required to face a permission stage? If an appellant raises a human right point on appeal, is the appellant required to satisfy a permission threshold even in circumstances where there is otherwise an unfettered right of appeal?

64. If the Government proceeds with its proposals, what constitutes "significant disadvantage" or "overriding public importance" will need to be worked out on a case-by-case basis. For example, it is not clear whether these tests are required to be context-specific, or to what extent an infringement of rights could be regarded as a significant disadvantage itself. This is likely to result in uncertainty and satellite litigation.

Positive obligations

Q11: 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.

65. The problems identified in the Consultation that form the premise for the question are misrepresented, and the case law misunderstood. Furthermore, we note that positive obligations are an established part of the protection of rights under the Convention. Any significant divergence by the UK would inevitably lead to more applications to Strasbourg.

66. The Consultation document deals with positive obligations generally[13], and specifically with the positive obligation to protect against real and immediate risk to life and/or serious harm contained in Articles 2 and 3. In the case of *Osman v. United Kingdom* (23452/94) [1998] 29 EHRR 245 it is suggested that the *Osman* test undermines public protection as it places an 'onerous burden' on police forces and other frontline services and has had unintended consequences. It states:

    "The expansion of human rights law by Courts, imposing overly prescriptive 'positive obligations' on police forces, and other frontline public services across the UK, risks skewing operational priorities and requiring public services to allocate scarce resources to contest and mitigate legal liability – when public money would be better spent on protecting the public. We take a principled view that decisions on the allocation of resources should be determined by elected lawmakers, and by operational professionals in possession of the full facts, and who are answerable to the public."[14]

67. The Bar Council considers it important to address the misrepresentation of the extent of the duty owed and the suggestion that the Courts have been "overly prescriptive"[15]. We consider it is important to address the implicit suggested criticism[16] that new duties have been imposed where the domestic Courts have previously explicitly refused to recognise claims in negligence.

[13] See Human Rights Act Reform: A Modern Bill Of Rights, Paragraphs 141–150 and 167–170.
[14] At Paragraph 150.
[15] Human Rights Act Reform: A Modern Bill Of Rights, p.43, Paragraph 150.
[16] Human Rights Act Reform: A Modern Bill Of Rights, Paragraphs 143 – 144.

68. There are two important features of the Strasbourg case law and the extent of the obligations owed that have not been referred to in the Consultation document:

    a. The European Commission has made clear that the allocation of resources is for member States and is an important part of the assessment as to whether there has been a breach of the obligation to protect life. In its report on *Osman*, the European Commission accepted that the resources of the State will have a bearing on the nature and scope of any positive obligation:

    "The extent of the positive obligation will vary inevitably having regard to source and degree of danger and the means available to combat it. Whether risk to life derives from disease, environmental factors or from the intentional activities of those acting outside the law, there will be a range of policy decisions, relating, inter alia, to the use of State resources, which it will be for contracting States to assess on the basis of their aims and priorities, subject to these being compatible with the values of democratic societies and the fundamental rights guaranteed in the Convention."[17]

    b. The ECtHR in *Osman* made clear that the positive obligation was not to be interpreted such as to impose "impossible or disproportionate burdens on the authorities"[18]. When setting out the operational duty to protect life, the Court first said:

    "For the Court and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention"[19].

69. These important parts of the judgment of the ECtHR in the *Osman* case are not referred to in the Government's Consultation.

70. The duty to protect life and/or protect against serious harm imposed by Article 2 and 3 when properly understood allows for proper account to be taken of both decisions with regards to resources and operational decisions. The ECtHR has explicitly

[17] (Comm. Rep. July 1, 1993) at Paragraph 91.
[18] See Paragraph 16.
[19] See Paragraph 116.

acknowledged that the obligation owed must not be interpreted in such a way as to impose impossible or disproportionate burden on the authorities.

71. In the Consultation document[20] it refers to the failure of claims in negligence against the police where the domestic Court found that no duty of care was owed in negligence, and contrasts this with the decision of the Strasbourg Court that a positive duty to protect life under Article 2 is owed by the police. A failure to provide for a domestic remedy was found in the case of *Osman*. This left the domestic Courts with an option, post the enactment of the HRA, to extend the law of negligence and recognise that a duty of care was owed by police to victims of crime. The domestic Courts decided against doing this, preferring instead to restrict any duty to be owed under the HRA, and not in negligence. This is significant as it limits the situations in which a claim for a breach of the positive obligations can be brought and ensures that the "high threshold" applies.

72. The domestic Courts have recognised that the *Osman* test of "real and immediate risk" sets a high threshold and is one that is not readily satisfied[21]. It is a more difficult test to satisfy than the one of "reasonable foreseeability" in tort law. While the ECtHR found that the inability to seek redress for a breach of the positive duties owed under Article 2 domestically to be a breach of the right to access to Court, the response of the domestic Courts was not to extend such a duty under the common law.

73. In the case of *Van Colle v Chief Constable of Hertfordshire and Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225, the House of Lords had the opportunity to consider two cases where it was alleged that the police had failed to protect life, where the threat to life came from a third party. In *Van Colle* it was argued that the failure to protect life breached Article 2, and in *Smith* it was argued that the police owed a duty of care to the victim in negligence. It is significant to note that both cases failed.

74. The claim in *Van Colle* failed on the basis that the test set out in *Osman* which imposed a "high threshold" for there to be a "real and immediate risk" to life before the positive obligation under Article 2 arose was not met. In *Smith* it was argued that as a positive obligation to protect life was owed by police under Article 2, the common law of negligence should be developed to create an equivalent liability in negligence; there could be no policy reasons for not imposing such a liability. This argument failed with Lord Bingham dissenting.

75. The domestic Courts have struck a balance. They have ensured that the positive obligations owed under Articles 2 and 3 are limited to only those cases where there is a "real and immediate risk" (a "high threshold"), and not more generally in tort to "reasonably foreseeable". And the Courts have declined to extend a duty of care to be owed by police to victims of crime.

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[20] See Paragraphs 143-144.

[21] See *re Officer L (Respondent) (Northern Ireland)* [2007] UKHL 36, [2007] 1 WLR 2135

76. A domestic remedy has been provided for because of the HRA, where one would otherwise not exist. But the Courts have not created a domestic remedy by extending the common law, which would have recognised a duty of care being owed where previously one was not. In doing so the domestic Courts have not expanded the cases in which claims could be brought in tort against the police (and other public bodies) with regards to operational decisions. This demonstrates judicial restraint, recognising the need not to impose impossible or disproportionate burdens on public authorities[22].

77. Positive obligations are an established principle under the ECHR. Any attempt to restrict or retreat from that position will inevitably lead to more applications being made to the ECtHR. It is the view of the Bar Council that the domestic Courts have struck the right balance in recognising the positive duties owed under the HRA, but not extending the common law of negligence. Further, the Strasbourg jurisprudence when properly understood clearly allows for the allocation of resources to be a matter for the States Parties and is a matter that is relevant to the scope and nature of the obligation owed.

78. Accordingly, in our view, the premise of Question 11, which is that "significant problems" have been created, is misconceived. The case law of the Strasbourg Court is not fairly represented in the Consultation and has been misunderstood. The domestic Courts have shown restraint and have ensured that a domestic remedy is available for a breach of the positive obligations owed but in doing so have been careful not to unnecessarily extend the law of negligence to provide more generally for a duty of care.

79. As a result, we do not consider that there is a problem here which any Bill of Rights needs to address.

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

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

Q12: 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.

80. The Bar Council does not support the options set out in the Consultation. It considers that Section 3 should be retained in its present form. The case law on Section 3 has settled down in the period since commencement of the HRA and the application of

[22] See in particular the judgment of Lord Hope in *Van Colle and Smith* at Paragraph 75.

that case law produces results which respect the architecture of the constitution, and which deliver coherent and readily enforceable remedies.

81. Section 3 was considered at length by the Gross Review. It concluded that there should be no changes to Sections 3 and 4 other than amendments to clarify the order of priority of interpretation coupled with increased transparency in the use of Section 3. In addition, there should be an enhanced role for Parliament through the Joint Committee on Human Rights, and the introduction of a discretion to make ex gratia payments where a declaration of incomparability is made. Amendments to clarify the order of priority of interpretation are not reflected in the options set out in Question 12 of this Consultation. The Gross Review effectively rejected the two options now suggested.

82. The Gross Review included a detailed analysis of the case law since commencement and the Bar Council does not seek to repeat this analysis. It agrees with the Gross Review's central conclusions about the current state of the case law on the issues relevant to Question 12. As chapter 5 states: "The leading statement on the approach to be taken to the use of Section 3 is now *Ghaidan v Godin-Mendoza* (2004)[23] (Ghaidan). It is an approach that has therefore been in place now for seventeen years."[24]

83. The Gross Review notes that in *Ghaidan* the use of Section 3 of the HRA to construe the reference to husband and wife in the relevant legislation as apt to include a same sex couple had been positively urged upon the House of Lords by counsel for the Government; a "not unusual"[25] feature in Section 3 cases.

84. The review sets out[26] the principles governing the exercise of Section 3 to be derived from *Ghaidan*. It goes on to comment: "The principles articulated in *Ghaidan* provide clear and sensible guidance to UK Courts to apply Section 3's interpretative duty. Since they were set out it is difficult to identify cases where UK Courts have strayed beyond Parliament's intention in enacting Section 3"[27]. The Bar Council agrees.

85. It is sensible to refer to the judgment of Lord Nicholls in *Ghaidan* to understand why the Gross Review concluded that the result in the case produced sensible guidance compatible with the basic architecture of the constitution.

    a. "Section 3 is a key ... It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with

[23] [2004] UKHL 30, [2004] 2 AC 557
[24] The Gross Review, p.203.
[25] The Gross Review, p.204.
[26] See the text box in the Gross Review at p.206.
[27] The Gross Review, p. 207.

the Convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in Section 3, and the Courts must give effect to this intention."[28]

b. "It becomes impossible to suppose Parliament intended that the operation of Section 3 should depend critically upon the particular form of words adopted by the Parliamentary draftsman in the statutory provision under consideration. That would make the application of Section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, Section 3 would be available to achieve Convention-compliance. If he chose a different form of words, Section 3 would be impotent."[29]

c. "Parliament, however, cannot have intended that in the discharge of this extended interpretative function the Courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary Section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of Section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that Section 3 should require Courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."[30]

86. The points made in Paragraphs 31 and 33 of the *Ghaidan* judgment (see points b and c respectively above) are both clear and crucial. Point b suggests that if one confines the operation of a provision such as Section 3 to circumstances where there is textual ambiguity, the resulting position is not principled but might be the result of a "semantic lottery", depending on the drafting history. But the counterpoint in point c is that any interpretation must respect the "grain of the legislation" and not ignore its central thrust. It must not involve the Court in exercising functions for which it is not equipped.

87. Accordingly, and common with the logic of the Gross Review and the judgment in *Ghaidan*, the Bar Council does not support either of the options referred to in

[28] See *Ghaidan*, Paragraph 26.
[29] See *Ghaidan*, Paragraph 31.
[30] See *Ghaidan*, Paragraph 33.

Question 12. The Bar Council considers that Section 3 should be retained in its present form.

Q13: How could Parliament's role in engaging with, and scrutinising, Section 3 judgments be enhanced?

88. How Parliament wants to consider judgments of the Courts applying any aspect of the HRA, including Section 3, is a matter for Parliament. The standing orders that set the mandate for committees such as the Joint Committee on Human Rights or the Lords Constitutional Committee could, for example, be amended to include reference to the need to consider such judgments.

Q14: Should a new database be created to record all judgments that rely on Section 3 in interpreting legislation?

89. We do not see any disadvantages to creating a database and it would aid the informed consideration of the impact of Section 3 if there was a record kept of judgments relying upon it. However, it should be borne in mind that Section 3, unlike Section 4, is not a remedy limited to specific higher Courts. It is a general obligation imposed on all persons, Tribunals, and Courts of all levels to use Section 3 to interpret legislation. Therefore, no database could be comprehensive and such limitation ought to be clearly and expressly acknowledged.

90. The Bar Council endorses the findings of the Gross Review on issues similar to those set out in Questions 13 and 14 of this Consultation (as above).

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

<u>Declarations of incompatibility</u>

Q15: Should the Courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

91. The Courts should not be able to make a declaration of incompatibility for all secondary legislation. This proposal is constitutionally improper and impossible to achieve in practice within the parameters set by the Lord Chancellor (i.e., without rolling back substantive rights).

92. Section 4 already extends to secondary legislation where the parent statute prevents the removal of the incompatibility. This proposal must mean going further than that (or it would be pointless) and so it is assumed to be a proposal that in some (currently seemingly undefined) circumstances, the Courts must or may make a declaration of incompatibility even where the parent statute does not require the secondary legislation in question to be read in a manner incompatible with the Convention rights.

93. Before addressing the impact of the reform, it is important to note that the Government has not made any sort of case for its necessity. Beyond a few anecdotes, the Consultation presents no evidence that the absence of a Section 4 power in respect of secondary legislation is in any way problematic. Indeed, between 2014 and 2020, there were just 14 cases in which a Court struck down secondary legislation on human rights grounds. During that period, the Government made more than a thousand pieces of delegated legislation every year[31]. Even if one accepts the premise that it is somehow ill-advised for the Courts to prevent the Executive from behaving unlawfully (which is what seems to be implied), this does not seem to be a problem of a size that warrants the sort of "far reaching proposals for reform"[32] proposed by the Consultation.

94. The proposal asks whether the Courts (when considering fundamental rights) should be required to afford the Executive the same deference as is currently afforded to Parliament. Section 4 of the HRA balances two constitutional imperatives: the sovereignty of Parliament, and the importance of fundamental rights. Both are essential for a functioning democracy. Parliament must be sovereign because it embodies the will of the majority. Rights must be protected because, without them, the Government of the day could enact laws to (whether formally or substantively) give itself power in perpetuity.

95. During the previous Consultation on the white paper entitled "Bringing Rights Home"[33], substantial thought was given to the proposal that the Courts should be empowered to strike down legislation that is incompatible with Convention rights. This would have brought the UK into line with other States that enshrine rights in their basic laws. The proposal was rejected because, as the (then) Home Secretary put it:

    "The Bill, important though it is, has the limited function of bringing the British people's rights home. It is no part of the project to call into question constitutional arrangements that have evolved in this country to make us one of the world's most stable democracies.

    "The sovereignty of Parliament must be paramount. By that, I mean that Parliament must be competent to make any law on any matter of its choosing. In enacting legislation, Parliament is making decisions about important matters of public policy."[34]

96. The Home Secretary was clear, however, that such deference is justified only by the democratic mandate:

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[31] J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', U.K. Const. L. Blog (22nd Feb. 2021) available at https://ukconstitutionallaw.org/

[32] Human Rights Act Reform: A Modern Bill Of Rights, p.3.

[33] 'Bringing Rights Home' (December 1996)

[34] HC Deb. Vol. 306, Cols. 769-770 (16 February 1998)

"In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of this place possess such a mandate because they are elected, accountable and representative."[35]

97. The democratic mandate justifies the separation of powers, whereby the Courts cannot strike down primary legislation.

98. The constitutional status of the Executive differs from that of Parliament in three principal ways:

    a. First, and most importantly, it has no democratic mandate of its own. As Lady Hale put it: "The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that."[36]

    b. Second, and consequently, the Executive has no inherent power to make law.[37]

    c. Third, unlike Parliament (which can "make or unmake any law"[38] and whose proceedings may not be impeached[39]), the Executive is subject to the law[40].

99. Secondary legislation must be made lawfully. This means it must not step outside the power conferred by the delegated Act and it must not be incompatible with other primary legislation (unless Parliament, in conferring the delegated power, intends it to be so). This includes the HRA (or whatever other statute gives effect to the Convention rights).

100. The role of the Courts is, inter alia, to ensure that the Executive acts lawfully when making secondary legislation. Parliament does not confer the delegated power because it trusts the Executive but, rather, because it can trust the judiciary to keep the Executive within the four corners of the powers conferred.

101. Section 4 is necessary to maintain the constitutional balance between the legislature and the judiciary but there is neither the need nor justification to treat the Executive in the same manner. Section 4 acknowledges the special constitutional status of

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[35] HC Deb. Vol. 306, Cols. 769-770 (16 February 1998)
[36] *R (Miller and Ors) v Prime Minister* [2019] UKSC 41, [2020] A.C. 373, Paragraph 55.
[37] Bill of Rights Act 1688, Article I.
[38] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Fund, 1982)
[39] Bill of Rights Act 1688, Article IX.
[40] *Entick v Carrington* [1765] EWHC KB J98

primary legislation which, in turn, flows from the sovereignty of Parliament. Neither secondary legislation nor the Executive has equivalent constitutional status.

102. There is, therefore, no need to extend the effect of Section 4 to secondary legislation and to do so would represent an affront to the separation of powers and Parliament's democratic mandate.

103. There is no way to give effect to the proposals in Question 15 without substantively limiting rights.

104. Section 3 provides that, where the parent statute permits, secondary legislation must be applied coherently with the Convention rights. Section 6 provides that, so far as the parent statute permits, the Executive cannot make delegated legislation that is incompatible with Convention rights. To do so would be an unlawful act which the Court must quash.

105. Under what circumstances would a Court be entitled or required to make a declaration of incompatibility in respect of secondary legislation? Under what circumstances is the Executive entitled to make delegated legislation that is incompatible with Convention rights?

106. In fact, the Convention itself already answers this question. The Articles of the Convention specify the circumstances in which the Executive can act incompatibly with the relevant right. These exemptions must be considered by the Court when it tackles the substantive question before it. If the secondary legislation in question falls within one of these exemptions, then it will not be unlawful, and the Court must leave it in place.

107. To suggest, therefore, that the Courts might, on some occasions, make a declaration of incompatibility is to envision a scenario in which the secondary legislation in question does not fall within the exemptions for which the Convention already provides yet must still, for some reason, be allowed to stand. This, in effect, requires carving out, from the Convention rights, further exemptions beyond those for which the Convention already provides. This would likely put the UK in breach of the Convention. It would lead to extensive litigation before the Strasbourg Court (which the UK would likely lose) and, quite possibly, throw doubt on the UK's position as a signatory to the Convention and a member of the Council of Europe.

108. The Lord Chancellor, in his foreword to this Consultation, stated that the UK "remains committed to the European Convention on Human Rights"[41]. If that is true, then the proposals in Question 15 are impossible.

Q16: 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

[41] Human Rights Act Reform: A Modern Bill Of Rights, p.3.

where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.

109. At present, the Court's powers where legislation is incompatible with the ECHR are threefold:

    a. Declarations of incompatibility of primary legislation.

    b. Declarations of incompatibility of secondary legislation where the 'source' primary legislation directs that incompatibility.

    c. Declarations of incompatibility of secondary legislation where the 'source' primary legislation does not direct that incompatibility and the Court then quashes or declares invalid that secondary provision.

110. In certain instances, in the latter case the Courts have found themselves able to disregard the secondary legislation. In each of the instances where declarations are made it is left for Parliament to decide what to do next and indeed whether to introduce and pass fresh legislation to address or replace the incompatible provision. It may choose the latter route through a remedial order in accordance with Section 10 of the HRA (which is the subject of Question 17 below).

111. The IRAL report recommended amending legislating to ensure the Courts may "issue suspended quashing orders in response to the unlawful exercise of public power"[42] albeit through an amendment to Section 31 of the Senior Courts Act 1981, not the more detailed provision as now set out in the Judicial Review and Courts Bill Part I (i.e., new Section 29a).

112. The Bar Council has previously highlighted, in its response to the post-IRAL Consultation by the Government, that such orders are likely to be inappropriate for individual administrative decisions which are found to be unlawful, as opposed to findings with respect to the lawfulness of legislation. That remains our view.

113. It is the Bar Council's view that it would be appropriate, in principle, to extend the proposals set out in Clause 1 of the Judicial Review and Courts Bill where secondary legislation is found by the Courts to be incompatible with the Convention rights. This is subject always to considerations of fairness and ensuring that the Courts will not be constrained with respect to taking into account the circumstances of the case and the effect of a suspension upon the successful claimant and in particular the ultimate absence or denial of a remedy for the party who successfully brings a challenge.

[42] The Independent Review of Administrative Law (March 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf p.74.

Remedial Orders

Q17: Should the Bill of Rights contain a remedial order power? In particular, should it be: similar to that contained in Section 10 of the Human Rights Act; similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself; limited only to remedial orders made under the 'urgent' procedure; or abolished altogether? Please provide reasons.

114. As noted in the Gross Review[43] and the Government's proposals[44] there have been very few remedial orders since the HRA was brought into force (some 11).

115. It is notable that the Gross Review did not conclude, nor was it suggested by the terms of reference, that there was evidence of any issues arising out of the Section 10 and Schedule 2 remedial order (RO) process in respect of length of time or otherwise.

116. By contrast, the Government's Consultation paper states that bringing new legislation through a RO "offers limited benefits in terms of speed compared to primary legislation"[45] and that such "orders have therefore been of less practical utility than was envisaged when the Act was passed"[46].

117. The Gross Review concluded that the "process, and particularly Joint Committee on Human Rights (JCHR) scrutiny, provides Parliament with a good foundation on which to consider the necessity of making such an order, as well as the terms of the order. Such deliberations take place through the process for affirmative approval by each House of Parliament"[47].

118. In answer to the "question … whether remedial orders are necessary, and if so, how to improve the process generally and particularly Parliamentary engagement with it"[48], the Gross Review clearly concluded that the provisions are necessary and should not be wholly repealed but should be the subject of some change. The Bar Council supports these conclusions and therefore in answer to the basic proposition in Question 17 we consider that any new Bill of Rights should indeed contain a RO power.

119. As to the form of such power, the Bar Council notes the concerns expressed in the Consultation document that in order to "ensure that Parliament addresses, takes responsibility for, and properly scrutinises incompatibilities in legislation and the appropriate means of resolving them" there should be a "strong presumption in favour of using more commonly used Parliamentary procedures when legislating to address legislative incompatibilities with Convention rights"[49]. The Gross Review

[43] The Gross Review p. 340, Paragraph 9.
[44] Human Rights Act Reform: A Modern Bill Of Rights, p.73, Paragraph 255.
[45] Human Rights Act Reform: A Modern Bill Of Rights, p.73, Paragraph 255.
[46] Human Rights Act Reform: A Modern Bill Of Rights, p.73, Paragraph 255.
[47] The Gross Review, p.393, Paragraph 22.
[48] The Gross Review, p.405, Paragraph 22.
[49] Human Rights Act Reform: A Modern Bill Of Rights, p.73, Paragraph 256.

similarly considered whether "Parliamentary scrutiny of remedial orders" needed to be improved[50].

120. The Gross Review drew upon and referred extensively to the recommendations of the JCHR in its 2001 report entitled "Making Remedial Orders" and its representations to the Gross Review which set out "two sets of principles to guide Government and Parliament's approach to the remedial order process"[51].

121. The conclusion drawn by the Gross Review supported the application of the JCHR principles and noted that the JCHR "did not itself raise any concerns with the remedial order making process"[52].

122. In the Gross review, the JCHR said "it is desirable for amendments to primary legislation to be made by way of a Bill"[53] as a "matter of general constitutional principle"[54], but concluded that there were factors which also "militate in favour of using the Remedial Order procedure"[55] and that ultimately it was a matter of judgement for the relevant the Minister who "must balance these (and other) relevant factors in the light of the situation giving rise to the particular incompatibility"[56].

123. The Gross Review's assessment did not suggest that specific changes should be made to the HRA to codify the JCHR principles but suggested the JCHR should be asked to revisit its principles first before any changes be made. The Bar Council does not consider that the Gross Review concluded that something akin to a presumption in favour of "using more commonly used Parliamentary procedures"[57] was required.

124. The Bar Council supports the Gross Review's approach and therefore does not consider a formal presumption of this type is necessary or would need to be reflected in RO powers within a Bill of Rights. In addition, with regard to Question 17, the Bar Council does not consider such powers should be limited only to ROs made under the "urgent" procedure, again in accordance with the findings of the Gross Review.

125. With regard to whether any RO powers ought not to be "able to be used to amend the Bill of Rights itself", again the Bar Council has noted the analysis carried out in the Gross Review of the current powers[58]. This analysis acknowledged the need to narrowly and strictly construe the use of Henry VIII powers. It concluded that it is "inappropriate to use the remedial order making power to amend the HRA in the

[50] The Gross Review, pp.418-422, Paragraphs 51-56.
[51] The Gross Review, pp. 419-422.
[52] The Gross Review, p.422, Paragraph 56.
[53] The Gross Review, p.410.
[54] The Gross Review, p.419.
[55] The Gross Review, p.419.
[56] The Gross Review, p.420.
[57] Human Rights Act Reform: A Modern Bill Of Rights, p.73, Paragraph 256.
[58] See Chapter 9 of the Gross Review.

light of its status as an Act with a wide ranging impact across the statute book and implications for the constitutional relationship between different branches of the State… [and] given the need of any amendment of the HRA to take proper account of devolution issues, and particularly the Northern Ireland Peace Agreement, we further consider it to be wrong in principle for the HRA to be amendable by any means other than Act of Parliament"[59]. The Bar Council supports these conclusions and would therefore endorse the same approach to be reflected in any Bill of Rights.

126. This Consultation is not based upon specific provisions and so the Bar Council's views are provisional and subject to any draft legislation that may be produced.

Statement of Compatibility: Section 19 of the Human Rights Act

Q18: We would welcome your views on how you consider Section 19 is operating in practice, and whether there is a case for change.

127. There is little evidence to suggest that Section 19 requires reform. It may nevertheless be refined to be a more effective constitutional instrument.

128. There is an inherent contradiction between the Lord Chancellor's acknowledgement of Section 19 in this part of the Consultation document and his earlier claims that Section 3 of the HRA facilitates judicial interpretations of statutes that were not intended by Parliament.

129. Section 3, inter alia, requires the Courts to interpret legislation (so far as possible) in a manner consistent with Convention rights. Section 19(1)(a) requires the Minister introducing legislation to certify that, in their view, legislation is consistent with Convention rights and, it follows, can be interpreted accordingly. When Parliament passes legislation subject to a Section 19(1)(a) statement (as all legislation is) it must intend that legislation to be interpreted in a manner that complies with Convention rights.

130. Parliament understands that it is the constitutional role of the Courts to interpret legislation and apply it to the facts of specific circumstances. Where legislation is passed under a Section 19(1)(a) statement, Parliament must intend that the Court will interpret that legislation accordingly. There can be no complaint, therefore, when the Courts apply Section 3 to interpret legislation in a manner consistent with Convention rights. Far from departing from the intention of Parliament, the Courts are, in such circumstances, squarely within the range of conclusions that Parliament intended they should reach.

131. Parliament may, of course, pass legislation with the intention that it should not be compatible with one or more Convention rights. In such a situation, the Court is obliged to make a declaration under Section 4 of the HRA. Such circumstances may arise via two principal paths: either (a) the relevant Minister will introduce a Bill to

[59] The Gross Review, p.49, Paragraph 418.

Parliament with a statement under Section 19(1)(b) and Parliament will accept this or (b) legislators will amend a Bill which has been introduced with a Section 19(1)(a) statement to such an extent that some or all of its provisions are no longer compatible with Convention rights.

132. A problem would arise, however, if Ministers introduced a Bill to Parliament with a Section 19(1)(a) statement (and Parliament subsequently passed that Bill) in circumstances where the Bill was not consistent with one or more Convention rights. In such circumstances, both Parliament and the Courts would be unable to fully perform their constitutional functions. Ministers are, in effect, not accountable for their Section 19(1)(a) statements. The current arrangements operate on the presumption that the Executive is both competent and acting in good faith. While it is hoped that this is the case, effective constitutions do not rely on trusting those in power. Effective constitutions are effective because they ensure those in power can be held accountable.

133. If an incompetent or mendacious Executive introduced an incompatible Bill to Parliament under a Section 19(1)(a) statement, then Parliament might well pass that Bill, trusting, as it does, in the Executive's competence and probity. The Courts would be left in an impossible situation. Parliament clearly intended the statute to be compatible (and was assured it was so) but it is not. It is only in these circumstances that a Court might be guilty of stretching its Section 3 powers to interpret a provision in a compatible manner (as Parliament intended).

134. To avoid such an occurrence, it is necessary to enhance Parliament's ability to scrutinise Section 19 statements. The JCHR conducts legislative scrutiny from a rights perspective. Such scrutiny, however, requires Parliament to perform a role for which it is constitutionally and institutionally unsuited. Legislators, who are intended to consider questions of public policy (i.e., is 'y' a good idea) must, instead, ask themselves questions of law (i.e., is 'y' consistent with the provisions of 'x'?).

135. Questions of law are typically answered by the judiciary, not the legislature, because they turn on factual and conceptual analysis rather than political preference. While there are many lawyers in Parliament (not least on the JCHR), they sit in Parliament to perform their role as legislators, not as assistants to the judicial branch.

136. MPs should, therefore, have the power to obtain expert legal opinion to assist their consideration of Section 19 statements. This might be envisaged in two ways:

    a. The JCHR may be empowered (including through appropriate funding) to seek advice from independent counsel on the compliance of proposed legislation with Convention rights.

    b. The JCHR may be empowered to refer a proposed Bill or provision to the High Court for an indicative opinion on its compliance with Convention rights. This is likely to produce a more authoritative answer as the Court

would be able to hear submissions from counsel representing various interested parties.

137. While the latter option might provoke objection due to its potential to delay the passage of legislation and breach Article 9 of the Bill of Rights, neither of these present an insurmountable obstacle. The High Court is, where necessary, able to deal with cases within weeks whereas there is often a gap of months between stages of a Parliamentary Bill. It seems unlikely that, in most cases, a proposal such as this will cause undue delay. Similarly, Parliamentary privilege may be waived by Parliament.

Application to Wales, Scotland and Northern Ireland

Q: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?

138. There is no evidence of the need for any reform of the current arrangements under which the rights contained in the ECHR can be prayed in aid in Scotland, Wales, and Northern Ireland.

139. The Gross Review found general support for the existing system of fundamental rights protection in Scotland, Wales, and Northern Ireland. This support was found among lawyers, judges and civil society organisations as well as the public at large in those countries.

140. The UK Government's Bill of Rights proposals appear to have little, if any, resonance in Scotland, Wales, and Northern Ireland. Certainly, the repeated invocation in the Consultation of the Magna Carta (a compact between the King of England and his restive Anglo-Norman barons), means little, if anything, outside England. Scotland, Wales, and Northern Ireland have quite different constitutional histories and founding documents to rely upon.[i]

141. The writ of Habeas Corpus, also referenced in the Consultation document, has never extended to Scotland[ii]. Instead, in Scotland the Criminal Procedure (Scotland) Act 1701 imposed a limit of 110 days for pre-trial detention; if the trial against an accused remanded in custody did not commence within that period then the accused was not merely released; the proceedings come to an end.[iii] Similarly the procedure of trying criminal offence by jury within the Scottish legal system and constitutional tradition, in which juries[60] are reserved by custom and statute only for trying the most serious crimes, has never attained the status of a fundamental or constitutional right.[iv] Indeed, the use of torture to obtain confessions for use in criminal trials was not

[60] Made up of 15 individuals who can, in all cases without specific direction, reach decisions by a bare majority of votes on any of the three available verdicts of guilty, not guilty, or not proven.

historically regarded as being in breach of any common law standards in Scotland; [61] and the use of torture was only abolished in Scotland by a statute of the post-1707 Union Parliament.[v]

142. If the Bill of Rights project is proceeded with, there would appear to be four possible options in relation to reflecting the different interests, histories, and legal traditions of the non-English nations within the Union as follows:

    a. In terms of minimal changes to the current devolution settlement, what might be done is simply to replace within the devolution statutes the current references to Convention rights to a 'British and Northern Ireland Bill of Rights'. These references are contained in Sections 29(2)(d), 57(2) and 100 and 126(1) of the Scotland Act 1998; Sections 6(2)(a), 13(4)(b), 24(1)(1)(a), 69(11)(b), 71, 98(1) of the Northern Ireland Act 1998; and Sections 81 and 108A(2)(e) and 158(1) of the Government of Wales Act 2006. That would keep the current arrangements under which the Devolved Legislatures and Executives simply have no power to legislate contrary to these enumerated fundamental rights and if and insofar as they do so, then the legislation will be declared by the Courts to be 'not law'.

    b. Any decision to reform the HRA so that secondary legislation is no longer subject to a fundamental rights compatibility test as a condition to validity would mean the UK Government's secondary legislation would have more of a protected status from being overturned by Courts than the devolved Parliament's primary legislation. In *AXA General Insurance Co Ltd v Lord Advocate* [2011] UKSC 46, [2012] AC 1 868 Lord Hope gives the leading judgment of a unanimous seven-judge Court as follows[62]:

        "The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate. While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are ignored or despised by the majority, the elected members of a legislature of this kind are best placed to judge what is in the country's best interests as a whole".

    c. A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the

[61] The Scottish Claim of Right 1689 has a presumption (but not a prohibition) against the ordinary use of torture, clearly allowing for its use where there is evidence that might justify its being prayed in aid as follows: "That the using torture without evidence or in ordinary crimes is Contrary to law"

[62] Lord Hope of Craighead DPSC, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Kerr of Tonaghmore, Lord Clarke of Stone-cum-Ebony, Lord Dyson and Lord Reed noted at Paragraph 49.

electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances. As Lord Bingham of Cornhill said in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] AC 719, § 45, the democratic process is liable to be subverted if, on a question of political or moral judgement, opponents of an Act achieve through the Courts what they could not achieve through Parliament.

d. If change is being contemplated to make a new balance favouring the policy choices of elected legislatures over unelected judges, then the more radical and arguably more Unionist approach would be to place the primary legislation of devolved Parliaments on a par with the primary legislation of Westminster. This would mean that neither can now be struck down by the Courts, whether for fundamental rights incompatibility or otherwise, but a declaration of incompatibility might be made, leaving it for the respective legislatures to respond (or not) as appropriate to that Court judgment.

143. In his speech on 14 September 2014 following the result of the Scottish independence referendum (in which one of the claims made by those advocating the status quo was that only by voting to stay in the UK could Scotland ensure that it remained within the EU), the then UK Prime Minister David Cameron proclaimed that he was "a passionate believer in our United Kingdom" and that he "wanted more than anything that our Union stay together"[63].

144. Theresa May, giving her acceptance speech as Prime Minister on 13 July 2016, said: "The full title of my party is the Conservative and Unionist Party. And that word Unionist is very important to me. It means we believe in the Union, the precious, precious bond between England, Scotland, Wales, and Northern Ireland."[64]

145. The final choice which might be made, in order not to upset the current fragile devolutionary balance, is simply to have the Bill of Rights project and legislation extend to and apply only within England. That would mean that the UK Government (which is domiciled throughout the UK) and the Westminster legislation which applies to Scotland, Wales, and Northern Ireland could continue to be able to be challenged before the Courts within the non-English jurisdictions on the basis of the primary legislation provisions' (or UK Government (in)actions') incompatibility with Convention rights as understood in the light of the relevant Strasbourg case law.

146. The precise nature of the currently devolved legislatures is not fully worked out and as a result, if there were to be a Bill of Rights, restricting it to England and Wales would be the safest and simplest solution. Extending it beyond England and Wales

[63] 'Scottish Independence Referendum: statement by the Prime Minister' (19 September 2014) https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister

[64] 'Statement from the new Prime Minister Theresa May' (13 July 2016) https://www.gov.uk/government/speeches/statement-from-the-new-prime-minister-theresa-may

will raise difficult questions. Some of those difficulties will arise from the complex, fluid and dynamic political and constitutional relationships between Westminster and the different devolved legislatures in Scotland, Wales, and Northern Ireland. Other difficulties will arise because it is unlikely that the content of additional rights to be contained within a Bill of Right would appropriately be the same across the UK, given some of the very different legal, constitutional and legislative histories and traditions.

Public Authorities: Section 6 of the Human Rights Act

Q20: 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.

147. The Bar Council sees no reason to amend the definition of public authority contained in Section 6(3)(5) of the HRA:

    a. The demarking of public from private acts is always context specific and inherently multifactorial. This has been exacerbated by the growth and proliferation in Governmental activity over recent decades. The task does not lend itself to precise or exhaustive definitions. An overly prescriptive approach would risk injustice and arbitrariness.[vi]

    b. The current definition achieves its purpose. The leading case was decided by the House of Lords in 2007.[65] There have been relatively few cases in the higher Courts since (most of which were constrained to their specific facts).[66] In view of the breadth and importance of the issue, this modest amount of litigation is a clear indication of success.

    c. Such uncertainty as does exist for (hybrid) authorities is almost certainly unavoidable. But it is limited (very few decisions on this issue have been overturned on appeal) and eminently manageable by the exercise of due caution by such organisations as may be affected.

    d. A move away from the 'functions based' definition contained in Section 6 of the HRA would risk unsettling the even broader and equally important related question of amenability to Judicial Review. The HRA's focus on the function being performed was replicated in the definition of Judicial Review (CPR Rule 54.1(2)[67]) and, while not always coterminous, the two definitions overlap very considerably and influence one another accordingly.[vii] A change

[65] *R (YL) v. Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95

[66] The most significant case since *YL* is *R (Weaver) v. London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363 which concerned a registered social landlord. In *The Foreign & Commonwealth Office v. Warsama* [2020] EWCA Civ 142 the Court of Appeal decided that it an argument that a public inquiry was not a public authority was unsustainable. There are no other significant cases that have troubled the Court of Appeal still less the Supreme Court since *YL*.

[67] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54#54.10

to one risks impacting upon the other or creating unwelcome discordance: a recipe for uncertainty.

148. Hence the need for change would seem to be overstated or incurable and the proposed solution likely to be counterproductive. The Bar Council does not believe there is an "alternative drafting which might achieve broadly the same application of obligations under the Bill of Rights, but in a way which offers more certainty or clarity"[68] and therefore makes no proposals in response to Question 20.

Q21: 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.

149. The Bar Council, like the Gross Review, does not agree with the premise upon which Question 21 is based. The approach of the Courts to Section 3 of the HRA has not led to wide divergence from the will of Parliament as is expressed in the subject matter legislation. On the contrary, the law on Section 3 has reached a settled and principled position whereby the Courts respect the "grain of the legislation". Hence, in the Bar Council's view there is no reason to amend Section 6(2)(b) by the removal of the words "which cannot be read … Compatibly with the Convention rights", or otherwise.

150. The contrary position would have public authorities acting lawfully while incompatibly with Convention rights, even when the empowering legislation can be read compatibly without going against its "grain". Although "public authorities would continue to be bound by other legal rules",[69] this would nevertheless be a highly unsatisfactory and unusual state for the law to be in.

151. The Consultation questions whether public authorities or Parliament should be "responsible … for addressing any declaration of incompatibility by the Courts"[70]. This is a misplaced concern. Only Parliament is ever responsible for addressing declarations made pursuant to Section 4 of the HRA and, moreover, the relevant Secretary of State is invariably an Interested Party in any proceedings against a public authority that calls for legislation to be interpreted in a particular way pursuant to Section 3 of the HRA. Accordingly, the Bar Council does not support either option proposed in Question 21.

[68] Human Rights Act Reform: A Modern Bill Of Rights, pp.75 and 76, Paragraph 269.
[69] Human Rights Act Reform: A Modern Bill Of Rights, p.77, Paragraph 274.
[70] Human Rights Act Reform: A Modern Bill Of Rights, p.77, Paragraph 274.

Extraterritorial jurisdiction

Q22: 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.

152. To answer this question, we have drawn on extracts from the Bar Council's response to the Gross Review's "Theme II" questions[71] as follows:

    a. "The essential determinant as to whether a person falls under UK jurisdiction for the purposes of the Convention and the HRA when overseas is whether s/he is under UK authority and control; that is, the international law concept of 'State agent authority and control'. The present position is an aspect of the role of the HRA in bringing rights home.

    b. "This applies, for example, in the context of embassies. The Bar Council assumes however, that the question is addressed primarily to the position of the British military when operating overseas; an area that has garnered significant political debate, albeit not always legally well-informed. In relation to that issue, there are different lines of case law relating to different factual circumstances reflective of the way that the Courts ensure that context is central to the delineation of rights' protection (in much the same way as applies in the context of tort law).

    c. "Specifically, the case law relating to the obligations of the British State towards British soldiers when operating overseas in non-combat and combat situations is different to the case law that applies in relation to the rights of military detainees and civilian populations. In relation to the latter two categories, the international humanitarian law of armed conflict (IHL) modifies the effect of the Convention. Further, the UK has a right to derogate from the Convention pursuant to Article 15 including in relation to 'deaths resulting from lawful acts of war' but not in respect of torture, inhuman or degrading treatment, slavery or retrospective criminal penalties: Articles 3, 4 and 7 respectively.

    d. "As to the legal implications, the Bar Council notes that the current position under the HRA ensures that the scope of its application is identical to 'jurisdiction' under Article 1 of the Convention. This ensures that the British Courts can hear and determine any case that could be considered by the ECtHR. Any restriction of the scope of application of the HRA would not alter the 'jurisdiction' of the UK under Article 1 of the Convention (and the IHRAR has made clear that it is not considering UK withdrawal from the Council of Europe). Consequently, individuals who could no longer bring a case under the HRA would be obliged to take their case directly to Strasbourg, which in turn would not benefit from factual findings and

[71] Please see further information in the Gross Review, discussion throughout.

reasoned analysis by the domestic Courts. Foreseeably, the ECtHR could find violations by the UK, which would not have been found by the domestic Courts. Thus, in opposing an amendment tabled to remove the Armed Forces from the Human Rights Bill, Lord Irvine of Lairg stated: 'I am not aware that the chiefs of staff have made any representations to the Government along the lines of this amendment. The Government is plainly answerable in Strasbourg for the actions of the Armed Forces which plainly engage the responsibility of the State. Individuals aggrieved at the actions of the Armed Forces, would, if the Bill were amended in the way that is proposed, still be required to go to Strasbourg to argue their case because they would be unable to rely on their Convention rights before our domestic Courts.'

e. "Lord Goodhart further noted: 'The English Courts know perfectly well, no doubt better than the European Court of Human Rights, the importance of discipline in the British Army and apply the law sensibly and properly…' (Hansard, House of Lords, 19 January 1998, Col. 1352-1359).

f. "Finally, it should be noted that much of the debate surrounding the application of the HRA to soldiers overseas is in fact concerned not with the HRA at all, but with tort law. It was Parliament that in 1987 (after the Falklands War) decided to remove the immunity of the armed forces from tort liability by way of amendment of the Crown Proceedings Act 1947. As accepted by all the judges in *Smith v. MoD* [72], there remains today a common law principle of 'combat immunity' [73]. It is now 33 years since British soldiers have been able to sue the Ministry of Defence. Despite numerous operations overseas, the Bar Council is not aware of significant litigation."[74]

153. We would also draw attention to the findings of the Gross Review, which summarised:

a. "The current position of the HRA's extra-territorial application is unsatisfactory, reflecting the troubling expansion of the Convention's application. The territorial scope of the Convention ought to be addressed by a national conversation advocated to IHRAR during the Armed Forces Roundtable, together with Governmental discussions in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR.

b. "Equally, the temporal application of the HRA is now uncertain and unsatisfactory. Clarity is needed. The temporal scope of the Convention

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[72] *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52

[73] [2014] AC 52, Paragraph 89 per Lord Hope (the doctrine's existence is "not in doubt") (judgment of majority).

[74] The Bar Council's response to the Independent Human Rights Act Review Call for Evidence (March 2021), https://www.barcouncil.org.uk/uploads/assets/404e3486-0b22-40d8-8813b1a787a92ce7/Bar-Council-response-to-the-IHRA-review.pdf Paragraphs 118-123.

ought to be addressed at a political level by the UK and the other Convention States.

c. "Future domestic developments, both legislative and judicial, will be informed by the progress and outcome of the national conversation and the inter-Governmental dialogue.

d. "Future domestic developments, both legislative and judicial, cannot go on hold indefinitely; it would be wrong to speculate now as to their shape, but they will doubtless be informed by the progress and outcome of the national conversation and the inter-Governmental dialogue"[75].

e. "Greater clarity and certainty could be achieved by a unilateral solution, for instance amending the HRA to eliminate or confine its ETJ. Such a solution would, however, risk serious harm to vital UK interests, as the UK would remain bound internationally to the Convention. There is a risk that the Armed Forces, Intelligence and Security Agencies, and Police would be exposed to claims before the ECtHR without the benefit of their full consideration by UK Courts, including the use of Closed Material Procedures. IHRAR is opposed to recommending such a course."[76]

Qualified and Limited Rights

Q23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the HRA? We wish to provide more guidance to the Courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons. Option 1: Clarify that when the Courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'. Option 2: Require the Courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right. We would welcome your views on the above options, and the draft Clauses after Paragraph 10 of Appendix 2.

154. Question 23 implies the possible introduction of new legislative provisions to influence the Courts' assessment of the proper balance, in individual cases, between the Convention right relied on and the countervailing legitimate aim said to justify an interference. The operation of such provisions is closely related to the scope of the 'discretionary area of judgement' the domestic Courts allow the decision-maker before finding that an interference exceeds the bounds of what is "necessary in a democratic society". Such provisions would require the Court to recognise a broader

[75] The Independent Human Rights Act Review – Executive Summary (December 2021) p.22, Paragraphs 77 and 78.
[76] The Independent Human Rights Act Review – Executive Summary (December 2021) p.23, Paragraph 82.

area of judgement in specified kinds of case. For example, challenges to immigration deportation, or cases where Parliament has expressed a view through legislation. That may well raise the bar to domestic judicial intervention in decisions in those types of areas. But it may well have precisely the opposite effect at the international level at which the ECtHR operates.

155. The concept of discretionary judgement is closely related to the Convention principle of the margin of appreciation. The ECtHR applies that principle to the whole of the domestic process that precedes an application to Strasbourg, including the domestic Courts' examination of the underlying Convention complaint. The very fact that, following commencement of the HRA, the domestic Courts have been entitled and bound to weigh and balance competing rights and interests for themselves has resulted in the ECtHR generally paying greater respect than previously to the domestic Courts' reasoning and conclusions. In other words, the balancing exercise developed by domestic Courts has maximised the benefit the UK obtains from the margin of appreciation. If new legislative constraints were imposed on the scope or outcome of the domestic balancing exercise, there is an obvious risk that the value of the resulting conclusions would be diminished in the ECtHR's eyes, and the UK would enjoy a less generous margin of appreciation as a result.

156. The Bar Council is not aware of any problems to which the application of the principle of proportionality has given rise in practice. The four-stage proportionality test is well-established.

157. In any event, the Bar Council is concerned that both options[77] fail to recognise the legal basis on which most decisions of public authorities are taken. The vast majority of public authorities' decisions involve the exercise of a power, usually involving the exercise of a discretion. In such cases, the relevant legislation affords the public authority a choice between potentially a very wide range of decisions; it does not prescribe the choice that the public authority must make. In such cases, it is entirely unclear how one would identify what is "Parliament's view of what is necessary in a democratic society", because generally Parliament does not express any view as to what is necessary in a particular case. On the contrary, Parliament leaves it to the relevant public authority to take a view as to what is necessary or appropriate in individual cases. Furthermore, it adds nothing to say that "the legislation is necessary in a democratic society" or that that "Parliament was acting in the public interest in passing the legislation", because that does not help answer the question of whether a particular exercise of discretion under the relevant legislation is necessary in a democratic society.

158. Accordingly, the Bar Council considers that neither option 1 nor option 2 is likely to have any real practical impact on the proportionality exercise in cases involving challenges to particular decisions. As such, the Bar Council considers that they

[77] Options 1 and 2 below Paragraph 10 of appendix 2 of the Human Rights Act Reform: A Modern Bill Of Rights.

would merely introduce unnecessary complexity, giving rise to uncertainty, litigation, and the risk of undesirable unintended consequences.

159. It appears to be implicit[78] that Parliament might express a view as to what is necessary in a democratic society other than by way of the enactment of legislation. The Consultation document does not explain what is envisaged in this respect, but the Bar Council observes that it would appear to be inconsistent with the important principle that the will of Parliament finds expression solely in the legislation which it enacts[79]. Such a provision is likely to give rise to satellite litigation as to whether Parliament has in fact expressed a view and/or as to the weight that should be attributed to it, potentially raising difficult issues under Article 9 of the Bill of Rights 1689.

160. It is unclear as to what basis it could be appropriate to characterise subordinate legislation which has been approved by only one House of Parliament as somehow representing the view of Parliament as a whole. It plainly would not be. It would (at best) represent the view of only one House. The proposed approach would in relevant cases create an inherent inconsistency[80] which would create uncertainty and require litigation to clarify.

Deportations in the Public Interest

Q24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons. Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment. Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights. Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the Courts from substituting their view for that of the Secretary of State.

161. Question 24 asks respondents to consider three options directed to "making sure deportations that are in the public interest are not frustrated by human rights claims". Given the commitment of the UK to remaining a party to the Convention, the Bar Council does not accept that the premise of the question is valid.

162. The Bar Council also observes that it is, at least, incongruous for questions about the detail of immigration policy to be included within a Consultation on a matter of broad constitutional significance.

163. Article 1 of the Convention requires that the contracting parties secure the rights in the Convention to "everyone within their jurisdiction". This includes those subjected

[78] In subclause (2) of option 1.

[79] See *R (SC) v Secretary of State for Work and Pensions* [2021] 3 WLR 428, Paragraph 167 per Lord Reed.

[80] Between subclauses (2) and (3) in each of options 1 and 2.

to expulsion and, necessarily, it includes ensuring that expulsion decisions do not breach Convention rights, both those of the individual facing expulsion and those of others, including children and other family members of that person, impacted by the decision.

164. In practice, the Convention rights relied upon by those seeking to resist deportation are Articles 3 and 8[81]. The Consultation document does not appear to contemplate any change in relation to the approach to Article 3 but envisages restrictions in the ability of those facing deportation to rely on other Convention rights, including Article 8[82].

165. Article 8 protects "the right to respect for … private and family life". It is a qualified right: interference with a person's Article 8 rights will be permissible where it is "in accordance with the law and is necessary in a democratic society" in the interests of one of the legitimate aims identified in Article 8(2)[83]. Any interference with the rights protected by Article 8 must be proportionate to the legitimate aim pursued. The interests of the individual must be balanced against the wider interests at play including, in particular, the strong public interest in deporting serious offenders.

166. The Immigration Act 2014 amended the Nationality, Immigration and Asylum Act 2002 inter alia by inserting a new Part 5a, which sets out the approach a Court or Tribunal is required to take when considering whether a removal or deportation decision breaches Article 8. Section 117b identifies a number of factors to be taken into account in all such cases. Section 117c identifies additional factors to be taken into account in cases concerning the deportation of "foreign criminals"[84]. Section 117c stipulates that "the deportation of foreign criminals is in the public interest" and that "the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal". Where a foreign criminal has been sentenced to less than four years' imprisonment the public interest requires their deportation unless one of two exceptions applies. Where a foreign criminal has been sentenced to imprisonment of at least four years, the public interest will require deportation unless there are "very compelling circumstances, over and above those described in Exceptions 1 and 2". The 2014 Act amendments to the 2002 Act narrow the scope of the Tribunal's exercise of independent judgement when allowing an appeal on Article 8 grounds. It does so essentially by mandating that certain

[81] Other rights can, in principle, be relied upon to resist expulsion, but where the allegation is of a potential breach in the receiving state, a particularly high threshold applies.
[82] Human Rights Act Reform: A Modern Bill Of Rights, p.79, Paragraph 292.
[83] As outlined by Article 8(2) of the ECHR:
"...in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
[84] A 'foreign criminal' is defined in Section 117d of the Immigration Act as a person as a foreign national convicted in the UK of an offence, and "who (i) has been sentenced to a period of imprisonment of at least 12 months, (ii) has been convicted of an offence that has caused serious harm, or (iii) is a persistent offender."

statutory criteria are properly considered and permitting an appeal to succeed if the Immigration Rules are not satisfied only where a compelling case is established.

167. The Consultation suggests that the HRA has been "used to dilute the intended impact"[85] of the 2014 Act, "namely to deport Foreign National Offenders who have shown little or no regard for the rights of others by committing crimes in the UK"[86]. Two cases, both unreported decisions of the Upper Tribunal, are mentioned to illustrate this point[87]. This claim is incorrect, and the cases cited do not support it. The following points are made in this regard:

    a. The operation of the HRA in the context of deportation was not an issue that the Gross Review was asked to address, nor was it asked to consider the impact of the 2014 Act. This is an area of considerable complexity where careful, evidence-based policy making is critical. The opportunity to have the Gross Review panel examine and address these issues was not taken. To make radical changes to the existing legislative framework without the sort of careful analysis that Sir Peter Gross and his panel could have brought to bear would be unwise.

    b. The two cases highted in the Consultation provide no support for the position taken. Lord Carnwath[88] has described the brief summary in the Consultation paper of the *AD (Turkey)* Appeal HU/0512/2019(V) decision as "a travesty of the careful reasoning of the experienced Upper Tribunal judge". He went on to say: "[The judgment] reads as an entirely faithful application of the complex statutory formulation of 'exceptions' to the normal presumption that deportation is in the public interest... As the judge said this was one of those 'rare and exceptional cases' where the appellant was able to show a disproportionate interference with his Article 8 rights. If the authors of the Consultation paper thought that it was a misapplication of the statute, it would have been helpful to know why. Rather it illustrates the very challenging task facing the specialist judges of that Tribunal, on a daily basis, of balancing public policy with human realities."

    c. The brief summary of the decision in *OO (Nigeria)* Appeal HU/24047/2016 casts no light on the First-tier Tribunal's reasons for allowing the appeal or the Upper Tribunal's reasons for upholding that decision, nor does it attempt any explanation of why it was a misapplication of the statute. A full reading

[85] Human Rights Act Reform: A Modern Bill Of Rights, p.38.
[86] Human Rights Act Reform: A Modern Bill Of Rights, p.38.
[87] The consultation refers (p.37) to a third case, "Case X", but this is understood to refer to a Court of Appeal decision from 2011 in which the ultimate issue was whether a decision taken by the First-tier Tribunal in 2009 had been in error of law.
[88] In his Constitutional Law Matters lecture at the University of Cambridge on 10 February 2022 Former Justice of the UK Supreme Court and a Yorke Distinguished Visiting Fellow at the University of Cambridge. Transcript: https://constitutionallawmatters.org/2022/02/lord-carnwath-lecture-on-human-rights-act-reform-is-it-time-for-a-new-british-bill-of-rights/

of the decision discloses a careful application of the statutory tests to exceptional facts, including that the 30-year-old Appellant was born in the UK and had lived here permanently since the age of nine, and that his rehabilitation had been positive.

168. The references to certain headline figures from internal Home Office data[89] cast no light on the issues at hand. The number of appeals is not placed in the context of the number of deportation decisions. Critically, there is no analysis of the factors arising in the individual cases that led to the appeals being allowed on human rights grounds. The figures presented (in the third Paragraph) relate to a shorter period, April 2016 to November 2021, during which 1,011 appeals against deportation were allowed. Conclusions about the proportion of successful human rights appeals that are allowed on Article 8 grounds are drawn from a random sample of 296 of those cases but, again, no detail is provided of the factors arising in those cases, so the figures do not elucidate the issues raised.

169. As to the specific proposals set out in Question 24, the Bar Council responds as follows:

    a. 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.

       The Bar Council strongly opposes statutory measures intended to exclude entire classes of individual from relying on their Convention rights in expulsion cases. We agree with the view expressed in the JCHR report[90] that states:

       "Any efforts to exclude or limit certain subject-matters or categories of people from the scope of the HRA would risk putting the UK in breach of its obligations under Article 13 ECHR, as well as being a retrograde step for compliance with human rights and the Rule of Law in the UK."[91]

       In assessing the proportionality of a proposed expulsion under Article 8, all relevant factors must be taken into account. The legislative framework and the relevant authorities make clear that, in a deportation appeal involving a foreign criminal the public interest in deportation attracts great weight. However, that does not remove the need for a fact sensitive determination

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[89] Foreign national offenders appeals on human rights grounds: 2008 to 2021 (24 February 2022) https://www.gov.uk/government/publications/foreign-national-offenders-appeals-on-human-rights-grounds-2008-to-2021 p.45

[90] Joint Committee on Human Rights, *The Government's Independent Review of the Human Rights Act*, Third Report of Session 2021–22, HC 89, HL Paper 31, 8 July 2021.

[91] JCHR report at Paragraph 152.

which, as Lord Carnwath put it, balances public policy with human realities and which, in exceptional cases, may result in deportation being held to breach Article 8.

Preventing certain categories of person from relying on Article 8 grounds at all impermissibly assumes that other factors, such as the best interests of children impacted by the decision, could never be sufficient to outweigh the public interest. There is no warrant for such an approach as it would likely result in significantly increased applications to Strasbourg and would risk the UK being held in breach of Article 13 as well as Article 8.

b. 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.

Save that the current statutory scheme in Part 5a of the 2002 Act applies solely to decisions of Courts and Tribunals, it is not immediately apparent how this differs from what is already in place. If it is intended that a new scheme would remove the discretionary elements present in the current legislation in certain categories of cases, the proposal would be opposed for the same reasons as the reasons given in relation to Option 1.

c. 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.

The proposal to limit the scope of challenge to a deportation decision in the manner suggested would, if implemented, likely place the UK in breach of its obligations under Article 13 ECHR, which provides for "an effective remedy before a national authority".

The ability to challenge an expulsion decision on Article 8 grounds must include the "effective possibility … of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality"[92]. Limiting appeal rights in the way suggested would not meet this test. Where the scope of the domestic remedy excludes consideration of

[92] *De Souza Ribeiro v France* (2014) 59 EHRR 454 at Paragraph 83, considered by the Supreme Court in *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42; [2017] 1 WLR 2380.

whether an interference with a person's Article 8 rights is proportionate to the aims pursued, there is likely to be a breach of Article 13[93].

Illegal and irregular migration

Q25: 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?

170. Question 25 asks respondents to consider how, while respecting international obligations, the UK could effectively address "impediments" arising from the Convention and the HRA, to tackling the challenges posed by "illegal and irregular migration". The Bar Council does not accept that the premise of the question is valid.

171. As with Question 24, it is, at least, incongruous for questions about the detail of immigration policy to be included within a Consultation relating to a matter of broad constitutional significance. Such substantive matters are best considered in the context of a Bill on immigration matters, such as the Nationality and Borders Bill presently before Parliament.

172. The premise that human rights present "impediments" to tackling illegal and irregular migration is not accepted. Article 1 of the Convention requires that the contracting parties secure the rights in the Convention to "everyone within their jurisdiction".

173. Two areas of controversy are advanced in the Consultation as bearing upon the issue. Both contain muddled thinking:

    a. First, it is said that elements of these proposals advanced in consideration of deportation could be applied also to the removal of 'failed asylum seekers', and those who enter the UK through safe and legal routes but 'overstay their right to remain'. This confuses two categories of persons. Refused asylum seekers may be lawfully present in the UK. They may have applied for asylum on arrival at port prior to entering the UK, or while present in the UK with lawful leave on some other basis. Such persons are not, without more, the same as those who are illegal entrants as defined in Section 33 of the Immigration Act 1971. Correspondingly, an illegal entrant may never have claimed (and been refused) asylum. Even if they had claimed asylum, they may have had a valid reason for doing so, albeit their claim was not accepted as well-founded in the final analysis. The conflation of refused asylum

[93] See *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 at Paragraph 138; *C.G. and Others v Bulgaria* (2008) 47 EHRR 51 at Paragraphs 59-64; *M. and Others v. Bulgaria* (2014) 58 EHRR 20 at Paragraph 125.

seekers with illegal entrants, when the two are distinct classes that overlap only in part, does not inspire confidence.

b. Furthermore, refused asylum seekers present a discrete set of issues quite separate from those who overstay any form of leave and who may never have sought asylum. In neither case is there a basis for asserting that the use of human rights under the current dispensation in the HRA presents an impediment to tackling the issues made out. Nor are there any antecedent policy reviews on the shoulders of which such an assertion may stand.

174. Considering the absence of any justification for defining the problem posed, the lack of any prior antecedent policy review on which to rest, and the shortage of evidence to support the assertions made, there is no basis to suppose that the matter of tackling illegal and irregular migration requires amendments to or adjustment of the current human rights provisions.

175. It is said that the second and third options advanced in Question 24 could be applied to 'asylum removals'[94]. Such a course of action would be unwise as there is no prior determination that removal is conducive to the public good. In other words, the public interest may not favour expulsion even when human rights considerations are not considered; the position in individual cases is likely to be more nuanced.

176. Equally, the first option advanced in Question 24 is inapposite. The notion that those who are not to be deported as foreign national offenders would nonetheless be subject to sentence length thresholds has not been properly thought through.

177. All this suggests that substantive policy areas, such as migration, ought not to be considered in a Consultation about a constitutional Bill designed to regulate all areas of public life. Up to now, the consideration of human rights in the field of immigration policy has taken place within the Immigration Acts. For example, the provision presently made in Part 5a of the Nationality, Immigration and Asylum Act 2002. That approach integrates the impact of human rights into the wider field of immigration legal policy. Whatever the view taken about the particular provisions made in that Act, Immigration Bills and Acts provide a better setting for establishing the connections between human rights policy and migration.

178. In addition, there are a number of other challenges to the Government's ability to tackle illegal migration, particularly via small boats in the English Channel. These are said to include the operation of the non-refoulement principle of international law and wider international legal instruments, such as the 1951 Refugee Convention which outlines the rights of refugees and the legal obligations of States Parties to protect them. Again, there is no justification for defining the problem posed, no prior antecedent policy review on which to rest, and no evidence advanced in support. This is not a sound basis on which to limit the ambit of human rights.

[94] Presuming this means the enforced removal of refused asylum seekers who refuse to depart voluntarily.

179. People who cross the Channel to seek asylum are protected from being sent back to places where they risk persecution, other forms of ill-treatment, or torture. Such protection arises not only under the Convention but also under the Refugee Convention and other international instruments by which the UK is bound. In the Convention it engages Article 3, from which it is not possible to derogate. There is no proposal which could or should interfere with such provision.

180. It may be that the addition of this part of the Consultation has been motivated by the inclusion in the Nationality and Borders Bill of new maritime enforcement provisions to permit the Home Office to take action against boats in international waters and foreign waters, as well as in UK territorial waters (as regards the latter there is already some provision). Be that as it may. It serves only to highlight the wisdom of considering the application of human rights as they bear on the field of immigration policy within a Consultation to reform the Immigration Acts and not in a general Bill of Rights or Consultation on the same.

181. In any consideration of the applicability of human rights in the field of migration via amendments to the Immigration Acts, there would also be the possibility of considering how potential reforms would sit alongside human rights instruments such as the Refugee Convention, as well as the duty of rescue (at sea) which applies to UK vessels and is contained within the 1982 UN Convention on the Law of the Sea, to which the UK is a Party.

182. The issues raised by Questions 24 and 25 have their proper place in a Consultation regarding any further amendments to the Immigration Acts.

Remedies and the Public Interest

Q26: We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include: the impact on the provision of public services; the extent to which the statutory obligation had been discharged; the extent of the breach; and 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.

183. Question 26 appears to proceed on a number of premises:

    a. That the Court's current powers or discretion following a successful claim to consider whether to make an award of damages and the extent of that award are limited or rather do not encompass the factors listed at (a) to (e); and/or

    b. That there is currently the potential for a public authority to be in effect unfairly penalised by an award of damages when its actions are found to be in breach of human rights when there are mitigating circumstances surrounding that act,

c. That the resources of a public authority should be relevant to an award of damages,

d. That such matters need to be brought within the Courts purview or to its attention by way of legislative provisions.

184. The Bar Council is not aware of any evidence or data that shows that Government bodies and local authorities have been penalised or consider themselves or their powers to act properly (in accordance with the law) to have been compromised as a consequence of any award of damages in this (or any) context.

185. Where a Judicial Act under Section 9 of the HRA is not performed in good faith, Section 8 applies, and in an appropriate case, damages should be awarded.

186. Section 8(1) and (2) of the HRA provide a general remedial discretion to any Court or Tribunal which finds that a public authority has committed an act which is unlawful under Section 6 because it is incompatible with the Convention. This discretion is subject to two limitations namely any remedy granted must be "within [the court's] powers" which confers power upon Courts and Tribunals to use their remedial powers in support of Convention rights and secondly, Ministers have a power to extend the remedial jurisdiction of a particular Tribunal where it is necessary to do so under Section 7(11).

187. With regard to Section 8(3) this was described recently in *MA, R (On the Application Of) v Secretary of State for Justice & Others* [2021] EWHC 1266 (Admin).

> "Section 8(3) provides that no award of damages is to be made 'unless, taking account of all the circumstances of the case … the Court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made'. By Section 8(4), in determining whether to award damages or the amount of an award, the Court must take into account the principles applied by the ECtHR in relation to the award of compensation under Article 41 ECHR"[95].
>
> "In *R (on the application of Faulkner) v Parole Board* [2013] UKSC 23 [2013] 2 AC 254 Lord Reed considered in detail the principles relevant to the remedy of damages under Section 8 of the HRA. While that case concerned damages for breach of Article 5.4 ECHR in the context of detention arising from delayed parole reviews, Lord Reed drew on guidance from the case of *Greenfield* [96] as being of general application. Lord Reed summarised his conclusions at §13. From that summary, the position is as follows: Damages under Section 8 should reflect levels of awards made by the European Court in comparable cases. Damages may be awarded for feelings of frustration and anxiety, being

[95] See Paragraph 15 of *MA, R v Sec of State for Justice & Others*.

[96] *R v Secretary of State for the Home Department (Respondent) ex parte Greenfield (FC) (Appellant)* [2005] UKHL 14

non-pecuniary loss. Where such feelings can be presumed or shown to have been suffered, a mere finding of violation of the relevant Article of the ECHR will not ordinarily constitute sufficient just satisfaction. An award of damages should also be made, but on a modest scale. On the other hand, where feelings of frustration and anxiety are 'insufficiently severe', no award should be made"[97].

188. Equally in *(R. (on the application of SXC) v Secretary of State for Work and Pensions* [2019] EWHC 2774 (Admin), the Court's powers under Section 8 give rise to two matters which: "emerge in particular: first whether compensation is necessary at all in order to afford just satisfaction for the breach of Convention rights that has been found to have occurred; and second if compensation is necessary for the purpose of just satisfaction, whether the breach of Convention rights that has been found to have occurred was the cause of the loss and damage claimed … In some circumstances a claim under the HRA is the vehicle to vindicate rights equivalent to those recognised in private law … In such instances, compensation may be the primary if not sole way in which just satisfaction can be afforded for the breach of Convention rights."[98]

189. The Gross Review's own conclusions and recommendation in respect of the Court's power to award a financial remedy[99] reference Irish law and the introduction of "a system of ex gratia payments, payable by the Government, where a declaration of incompatibility is issued. This would introduce a form of individual relief, albeit not a remedy"[100] and which would have the 'attraction' of reducing any "time and cost of a matter of this nature needing to proceed to the ECtHR simply because of the absence of such a procedure domestically."[101]

190. The Bar Council does not consider that there would be any benefit to public authorities or claimants by setting out specific factors which the Courts should consider if and when to make an award of damages but that the discretion should remain as it currently stands: the two factors 'necessity' and 'causation' appear to be sufficiently wide to encompass the concerns the Government raises but also are well understood and applied. There is merit in the Gross Review's proposal but that is not a matter the Government has commented upon.

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

Q27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons. Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or option 2: Provide that damages

[97] See Paragraph 16 of *MA, R v Sec of State for Justice & Other*s.
[98] Paragraph 8 per Swift J.
[99] The Gross Review, pp.204 and 205.
[100] The Gross Review, p.257.
[101] The Gross Review, p.257.

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.

191. The Bar Council urges caution before the Government considers such a step.

192. Human rights are universal. There is no qualification as to that entitlement. 'Bad' or 'undeserving' people are just as entitled to benefit from rights as 'good' or 'deserving' people. Indeed, the mid-20th century atrocities that the ECHR was developed to prevent occurred because States began sorting their populations into specific groups because the authorities perceived them to be more or less 'deserving' or, indeed, more or less human than others.

193. To deny or limit a remedy is to, in practice, deny or limit the right itself. Any restriction of remedies to those who are "deserving" (which is what option 2 seems to imply) would be wrong.

194. The Bar Council is unaware of any evidence that would demonstrate that this is a real problem. If the Government wishes to pursue this aspect of possible reform, then the basis for the concerns should be made public. As matters stand, the Bar Council does not support either option. However, if evidence is supplied that suggest, for example, that reform consistent with option 1 is soundly based then we would consider those proposals.

195. It is not clear from the question whether the Government has in mind the principles of contributory negligence. Insofar as this may be so, we consider that there are substantive differences that should be carefully considered. First, human rights are conceptually different from rights deriving from negligence, in that they flow from a recognition of the humanity of the individual. They are, in this sense, prior to and apart from tort. Secondly, contributory negligence depends on the claimant's role in causing or failing to prevent the specific harm complained of. But option 1 is put more broadly, relating generally to the "circumstances of the claim". This language appears to go well beyond contributory negligence because it does not appear to be tied to causation.

196. Article 1 of the Convention requires that the UK secure the rights and freedoms guaranteed by the Convention to "everyone" within its jurisdiction.

197. Article 13 entitles "everyone whose rights and freedoms are set forth in this Convention" to an effective remedy. A remedy cannot be "effective" unless it is, inter alia, capable of "directly remedying the impugned decision"[102]. A remedy is not "effective" where excessive restrictions are placed on the ability to access to it.[103]

198. Article 14 requires that Convention rights are secured without discrimination. While the right gives a number of examples of grounds on which discrimination is not

[102] *Pine Valley Developments Ltd and Ors v Ireland* [1991] ECHR 55
[103] *Camenzind v Switzerland* (136/1996/755/954) (1997) 28 EHRR 458

permitted, it is clear this is an open-ended list because it concludes with the words "or any other status".

199. While there is a margin of appreciation afforded to States as to how to secure an effective remedy for claimants, this margin is unlikely to extend to discrimination as to who can access a remedy. It should be noted that neither Articles 13 nor 14 are qualified rights. It is not, therefore, open to the UK to depart from them, even if doing so could be justified in a democratic society.

200. Any criteria imposed to restrict access to a remedy would put the UK in breach of Articles 13 and 14 because it would require discriminating between claimants on the basis of an "other status", regardless of what that may be. Any such criteria would likely, therefore, put the UK in breach of its Convention obligations (particularly, but not limited to, Article 1). Any implementing decision would likely see the UK ruled in breach by the Strasbourg Court.

201. This proposal will, therefore, not only do the UK's international reputation real harm but will likely lead to substantial litigation before the Strasbourg Court which will serve no purpose other than to see the decisions of UK Courts ruled unlawful.

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

Q28: 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.

202. This proposal addresses the relationship between the Government and Parliament, and therefore the Bar Council does not express any view on it, save to note that Sub-Clause 1 of the Clause set out after Paragraph 11 of Appendix 2 merely restates the current position (as appears to be recognised by the use of the verb 'affirms'), and therefore the Bar Council questions its utility.

Impacts

Q29: 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:
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. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate; and how might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.

203. The Bar Council considers that the proposals will not provide greater legal certainty. On the contrary, the proposals are likely to result in a high degree of uncertainty. In particular, the proposals are likely to give rise to the following practical impacts:

a. A destabilisation of the currently well-established and well-understood framework for the protection of rights in the UK and a high degree of uncertainty for public authorities, individuals and organisations (including commercial organisations).

b. An increase in human rights litigation involving public authorities, something that is likely to continue for the foreseeable future.

c. Increased complexity in human rights litigation, resulting in increased legal costs for all parties, including public authorities, and increased demands on the Courts.

d. An increase in the volume of applications made by individuals to the ECtHR, to which the Government will bear the responsibility for responding, regardless of the identity of the relevant public authority in domestic law, and an increase in the volume of applications that are successful.

e. A diminution in the ability of the UK Courts to influence the development of the case law of the ECtHR by way of judicial dialogue.

Conclusion

The Bar Council looks forward to engaging further with the Government and other stakeholders in relation to any policy proposals that emerge from this consultation process.

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[i] See for example *R. v Manchester Stipendiary Magistrate Ex p. Granada Television Ltd* [2001] 1 AC 300 per Lord Hope of Craighead at Paragraph 304:

> "The system of criminal law which operates in Scotland has remained entirely separate from that of England … Thus, although there is now much common ground between England and Scotland in the field of civil law, their systems of criminal law are as distinct from each other as if they were two foreign countries."

[ii] See *King v. Cowle* (1759) 97 Eng. Rep. 587 per Lord Mansfield at Paragraph 599:

> "to foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland".

The fuller Mansfield dictum is quoted in *R (Bancoult) v Foreign Secretary* [2001] QB 1067 (DC) per Laws LJ at 1087 D-F. See, too, the discussion of this issue (within the context of whether habeas corpus could be prayed in aid by Guantanamo detainees) before the UK Supreme Court in *Boumediene v. Bush* 553 US 723 (2008) per Justice Kennedy (giving the majority opinion of the court):

> "The [US] Government argues, in turn, that Guantanamo is more closely analogous to Scotland and Hanover, territories that were not part of England but nonetheless controlled by the English monarch (in his separate capacities as King of Scotland and Elector of Hanover). See Cowle 97 Eng. Rep., at 600. Lord Mansfield can be cited for the proposition that, at the time of

the founding, English courts lacked the 'power' to issue the writ to Scotland and Hanover, territories Lord Mansfield referred to as 'foreign'."

And see Justice Scalia in *Boumediene v. Bush* (dissenting on the result) at footnote 7:

> "Lord Mansfield's opinion in Cowle plainly understood Ireland to be 'a dominion of the Crown of England,' in contrast to the 'foreign dominio[n]' of Scotland and thought that distinction dispositive of the question of habeas jurisdiction."

[iii] See the discussion in *Dyer v. Watson* [2002] UKPC D1, [2004] 1 AC 379 per Lord Bingham at Paragraph 24:

> "The procedural law of Scotland is distinctive in its inclusion of stringent rules intended to avoid delay in the dispatch of criminal proceedings. Some of these effectively preclude a breach of the reasonable time requirement: for example, the rules that an accused in custody in summary proceedings must be brought to trial within a maximum of 40 days (Criminal Procedure (Scotland) Act 1995, section 147(1)) and that an accused in custody in solemn proceedings must be brought to trial within a maximum of 110 days (1995 Act, section 65(4)). If these time limits are not met, the accused is not merely released; the proceedings come to an end. Other provisions make a breach of the reasonable time requirement unlikely: for example, the rule already mentioned that an accused appearing in court on petition must be brought to trial within 12 months of that appearance (1995 Act, section 65(1)). But the statutory rules do not apply to summary proceedings where an accused is not in custody nor to solemn proceedings where an accused is not in custody and does not appear on petition. In such cases an accused is not without protection under the common law. He may raise a plea in bar of trial … on grounds of delay".

[iv] For example, Lord Hope of Craighead noted *Montgomery v HM Advocate* [2003] 1 AC 641 at Paragraph 654:

> "For almost three hundred years since the Union Agreement of 1707, known as the Treaty of Union, which preserved intact the Scottish legal system and the courts which administered it, the system of criminal justice in Scotland has survived as a self-contained and independent system."

[v] As is explained by Lord Hope in *A and others v. Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221 at Paragraphs 284-285:

> "104. …When the Act of 16 Charles I, c 10, abolished the Star Chamber the jurisdiction of the Privy Council in all matters affecting the liberty of the subject was transferred to the ordinary courts, which until then in matters of state the executive could by-pass. Torture continued to be used in Scotland on the authority of the Privy Council until the end of the 17th century, but the practice was brought to an end there after the Union by section 5 of the Treason Act 1708.
>
> "107. When the jurisdiction of the Star Chamber was abolished in England prisoners were transferred to Scotland so that they could be forced by the Scots Privy Council which still used torture to provide information to the authorities. This is illustrated by the case of Robert Baillie of Jerviswood whose trial took place in Edinburgh in December 1684. A detailed description of the events of that trial can be found in *Fountainhall's Decisions of the Lords of Council and Session*, vol 1, pp 324-326. For a summary, see 'Torture' 53 *ICLQ* 807, 818-820. Robert Baillie had been named by William Spence, who was suspected of being involved in plotting a rebellion against

> the government of Charles II, as one of his co-conspirators. Spence gave this information having been arrested in London and taken to Edinburgh, where he was tortured. Baillie in his turn was arrested in England and taken to Scotland, where he was put on trial before a jury in the High Court of Justiciary in Edinburgh. All objections having been repelled by the trial judge, the statement which Spence had given under torture was read to the jury. Baillie was convicted the next day, and the sentence of death that was passed on him was executed that afternoon. There is a warning here for us. 'Extraordinary rendition', as it is known today, is not new. It was being practised in England in the 17th century."

[vi] See Lord Bingham in *R (YL) v. Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at Paragraph 5 echoing Lord Nicholls in *Aston Cantlow v. Wallbank* [2003] UKHL 37, [2004] 1 A.C 546:

> "there is no single test of universal application to determine whether a function is of a public nature. A number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case. Tempting as it is to try and formulate a general test applicable to all cases which may arise, I think there are serious dangers in doing so."

[vii] Judicial opinion about this varies to some degree: Lord Bingham in *YL* at Paragraph 12 suggested that the definition under the HRA may be broader than in respect of Judicial Review. However, Lord Dyson said in an earlier case that on "the facts of this case, and I would suggest on the facts of most cases, the two issues march hand in hand: the answer to one provides the answer to the other." (*R (Beer) v. Hampshire Farmers Market Limited* [2004] 1 WLR 233 at Paragraph 29). The Bar Council is unaware of any case in which the actions of a body have been found to be public under one regime but not the other.