MINISTRY OF JUSTICE: HUMAN RIGHTS ACT REFORM: A MODERN BILL OF RIGHTS

Response from Humanists UK, March 2022

ABOUT HUMANISTS UK

At Humanists UK, we want a tolerant world where rational thinking and kindness prevail. We work to support lasting change for a better society, championing ideas for the one life we have. Our work helps people be happier and more fulfilled, and by bringing non-religious people together we help them develop their own views and an understanding of the world around them. Founded in 1896, we are trusted to promote humanism by 100,000 members and supporters and over 115 members of the All-Party Parliamentary Humanist Group.

We are leading experts in the religion or belief human rights strand. Our charitable objects include 'The promotion of equality and non-discrimination and the protection of human rights as defined in international instruments to which the United Kingdom is party, in each case in particular as relates to religion and belief'. Our commitment to human rights has seen us organise a coalition over the last year of more than 250 charities, trades unions, human rights organisations, and religion or belief groups in opposition to any weakening of the Human Rights Act (HRA) or judicial review, at https://humanrightsact.org.uk/. An identical petition has been signed by over 7,000 people. We provide the statement and full list of signatories as an annex to this report. We also responded to the Independent Human Rights Act Review (IHRAR) Panel consultation on reform of the HRA.[1]

SUMMARY OF THIS RESPONSE

We have responded to all the questions in this consultation. However, we wish to draw the Government's attention to two areas where these proposed reforms which would especially affect the human rights of non-religious people: namely, those related to sections 3 and 6. **We are seriously concerned that plans to repeal or weaken sections 3 and 6, to remove the power of public bodies or the courts to make 'reading ins' to legislation to ensure that it is human rights-complaint, will undermine human rights protections for non-religious people, such as humanists.** This is because sections 3 and 6 have been fundamental in establishing that references to 'religion' in the law (including statute that predates the HRA) must, where possible, be interpreted as inclusive of the non-religious. Under the proposed reforms, public bodies and the courts would no longer be able to rely upon this 'reading in' mechanism to resolve incompatibilities in areas such as marriage and family life, education, and employment. Therefore, humanists would have little choice but to seek declarations of incompatibility under section 4, thus creating more work for public authorities (when the focus of a case is policy or guidance) and Parliament (when the focus is an Act) on matters that can currently easily be resolved by public authorities as a matter of course, and denying the successful claimant a quick and easy remedy. This is in turn likely to result in more cases going to Strasbourg. Please see our answer to questions 12 and 21 for more detail on this issue.

We would support an enhanced role for the Joint Committee on Human Rights (JCHR). This is not a matter that requires legislative change but increased resourcing so that it can carry out its function

[1] *Independent Human Rights Act Review: Call For Evidence – Response from Humanists UK*, February 2021. https://humanists.uk/wp-content/uploads/Independent-Human-Rights-Act-Review-response-from-Humanists-UK.pdf

of scrutinising the human rights impact of every bill and of past legislation. We support the recommendation of the IHRAR to create a database of section 3 judgments.

RESPONSE TO THE CONSULTATION QUESTIONS

About you

a) **What is your name?**
Richy Thompson
b) **What is your email address?**
richy@humanists.uk
c) **Type of organisation or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)**
Human rights organisation
If you are a representative of a group, please tell us the name of the group and a summary of the people or organisations that you represent:
See above.
d) **What region are you in?**
Other: UK-wide
e) **Company name/organisation (if applicable):**
Humanists UK

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

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

We reject options 1 and 2, which both go beyond the recommendation of the IHRAR on reform of section 2 of the HRA. Both options, in seeking to reduce the extent to which European Court of Human Rights (ECtHR) judgments can be taken into account by our courts, are likely to result in a lower standard of protection for UK citizens, and more claimants seeking redress in Strasbourg. UK courts can already draw upon a wide range of jurisprudence in their decision making, of which the ECtHR is an important source, and with which there is a well established and strong working relationship. We do not see any justification for changing that relationship.

Option 1 seeks to change the meaning of section 2 completely and remove any obligation for UK courts to consider ECtHR judgments. The Government has not established its case for this reform and it was wholly rejected by the IHRAR, which stated:

> 'The repeal of section 2 would result in there being no formal link between the HRA and the Convention. While the UK remains a party to the Convention, this option has nothing to commend it.'[2]

[2] *Independent Human Rights Act Review*, p79.

With regards to option 2, the IHRAR also rejected the weakening of the current relationship between the two courts as it would likely result in a gap between the rights and protections that people should expect to receive in the UK. The IHRAR warned,

> 'Any such gap would undermine the HRA's aims and lead to an increasing number of applications, including successful applications, brought against the UK before the ECtHR.'[3]

Historically, there are two schools of thought with regard to the duty to 'take into account' ECtHR jurisprudence. The first school, typically known as the *Ullah* principle or 'mirror principle', suggests that under the HRA the courts must slavishly follow the rulings of Strasbourg except when the ECtHR lacks a 'clear and constant' jurisprudence.[4] In other words, the content and scope of our domestic rights must mirror Strasbourg's interpretations, and our domestic courts cannot ordinarily provide a more expansive interpretation. The second school suggests that while domestic courts should not ordinarily depart from Strasbourg's rulings, they can choose to outpace Strasbourg when there are good reasons to do so.

In his seminal discussion on this topic, Professor Roger Masterman has persuasively demonstrated that while in the initial years of the HRA our judges adopted a cautious approach that favoured the mirror principle, in practice they now emphasise the non-binding nature of Strasbourg's jurisprudence, and the so-called mirror principle has therefore cracked.

In his assessment there are now at least thirteen circumstances where our domestic courts may choose to depart from the ECtHR:[5]

1. *Strasbourg's jurisprudence would compel a conclusion which could be 'fundamentally at odds' with the UK's separation of powers*[6]
2. *'Special circumstances' justify a departure*[7]
3. *There is a 'good reason' to depart from Strasbourg's jurisprudence*[8]
4. *It is 'reasonably foreseeable' that the ECtHR would come to a different conclusion than they did beforehand*[9]
5. *The question is one for domestic authorities to 'decide for themselves'*[10]

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[3] *The Independent Human Rights Act Review*, p78.
[4] Articulations of this principle have ranged from limiting domestic discretion to situations where Strasbourg lacks a 'clear and constant' jurisprudence (*R (on the application of Ullah) v Special Adjudicator [2004] UKHL 26*) to more overt statements such as 'Strasbourg has spoken, the case is closed' (*Secretary of State for the Home Department (Respondent) v AF [2009] UKHL 28*) or to more nuanced notions such as the mirror requiring interpretations which are 'no less but certainly no more' than required to remain in line with Strasbourg (*R (Al-Skeini) v Secretary of State for Defence [2007] UKHL 26*).
[5] Roger Masterman, 'The Mirror Crack'd', UK Constitutional Law Association (2013). https://ukconstitutionallaw.org/2013/02/13/roger-masterman-the-mirror-crackd/
[6] *R (Alconbury Developments Ltd) v SS for Environment, Transport and the Regions [2001] UKHL 23.*
[7] Ibid.
[8] *R (Amin) v Secretary of States for the Home Department [2003] UKHL 51.*
[9] *R (on the application of Gentle (FC) and another (FC)) (Appellants) v The Prime Minister and others [2008] UKHL 20.*
[10] *P & Others [2008] UKHL 38.*

6. *The area is governed by common law and the court is minded to exercise its discretion to depart from Strasbourg's line of authority*[11]
7. *'Great weight' is attached to a legislative decision which determines the balance to be struck in a way which might be inconsistent with Strasbourg's authority*[12]
8. *Strasbourg's authority is past its use-by date*[13]
9. *Domestic court prefers to follow non-Strasbourg authority*[14]
10. *Strasbourg's jurisprudence is not 'particularly helpful'*[15]
11. *Strasbourg's authority is inconsistent with a fundamental substantive or procedural aspect of the UK's law*[16]
12. *Strasbourg's case-law overlooks or misunderstands some point of principle or argument*[17]
13. *The courts wish to engage in a 'dialogue' with the ECtHR on the basis of potentially wrong case law*[18]

Although the above list is not an exhaustive account of all the situations in which our domestic courts are able to outpace Strasbourg, it underscores the extent to which the courts are no longer – assuming they ever were before – bound by the ECtHR.

The rationale behind proposals to amend s2(1) is therefore unclear. The above analysis demonstrates such an amendment is unnecessary. Moreover, it is worth noting that while the UK is free at a domestic level to depart from Strasbourg's rulings, we are nevertheless still bound under Article 46 of the ECHR on an international level. Given that a cardinal principle of interpretation under our common law is to interpret legislation in a manner compatible with the UK's international treaty obligations – since in the absence of explicit instruction otherwise, the common law assumes Parliament would not intentionally seek to create legislation incompatible with said obligations – it is unclear how any amendment would meaningfully work in practice. [19] For example, even if s2(1) was clarified to stress that it is optional for the courts to take into account Strasbourg's rulings, the nature of this provision would almost certainly be interpreted to achieve the same outcome as we have today. Hence, at best any amendment to s2(1) would be purely symbolic.

Considering that there are several strong public policy arguments in favour of the UK to at least keep pace with Strasbourg's rulings, the case in favour of reform is weaker still. Firstly, continuing to adhere to ECtHR jurisprudence makes sense in the interests of preserving uniformity. Human rights are designed to provide universal and inalienable freedoms to everyone, irrespective of their location or nationality. Thus, as Humanists UK's patron Sir Stephen Sedley has rightly argued, 'if you are serious about the universality of human rights, the Convention cannot mean one thing in Britain and another thing, on indistinguishable facts, in Denmark or Russia.' [20] In other words, to preserve the consistency of the ECHR's standards, the UK should not depart from Strasbourg without a good reason.

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[11] *Rabone & Anor v Pennine Care Foundation NHS Trust [2012] UKSC 2.*
[12] *R (Animal Defenders International) v Culture Secretary [2008] UKHL 15.*
[13] *R (Quila) v Sec of State for the Home Department [2011] UKSC 45.*
[14] *R (Daly) v Secretary of State Home Department [2001] UKHL 26.*
[15] *R (A) v Secretary of Statement for the Home Department [2004] UKHL 56.*
[16] *Manchester City Council v Pinnock [2010] UKSC 45.*
[17] Ibid.
[18] *R v Horncastle [2009] UKSC 14.*
[19] *Belhaj v Straw [2017] UKSC 3.*
[20] Stephen Sedley, *Law and the Whirligig of Time*, Hart Publishing 2018.

Secondly, given that consistency promotes legal certainty and predictability, it follows that by detaching the UK from ordinarily following Strasbourg's rulings the UK would jeopardise confidence in the ability of citizens to predict the outcome of human rights cases. This is important, because in the event that domestic courts issue a declaration of incompatibility and Parliament refuses to act, the logical next step of a claimant is to appeal to the ECtHR. Yet, if UK courts and Strasbourg began adopting radically different interpretations of the law, citizens would be incapable of assessing the likely prospects of their case – exposing them to potentially significant financial and other costs and undermining confidence in the rule of law. Finally, it is worth noting that the ECtHR is a specialist court which exclusively deals with human rights issues. Although in recent years our domestic courts have developed a formidable reputation for their human rights jurisprudence, it remains the case that they deal with comparatively few human rights cases. By weakening the duty to take into account the ECtHR's judgments, the UK would risk stifling our domestic jurisprudence by limiting the courts' exposure to the ECtHR's expertise.

An example of this, in an area where we have extensive experience, is the issue of assisted dying. In 2002 Diane Pretty challenged the Suicide Act 1961 – which prohibited her husband from assisting her in travelling abroad for an assisted death – on the basis of it infringing her Article 8(1) (private and family life) rights under the ECHR. Yet the House of Lords (then the highest authority in the UK) refused to engage with her arguments on the basis that Article 8(1) was 'not engaged at all' and solely related to the manner in which someone conducts their life, rather than ends it. [21] The ECtHR reversed this finding, holding that Article 8 rights were engaged by end-of-life issues, [22] and prompted the House of Lords – when invited to reconsider the issue by Debbie Purdy in 2009 – to change its stance and rule that in the absence of clear and foreseeable prosecutorial guidelines the UK's blanket ban on assisted dying did breach Article 8(2) of the HRA. [23] In other words, in the absence of the ECtHR's expertise, British citizens travelling abroad for an assisted death would remain entirely unable to predict in what circumstances they would be likely to face prosecution, and the development of our law would lag behind Europe's. Whereas because of the ECtHR's role, there are now specific prosecutorial guidelines which provide some assistance to families.

In summary, we believe the duty to 'take into account' the ECtHR's jurisprudence is now far less restrictive than some would contend, and whilst the courts occasionally outpace Strasbourg, there remain good public policy arguments to closely align domestic jurisprudence with the ECtHR's. The status quo strikes the right balance of powers between the two courts. It ensures that people in the UK can broadly expect to have a comparable standard of human rights to those across Europe. Whilst at the same time, does not mean that UK courts are bound by the ECtHR and can make different interpretations if there is a good reason for doing so. The HRA has been successful in bringing rights home by allowing UK citizens to claim these rights in the UK courts. This relationship has empowered and protected our citizens and courts rather than diminished them.

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

[21] *R (Pretty) v Director of Public Prosecutions [2001] UKHL 61.*
[22] *Pretty v UK 2346/02 [2002] ECHR 427.*
[23] *R (Purdy) v Director of Public Prosecutions [2009] UKHL 45.*

This question is confusingly worded and it is unclear whether it is referring to the relationship between the ECtHR and the UK Supreme Court, or whether there are some matters which are beyond the competence of the UK courts, or both. In either case, the Government should pay deference to the IHRAR's findings on reform of section 2.

UK Supreme Court supremacy to ECtHR

The IHRAR found that there is no case for major reform of section 2, as there is no evidence that the ECtHR has undermined the supremacy of the UK Supreme Court. As described in detail in our answer to question 1, for 20 years, UK courts have taken into account relevant judgments from Strasbourg and been free to apply them within the UK with a wide margin of appreciation to account for domestic context. Equally, the same UK courts can and have chosen to not follow Strasbourg jurisprudence if there has been a good reason for doing so. It is the Supreme Court that is the ultimate arbiter of domestic law.

It is a popular misconception about the HRA is that it enables Strasbourg to exert too much control and influence over the UK's domestic law. Despite the ECtHR lacking a concept of *stare decisis* or *ratio decidendi*,[24] this myth that the duty of section 2(1) of the HRA – to 'take into account' Strasbourg's rulings – has instead bound the courts to its decisions, has proven remarkably persistent. Although it is important to acknowledge that the obligations of the UK are different on an international and domestic plane, this myth stems from a misunderstanding of the courts' discretion and interpretive toolkit. In general, we believe there are good public policy reasons for our domestic courts to closely mirror Strasbourg's decisions, not least on the occasions where the European Court has raised standards domestically. Nevertheless, in circumstances where domestic courts choose to closely follow the ECtHR this is to ensure a minimum level of rights protection exists. It does not fetter their discretion to provide different (typically more beneficial, in fact) interpretations. We therefore believe proposals to reform this balance are either unnecessary or at best symbolic.

The principle of the margin of appreciation

A defining principle of the ECHR's framework is the notion of 'subsidiarity': the idea that the protection of fundamental rights lies first and foremost with domestic authorities instead of the ECtHR, and therefore the ECtHR should only intervene where domestic authorities fail in their task. The corollary of this is that so far as is possible the ECtHR will afford national authorities a measure of discretion to implement the ECHR in ways appropriate to their particular needs and resources. This in essence is the 'margin of appreciation' (MoA); a minimum level of human rights protections will exist in all contracting states, but a degree of freedom of choice will be given to states if they adopt measures to restrict or limit certain subject matters falling under the Convention. For example, in *Handyside v UK* the central issue was whether limiting the sale of a book aimed at teaching children about adolescence and topics including sex was a disproportionate infringement of someone's freedom of speech.[25] In discussing whether the UK's ban was *necessary* in a democratic society under Article 10(2), the ECtHR resolved that a uniform conception of morality at

[24] Lady Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' *Human Rights Law Review*, Vol 1, Issue 1, 2012. https://academic.oup.com/hrlr/article/12/1/65/562107 Perhaps the most famous example of the ECtHR's non-binding nature is the issue of prisoner voting. In the case of *Hirst v UK (No.2) (2006)* and *MT & Greens v UK (2011),* the Government failed to repeal offending legislation despite a ruling from the ECtHR and thus the UK's law was not affected.

[25] *Handyside v UK 5493/72 [1976] ECHR 5.*

the European level was not necessary and national authorities were therefore better placed than an international court to evaluate the needs and conditions of the UK. Thus, domestic courts were given a margin of appreciation (discretion) to assess the 'necessity' of the UK's restriction.[26]

It is unclear from the question on what basis our domestic courts' treatment of issues falling within the margin of appreciation might change. Professor Mark Elliot has convincingly argued that there are two possible ways the margin of appreciation could be approached. One option would be to hold that the discretion provided by the ECtHR to domestic authorities in reality means providing discretion to the executive or legislature. Thus domestic courts should show decision-makers a high degree of deference when a subject matter falls within the European margin of appreciation. In other words, the international concept of appreciation is interlinked with the national concept of deference. The alternative, orthodox approach, is to view the margin of appreciation as a concept distinct from deference. In other words, if the ECtHR via the MoA affords a state a measure of discretion on a matter, it remains the responsibility of the domestic courts to assess the legality of the outcome.[27]

In our experience, domestic courts tend to emphasise the latter approach. For example in 2014, in *Nicklinson*[28] – which concerned the legality of banning assisted dying for people with an incurable illness who voluntarily wish to end their lives – it was well established by the European case law of *Haas v Switzerland*[29] and *Pretty v UK*[30] that each nation state has a wide margin of discretion when determining the legal prohibitions on assisted dying. Nevertheless, a majority of the UK Supreme Court held that the mere fact that assisted dying fell within the margin of appreciation was not in itself sufficient to determine that a declaration of incompatibility could not be issued under the HRA. After all, as Lord Mance insightfully held, a measure could be 'incompatible at the domestic level' while simultaneously 'compatible at the international level'. And in any event, assisted dying is an obvious example of where UK courts may wish to exercise their ability to depart from Strasbourg's jurisprudence,[31] thus assimilating the margin of appreciation to deference would be especially misguided.

In our view, there is no reason for the courts to change their practice with regard to the MoA. Despite the European concept typically applying to contentious moral, social, economic, or political issues, this should not automatically prevent the courts from scrutinising the proportionality and appropriateness of potential human rights abuses. Indeed, in some cases, the independence of our judiciary means they are better placed to confront these issues, without fear of electoral punishment, than the legislature and executive. At any rate, the UK has long recognised that it is a function of our judiciary to adjudicate upon potential violations of the law and to serve as guardians

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[26] Stephen Sedley, *Law and the Whirligig of Time*, Hart Publishing, 2018.
[27] Mark Elliott, 'Is the margin of appreciation something that domestic courts should be applying?', Public Law for Everyone, 2013.https://publiclawforeveryone.com/2013/02/25/is-the-margin-of-appreciation-something-that-domestic-courts-should-be-applying/; 'The right to die: deference, dialogue and the division of constitutional authority', Public Law for Everyone (2014).https://publiclawforeveryone.com/2014/06/26/the-right-to-die-deference-dialogue-and-constitutional-authority/
[28] *R (Nicklinson)* v *Ministry of Justice [2014] UKSC 38.*
[29] *Haas v Switzerland [2011] ECHR 2422.*
[30] *Pretty v UK 2346/02 [2002] ECHR 427.*
[31] See in particular the discussion of Lord Neuberger (71-75) in *R (Nicklinson)* v *Ministry of Justice [2014] UKSC 38.* https://www.supremecourt.uk/cases/uksc-2013-0235.html

of our fundamental liberties. Although we believe it was lamentable that a narrow majority of the Supreme Court chose to defer to Parliament in the case of *Nicklinson*, it is obvious that the analytic assessment that led to that outcome should not have been predetermined or fettered merely by virtue of the MoA. Thus, we recommend no changes are necessary.

3. **Should the qualified right to jury trial be recognised in the Bill of Rights?**
   No

   Please provide reasons:

The Government has not made its case as to why it is necessary to provide further protections for the right to a jury trial. The right to a fair trial is already well protected under Article 6. Without further clarification on how a Bill of Rights would respect the different legal traditions across the devolved jurisdictions of the UK, with respect to the jury trial, we cannot support this proposal. The IHRAR did not consider the right to trial by jury as part of its report, so it is unclear what evidence the Government is basing the need for reform in this area on. Moreover, if it was considering putting forward such a right, why did it not include this in the terms of reference for the IHRAR's work?

The ECtHR accepts trial by jury within Article 6 of the ECHR and has not attempted to standardise the approach to criminal justice across member states. So it is not the case that there is any threat to jury trial from the courts in Strasbourg. Conversely, including a right to trial by jury in a new Bill of Rights might actually weaken the availability of such trials to citizens in certain circumstances. Although this consultation has not put forward a draft of what such a right would look like, it has suggested that this would be a qualified right. This would mean that the Government would have a greater influence and potentially the power to prevent jury trials going ahead, which they would not otherwise have been able to do under the current HRA. This would interfere with the demarcation between the power of the executive and the judiciary. Far from protecting the right to a jury trial, introducing a qualified right might result in fewer people being able to access one.

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

Overall, we believe that Article 10 of the HRA and its qualifications have been successful in striking the right balance between freedom of expression and other rights, such as privacy, when they have come into conflict. Section 12 was created as part of the HRA as result of press lobbying and was drafted with strong press involvement. The wording of the text is clear, especially in section 12(4), in establishing the primacy of freedom of expression and the importance of journalistic, literary, or artistic expression, and providing a narrow test for when publications can be restricted. As a result of this test, which sets a high bar for the plaintiff seeking an injunction to demonstrate that there is no public interest in publication, successful privacy claims are actually rare. The wording of section 12 very closely reflects the IMPRESS Standards Code for journalists. [32] Therefore, short of calling for full prohibition on any prior restraint on publications, it is hard to see how this could be effectively strengthened.

The consultation states that the reason why the Government is considering changes in this area is because of the development of Strasbourg case law on the right to privacy, and the belief that, in

[32] 'IMPRESS Standards Code', IMPRESS. https://www.impress.press/standards/

practice, freedom of expression has not correspondingly kept pace with this development. The IHRAR again did not consider this issue, so it is unclear what evidence the Government is using to substantiate this claim. The extent to which the HRA has led to a radical departure on the question of privacy is often overstated. Courts have long recognised issues such as sex, for example, as falling within the tort of breach of confidence. Likewise super-injunctions were used prior to the HRA. The main contribution of the HRA was to change the tests that are used ('reasonable expectation of privacy' and proportionality) to identify such a breach, which is an improvement on the pre-HRA situation. As stated above, it is a matter for the courts to determine to what extent they take account of ECtHR jurisprudence on privacy and freedom of expression. Overall, it is not a problem of legislation, and thus the place of parliament to intervene, but a problem of interpretation in individual cases, which is the sole preserve of the judicial branch.

Concern about the abuse of the tort on privacy laws and confusion amongst publishers about its impact are not best dealt with through amending the HRA or introducing new provisions as part of a Bill of Rights. A better approach would be to clarify and consolidate the various laws that impact on privacy, such as the Data Protection Act 2018 and various laws relating to breach of confidence and misuse of private information, into a single updated Act. Such an approach was taken with the Defamation Act 2013 and could provide a useful model for how to provide clarity and reassurance on issues of privacy.

5. **The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations in the consultation document. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?**

The right to freedom of expression is one of the most fundamental human rights as it is vital to enable a plurality of opinions and to preserve democracy. Its importance is reflected in the protections afforded to it in Article 10 of the ECHR. But it is a qualified right, with legitimate restrictions as laid out in Article 10(2) of the ECHR. The fact that it is a qualified right does not reduce its importance to society, but does create a legal process by which it can be balanced against competing rights in specific cases where they come into conflict. An example is the right to a reasonable expectation of privacy. It runs fundamentally against the principle of qualified rights to legislate that they must in all circumstances take precedence over another right. The courts are, in most circumstances, better placed to be the arbiter of decisions regarding the balancing of rights as cases of conflict arise over time and to develop precedent through case law. The HRA allows for this development and provides the courts with the tools needed to assess the comparative importance of the rights on a case by case basis, taking into account the justifications for restricting each right, and applying a proportionality test. This careful process of fact-finding and balancing is not something that can be achieved through legislation or guidance. Parliament cannot replicate this process as it cannot foresee every potential conflict in rights that may arise, nor create guidance that could possibly take account of all consequences for individuals and society at large caused by the conflict. Therefore, we recommend no change to guidance on Article 10.

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

Journalists' sources are already protected under section 10 of the Contempt of Court Act 1981[33] and this works in conjunction with Article 10 of the HRA to protect the free expression of journalistic content. In the case where revealing a source could result in a threat to life, Article 2 of the HRA can also be engaged. This current legal framework works well overall and we would not recommend any reform in the form of a Bill of Rights.

A Bill of Rights seems an unsuitable vehicle for dealing with the matter of protection of journalists' sources. This would be better dealt with, as it has until now, through ordinary legislation. This is because protection of sources is not a matter that affects the underlying framework of human rights itself, but is one of policy arising from the right to freedom of expression. The IHRAR did not consider this area in its report and the consultation does not give any indication of what such protections would look like. So it is unclear on what evidence the Government is basing its call for reform and why it believes it should be included in a Bill of Rights. All that is said within the consultation is 'in addition, the government believes that journalists have an important role in our society, providing scrutiny and holding those in positions of power to account. We intend to make specific provision for journalists' sources in the Bill of Rights, to make sure that they are properly protected.' This not only fails to describe what remedies the Government is considering, but further fails to describe what the issues are with the current protections. A better approach would be to codify various existing laws on journalists' sources into a single Act and review any areas of uncertainty that currently exist in legislation. This consultation fails to note that this process has in fact already begun, as the Law Commission is currently reviewing the creation of a public interest defence for journalists' sources in the Official Secrets Act (it also does not note the fact that the Government is opposed to this).[34]

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

Protections for freedom of expression are already comprehensively and effectively covered by the HRA. We do not believe that there is any demonstrable need for these protections to be altered or superseded by new provisions within a new Bill of Rights.

Restoring a sharper focus on protecting fundamental rights

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

No

Please provide reasons

We entirely reject the proposal to create a new additional permission stage for human rights claims. This issue was not considered by the IHRAR and so it is unclear what evidence the Government is presenting in support of the claim that there is a significant problem with 'frivolous or spurious

[33] Contempt of Court Act 1981, section 10. https://www.legislation.gov.uk/ukpga/1981/49/section/10
[34] 'Protection of Official Data', Law Commission. https://www.lawcom.gov.uk/project/protection-of-official-data/

cases.'[35] The Government has presented no data as to the number of such cases that have reached the courts nor any case studies to illustrate the type of cases that would fall within this category. The assertion that cases without merit are a significant problem in need of remedy remains unsubstantiated. There is no other area of law where a claimant has to prove a significant disadvantage to gain permission to bring a case. This would set human rights cases apart from criminal or civil proceedings, without clear reason why this should be the case.

Courts already have an admissibility process. Claimants have to demonstrate that their claim has 'reasonable grounds' of success in order to bring a human rights case to the High Court and at each subsequent appeal stage. This admissibility stage already provides adequate safeguards against frivolous litigation. It ensures that only cases where there is an arguable breach of human rights are heard. If the case is arguable and has a reasonable prospect of success then a sense of natural justice would dictate, regardless of other considerations, that it should be heard. The claimant and the court should be given the opportunity to explore the merits of the case. Furthermore, courts engage in a fact finding process and it might not be apparent at the permission stage the full extent of disadvantage or public importance caused by the human rights breach. Such would only be established once the case is underway and the claimant has received full disclosure from the defendant public body. In cases where there is a parallel criminal investigation or an inquest, it may be years after the claim is issued that full disclosure is revealed.

It is important to note that no such permission stage exists within the European Convention on Human Rights. This proposal may lead to the perverse situation where someone fails to get permission domestically but then wins in Europe. This situation would benefit neither the claimant, who would have a considerably greater financial burden taking the case to Europe, nor the UK Government, which is likely to be subject to more adverse findings at Europe. Overall this will place too much burden upon the claimant, reduce access to justice for victims, and risk leaving possible human rights breaches unremedied.

9. **Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless?**
   No

   Please provide reasons:

As above, we reject the proposal to create an additional permission stage as it reduces access to justice and the Government has failed to evidence its claim that there is a significant problem with spurious cases. With regards to this second limb, the purpose of human rights cases is to provide redress for the individual who believes that their rights have been violated. Section 7 of the HRA already adequately defines the criteria for being considered a victim who is able to bring a human rights case. It correctly emphasises the role of the individual by specifying that 'only if he is (or would be) a victim of the unlawful act'.[36] It may be the case that a claim also has greater public importance, but this ignores the fundamental principle that human rights first and foremost protect the rights of the individual. A case should not be refused permission because it does not have wider

[35] *Human Rights Act Reform: A Modern Bill Of Rights – A consultation to reform the Human Rights Act 1998 '*, Ministry of Justice, p65. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf
[36] Human Rights Act 1998, section 7. https://www.legislation.gov.uk/ukpga/1998/42/section/7

public importance.

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

This question rests on the incorrect premise, as discussed above, that there is a substantial problem with spurious human rights cases requiring reform of the HRA. The Government has failed to evidence this claim or the need for reform. We are alarmed at the proposal that reform is needed to ensure differences in treatment for 'the claimants who have abused their rights or the rights of others'. Such a statement runs counter to the central tenet of human rights legislation; that human rights are inalienable and as such apply equally to all people regardless of whether or not the Government approves of their conduct.

Section 8(3) of the HRA mandates that judges take into account relief or remedy granted by other courts when determining an award for damages. This approach should be maintained as it allows judges to be flexible in their approach to damages and use a variety of different remedies. We reject the proposal to amend section 8(3) of the HRA to 'require applicants to pursue any other claims they may have first, either so that rights-based claims would not generally be available where other claims can be made, or in advance of any rights argument being considered, to allow the courts to decide whether the private law claims already provide adequate redress.'[37] Both proposals would prevent people making genuine claims or overly dictate when they can do so. Often human rights cases need to be brought to resolve an incompatibility in law and for the public body or Parliament to be instructed to fix it. This is good for both the claimant and society and should be encouraged. This proposal overly protects public bodies and reduces an important means of accountability. The Government has not provided a justification as to why human rights claims should be treated differently to other areas of law.

We believe this question should be refocused on how the Government can alleviate the conditions that cause human rights violations in the first instance. Such measures should include creating a Northern Ireland Bill of Rights, which takes account of the historical issues facing its communities and remains an unfulfilled obligation from the Good Friday Agreement in 1998. It should also clarify the definition of 'public body' under Section 6 of the HRA as to whether it applies to organisations carrying out public functions under contract. Please see our answers to question 19 and 20.

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

This question reveals a fundamental misunderstanding of rights-based legislation. The HRA, ECHR, and indeed any future Bill of Rights are not static documents, but constitutional frameworks designed to develop over time and keep pace with the moral, legal, and technological changes in society. Positive obligations are neither new, controversial, nor 'imposed' upon us, but an essential part of human rights in the UK since it became a signatory to the ECHR in 1951 having contributed to its drafting. It is essential that any new Bill of Rights ensures a minimum standard of protection for its citizens. This can only be achieved through a two-pronged approach, namely that

[37] *Human Rights Act Reform*, p66.

governments are obliged to not directly cause violations (negative obligations); and they are obliged to provide an environment where citizens are protected from violations occurring (positive obligations). The Government seems to be suggesting in this question that it should be able to pick and choose when it is required to meet its human rights obligations, depending upon what other priorities it has at the time. This is not a consistent, workable, or well thought out approach, and will result in more uncertainty in policy-making and the exercise of public bodies' powers rather than less.

This proposal also seems to ignore the fact that human rights obligations are not just about litigation, but are used by public bodies on a daily basis as the foundation of their safeguarding towards staff and service users. There are many key elements of our society that we would not want to live without that rely upon consistent and well-developed positive obligations. For example, it would be unacceptable for a public body to use cost, other pressing priorities, or lack of public interest as reasons to deny bereaved families the right to a Coroner's Inquest to see if the state failed in its positive obligations with regards to Article 2, as the families of the Hillsborough disaster did. Nor would it be acceptable for those same reasons to be used to prevent investigations in Children's Services if they fail to remove children from an abusive and dangerous home under Article 3, as was the case when the case of Baby P occurred. By their nature these obligations will develop as new cases and scenarios develop. That is not a flaw in the HRA, but one of the deliberate intentions behind it and one of its greatest strengths.

We recommend no change to the operation of positive obligations. It should also be noted that this was not considered or recommended by the IHRAR.

Preventing the incremental expansion of rights without proper democratic oversight

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

Before describing in detail our objections to the proposed reforms to section 3, we would like to point out the inconsistency in the Government's positions in this consultation. The consultation paper says 'We note that the IHRAR Panel did not support repeal of section 3. The government is minded to agree.'[38] Yet then it continues to propose two options that both involve repealing section 3. If the Government is minded to agree with the IHRAR's recommendations, why has it put forward these options for consideration in this consultation?

Option 1
First and foremost, we strongly disagree with the implicit view articulated in this question that section 3 of the HRA creates a permissive environment for the courts to interpret legislation in a manner inconsistent with Parliament's will. Such a viewpoint adopts an incredibly dim view of the

[38] *Human Rights Act Reform*, p69.

UK's constitutional tradition, and arguably misses the consistent historical assumptions that underpin the provision's existence – namely, the longstanding assumption that Parliament does not intend to enact legislation that is incompatible with our fundamental freedoms.[39]

We recognise that section 3 exceeds the common law foundations it is built upon, by enabling the courts to reinterpret legislation even in the absence of ambiguous language. But it is important to be clear that in doing this the courts are still giving effect to Parliament's intention. It was after all Parliament's intention in passing the HRA for all legislation, whenever possible, to be interpreted in a compatible manner. In other words, even if a seeming conflict may arise, in actuality the courts are merely giving effect to Parliament's will. In fact, since Parliament deliberately rejected the more restrictive model of 'reasonable interpretation' which exists in New Zealand, and instead modelled section 3 on the EU's 'Marleasing principle' – which was already routinely applied by UK judges at the time of deliberation – it is clear that Parliament's overriding intention was that all legislation should be compatible with the Convention.

In our view, the consistent case history of the courts since the advent of section 3 demonstrates that rather than abusing or unduly leveraging the HRA's powers, on the few occasions the courts have utilised section 3 (and 4 for that matter) they have done so with considerable caution and restraint.

It is important to remember that prior to remedying human rights violations, the HRA's framework requires the courts to identify and determine if a violation has occurred at all. Moreover, given that the HRA contains qualified rights it is rarely the case that the courts identify violations on a black and white basis. For example, in the case of humanist marriages in Northern Ireland the claimant contended that the state's non-recognition violated her rights under Article 9 (freedom of religion or belief) taken with Article 14 (prohibition of discrimination). However, in order to succeed she not only had to demonstrate that discrimination arose, but also that it was manifestly without reasonable foundation.[40] Putting this in context, one way in which the courts have demonstrated considerable caution under the HRA is by imposing a restriction on themselves to interpret the ambit of said rights in a strongly deferential manner.

Moreover, even in cases where the courts establish a violation of human rights, there is clear evidence of their reluctance to use section 3. In successive cases, judges have now affirmed the idea that section 3 cannot be used to change legislation in such a way as to amend its fundamental purpose.[41] Indeed, the examples of *R (Anderson) v Home Secretary* and *Re S* illustrate the courts' principled abstention from using their powers, as in *Anderson* the House of Lords refused to adopt an interpretation of sentencing laws that would have removed the Home Secretary's discretion to release a mandatory life sentence prisoner on licence; equally, in *Re S* the House of Lords overturned a Court of Appeal judgment for unduly reading in an interpretation which went against a fundamental feature of a local authority's care order under the Children Act 1989.

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[39] *R (Simms) v Secretary of State for the Home Department [1999] UKHL 33.*
[40] Smyth [2017] NIQB 55.
[41] See for example *Re S [2002] 2 AC 291* where it was held section 3 could not be used to give 'a meaning which departs substantially from a fundamental feature of an Act of Parliament; and *Ghadian v Godin Mendoza [2004] UKHL 30* where the court adopted a limitation of not going against the 'underlying thrust of the legislation being construed' or against 'the grain of the legislation'.

Use of section 3 powers is also very rare. The charity Justice collated examples of where this power had been used since the HRA. It identified only 24 cases where s.3(1) was used to interpret legislation that would otherwise have been incompatible with Convention rights. In these cases the court expressly used s.3(1) to reach a decision on the interpretation of the legislation, including 'reading it down' or 'reading in' a provision to make it Convention-compliant.[42] Over a twenty year period, this constitutes a very low number of cases. These cases do not place an overly burdensome demand on public resources to keep up with and the level of confusion arising from them is minimal. Therefore we cannot see that there is a need to repeal this power.

Option 2

Even assuming the above isn't true and that a convincing case could be made for section 3 resulting in interpretations beyond Parliament's will, we believe limiting section 3, as laid out in option 2, would be counterproductive and seriously risk undermining human rights protections for non-religious people, who would then have no option but to take their cases to Strasbourg.

Under option 2, section 3 of the HRA would be severely curtailed. This would result in the ability of the courts to 'read in' human rights-compliant interpretations to legislation (where it is possible to do so) being reduced to only a 'natural reading of the words used'.[43] An example of such a 'reading in' that has been made by the courts[44] (and has been even more influential in changing policy to avoid cases ending up in courts – as we will come onto with the question about section 6) is reading references to 'religion' as being inclusive of non-religious worldviews such as humanism.[45] This crucial power of interpretation is what has underpinned almost all positive developments in the freedom of belief and equal treatment of humanists and the non-religious in the last twenty years. The non-religious are estimated to comprise 53% of the population.[46] Further, a private opinion poll commissioned by Humanists UK in 2019, carried out by YouGov, found that 7% of British adults primarily identify with the term 'humanist' (the other options presented to non-religious respondents being atheist, agnostic, spiritual, naturalist, none of these, and don't know). This change would make it harder for arguments around religion or belief to be heard within UK courts and an equivalent change to section 6 would have the same respect with regard to the decisions of public bodies. It therefore works against the repatriation of rights that occurred under the HRA.

In depth, the ability to 'read in' human rights-compatible language often allows non-religious people to challenge unfair and discriminatory practices in the fields of education, employment, and marriage law. In 2005, humanist marriages became legally recognised in Scotland after the registrar general decided he had to make just such a reading in. In 2017, legally recognised humanist marriages in Northern Ireland were brought about after a judge read into existing

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[42] *The Independent Human Rights Act Review Call for Evidence – Annex to Response from JUSTICE* , JUSTICE, March 2021 https://files.justice.org.uk/wp-content/uploads/2021/03/09152051/Annex-to-response-to-IHRAR-call-for-evidence-JUSTICE.pdf

[43] *Human Rights Act reform*, p98.

[44] Smyth [2017] NIQB 55.

[45] It is unclear exactly what is meant by 'a natural reading of the words used.' However, we believe that it is unlikely that the interpretation of 'religion' as 'religion or belief' would continue to be protected, as we suggest that it means one that is within the range of plausible understandings without reading in additional words.

[46] 'Latest British Social Attitudes survey shows huge generational surge in the non-religious', Humanists UK, 1 April 2021. https://humanists.uk/2021/04/01/latest-british-social-attitudes-survey-shows-hugegenerational-surge-in-the-non-religious/

marriage law an interpretation that humanist marriage should be understood to be included.[47] This allowed humanist couples to have wedding ceremonies that are uniquely tailored to them and reflect their deeply held worldviews, just as their religious counterparts can. Since this change, humanist marriages have become popular in both jurisdictions.[48]

Similarly, in 2018 the Welsh Government concluded that humanism had to be equally included in Religious Education (RE) for this reason.[49] The same law also applies in England, and dozens of local authorities have made exactly the same 'reading in' in their RE provision. This change has allowed children across Wales and parts of England to learn for the first time about non-religious worldviews and has ensured that RE is reflective of the wider beliefs held within our society, which these children may choose to hold or will encounter in their daily lives. We also have been involved in multiple cases where local authorities have refused humanists membership of local statutory bodies responsible for overseeing religious education on the basis that humanism is not a 'religion'.[50] Again, these have generally been resolved through such a 'reading in'. Again, this decision has also been taken by the Welsh Government.

The same 'reading in' interpretation has allowed prisons and NHS Trusts to ensure that their chaplaincy and pastoral support teams provide like-minded and appropriate care for non-religious prisoners and patients. Such support has had a large impact upon the individuals who receive it, who previously were not served through an entirely religious service.

In these cases, the ability to argue that 'religion' must be interpreted to include analogous non-religious worldviews, such as humanism, has been vital in ensuring humanists and other non-religious people are not unlawfully discriminated against. As described above this interpretation has not only been used by judges in courts but also by public bodies in the allocation of resources for their service users. If section 3 or 6 was weakened the HRA would cease to provide an effective remedy in such cases. Public authorities would no longer be able to take advantage of these interpretations, resulting in victims having to seek redress through taking a case to court and seeking a statement of incompatibility under section 4. In such an eventuality, public authorities would be faced with more litigation, rather than less. Ultimately more victims would have to escalate cases to the ECtHR: a problem the HRA was specifically designed to overcome.

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[47] Smyth [2017] NIQB 55. This decision was later overturned by *Smyth [2018] NICA 25, where the Court of Appeal held that other statutory provisions meant that legal recognition of humanist marriages could be brought about without recourse to the Human Rights Act at all. But this proved unworkable in practice due to problems with these provisions that the Court did not consider. So the result was that in 2020 the Finance Minister chose to use section 6 to resort to the line of reasoning employed in the High Court decision.*

[48] Steven Brocklehurst, 'Scottish humanists to overtake Kirk weddings', BBC News Online, 18 June 2015. https://www.bbc.co.uk/news/uk-scotland-33146226

[49] 'Welsh Government to change law on school RE to include humanism', Humanists UK, 28 January 2019. https://humanists.uk/2019/01/28/welsh-government-to-change-law-on-school-re-to-include-humanism/

[50] See for example 'Humanist parent in High Court challenge to exclusion from local religious education body', Humanists UK, 2017:https://humanism.org.uk/2017/07/19/humanist-parent-in-high-court-challenge-to-exclusion-from-local-religious-education-body/; and 'English council backs down after legal challenge to exclusion of humanist from RE body', Humanists UK, 2019: https://humanism.org.uk/2019/08/02/english-council-backs-down-after-legal-challenge-to-exclude-humanist-from-re-body/.

Finally, it is worth considering further that outside our judicial system, the HRA imposes duties on all public authorities through section 6.[51] Section 3 thereby has a normative impact on society without invoking the powers bestowed on the courts. Indeed, the mindset of section 3 has arguably permeated government and local decision-makers and engendered a fundamental respect for human rights at all levels of decision making. For example, when the Welsh Government announced in 2019 its intention to amend the law on RE to explicitly include non-religious worldviews, putting them on an equal footing with major religions, its White Paper explicitly stated that its reason for changing the law was 'to take account of the effect of the Human Rights Act 1998'. [52] The purpose of the amendment was to make explicit in education law what the Government already saw a requirement flowing from sections 3 and 6. In other words, the HRA successfully cultivated a culture where rights were protected by providing a lens through which the Government assessed its decision-making, without the need for litigation.

In sum, we do not believe the application of section 3 leads to legislation being interpreted in a manner inconsistent with Parliament's will. Parliament intended in 1998 that laws should be reinterpreted in line with human rights and that wording redolent of long-superseded prejudices should be freed from such restrictions. Circumscribing section 3 would make the HRA a less effective legal remedy, undermining the wider social effects it has upon local decision-makers, and scaling back rights protections to effectively pre-HRA levels. Furthermore, we do not believe that the Government has adequately considered the implications of this reform upon non-religious people.

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

We recommend that the Government takes note of the recommendations of the IHRAR to reject further reform of section 3:

> 'there is no substantive case for [section 3's] repeal or amendment… any damaging perceptions as to the operation of section 3 are best dispelled by increased data as to its usage; and that, as a matter both of perception and reality, Parliament could and should take a more robust role in rights protection, a role which could sensibly be reinforced via an enhanced role for the JCHR.'[53]

We would support an enhanced role for the JCHR. This is not a matter that requires legislative change but increased resourcing so that it can carry out its function of scrutinising the human rights impact of every bill and of past legislation.

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

[51] Section 6 Human Rights Act 199. https://www.legislation.gov.uk/ukpga/1998/42/section/6
[52] 'Welsh Government to change law on school RE to include humanism', Humanists UK, 28 January 2019.https://humanists.uk/2019/01/28/welsh-government-to-change-law-on-school-re-to-include-humanism/
[53] *The Independent Human Rights Act Review*, p15.

Yes

Please provide reasons:
We support the recommendation of the IHRAR to create a database of section 3 judgments. It would allow for better analysis of its use and to evidence any areas for potential reform. Such a database could be used to identify some common interpretations (such as 'religion' meaning 'religion or belief') and whether legislation should be introduced to specifically put some common readings in on a direct statutory footing.

Declarations of incompatibility

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

Yes. It is our understanding that per the Supreme Court's judgment in *RR* public authorities (including courts and tribunals) can, and in fact must, disapply secondary legislation that is incompatible with the HRA.[54] In our view, this is an entirely rational position given that the HRA is primary legislation and primary legislation has always taken precedence over subordinate legislation within the UK's constitutional order. Failing that, we note that section 6(2) of the HRA specifically entertains the possibility of public authorities failing to comply with the Convention as a result of primary legislation, and therefore support the ruling in RR since it would have been open to Parliament to extend this exception to secondary legislation as well. In other words, Parliament must not have wanted public authorities to act incompatibly due to secondary legislation. Although we understand that RR failed to give any specific guidance on how public authorities (such as courts and tribunals) should disapply incompatible secondary legislation, we note that under the courts' ordinary powers of judicial review secondary legislation can be quashed and therefore believe there is no need to amend how courts and tribunals deal with incompatible subordinate legislative provisions. If Parliament had to intervene each time a piece of secondary legislation was found at fault this would massively increase its workload.

In sum, when the courts find that secondary legislation contravenes protected rights, they should retain the power to disregard it or to strike it down. The HRA is an expression of Parliament's will, including that all primary and secondary legislation should be compatible with it.

16. Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where subordinate legislation is found to be incompatible with the Convention rights?

No

Please provide reasons:

In principle, we support the introduction of suspended quashing orders, provided they remain a discretionary remedy. In very rare circumstances, we believe the application of immediate nullity can be inequitable and therefore this remedy would be appropriate. However, we are concerned a

[54] *RR v Secretary of State for Work and Pensions [2019] UKSC 52.*

wider application of this remedy would serve to deny claimants remedies, deter judicial review proceedings, and induce a blasé mentality within public bodies towards potentially unlawful conduct. For these same reasons, we have several reservations about the application of prospective-only remedies, and advise against their introduction in the above Bill and any extension to other legislation.

We recognise that in principle there may be some circumstances in which the provision of a suspended quashing order serves the interests of justice. Namely, circumstances where an immediate order of nullity would be inequitable e.g. where it would entail hardship for those who had legitimately relied upon a certain interpretation of the law. Nevertheless, it is important to stress that we would expect these circumstances to be exceptional and rare. Thus, we firmly believe this remedy, if enacted, must be discretionary, exceptional and hardly ever be used in cases involving secondary legislation.

If suspension became routine it would materially damage access to justice. The consequence would be to deny claimants the remedies (albeit maybe only temporarily) that from their perspective are arguably the most important aspect of judicial review. Indeed, given that these proposals would not ease the significant financial burdens associated with bringing a judicial review,[55] the risk of a court suspending its judgment would be likely to operate as a substantial disincentive for ordinary citizens to challenge unlawful behaviour. Moreover, aside from the fundamental injustice of denying a claimant their remedy, it follows that if suspended remedies deter claimants from challenging unlawful conduct, then overall accountability would also be severely curtailed. As the title of the Government's guidance on judicial review for local authorities, *Judge over your shoulder*, epitomises, one of the undisputed benefits of judicial review is the effect it has upon decision-making. Indeed, the threat of knowing that unlawful conduct can be challenged via the courts consistently leads to better decision making. Consequently, if public bodies (including the Government) were no longer concerned about litigation arising from their conduct, or knew that the immediate consequences would be at worst minor, we are concerned they would become more prone to careless decision-making.

With regards to prospective-only quashing orders, we strongly recommend against its extension to subordinate legislation. The risk of prospective-only remedies is two-fold. First, to a far greater extent than suspended quashing orders, making a remedy only applicable for the future undermines a claimant's access to justice. This is because whilst a suspended remedy will at least theoretically lead to the provision of restitution at some point (albeit a later date than preferred), prospective remedies unambiguously do not right the wrong complained of by the original claimant. Thus, prospective remedies violate the fundamental principle of judicial review that someone who endures unlawful treatment is entitled to a remedy. Further, while suspended quashing orders would disincentivise some claimants, prospective-only remedies would deter far more from bringing actions: claimants would have to fund the prohibitive costs of a judicial review without any guarantee of a remedy at the end. Moreover, prospective-only remedies would create a prisoner's dilemma situation in which any potential claimant would see advantage in holding off in the hope that another might initiate an action. The result might well be that questionable decisions went unchallenged.

[55] In our experience a claim will cost at least £40,000.

This in turn leads to the second major drawback of prospective-only remedies: reckless decision-making. If it was unlikely unlawful conduct would be challenged, or if challenged that the effects of the impugned acts would anyway remain valid, public bodies would clearly have less need to worry about the lawfulness of their decisions. As noted above an important facet of judicial review is that it encourages better decision-making in the first place. For example, following our proposed challenge against the exclusion of a humanist representative from the SACRE[56] in the Vale of Glamorgan, it was apparent that other local authorities sought to learn from the Vale of Glamorgan's mistake by correcting their own policies. Had it been the case that our challenge had no immediate effect, it is hard to see why other local authorities would have felt compelled to improve their own policies. Put simply, prospective remedies are unattractive because they risk promoting a culture of bad decision-making.

Aside from these major risks, from a constitutional standpoint, we fear prospective-only rulings might blur the separation of powers. The key analytical distinction between the legislature and judiciary has always been that the former makes law, and the latter applies it. If, however, the courts became capable of issuing rulings that would only apply in the future, we think they would in effect be making legislative decisions in all but name. To the extent the Government is therefore concerned by the perceived over-politicisation of the judiciary, it should be conscious that its reform would dramatically exaggerate this perceived problem further. In the event a prospective-only ruling is given, we believe two essential safeguards should be introduced: courts should be required to state their reasons and claimants should be allowed to appeal.

Remedial orders

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

B. Similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself

Please explain your reasons:
There is little to no evidence to support the Government's case that there is a need to reform the system of remedial orders. It is not the case that this power undermines the role of Parliament. Although in general we believe 'Henry VIII powers' should be subject to enhanced oversight, with regards to section 10 we believe the existing HRA framework provides sufficient scrutiny. In particular, we are satisfied that: (i) the Joint Committee on Human Rights' ability to flag specific remedial orders for Parliament's attention, (ii) the requirement that both Houses of Parliament must approve remedial orders for them to come into effect, and (iii) the 120 day period in which orders must be laid before Parliament for consideration, all already provide sufficient parliamentary safeguards on the use of remedial order process.[57] Indeed, given that Parliament already has four

[56] A statutory local body responsible for overseeing religious education (the Standing Advisory Council for Religious Education or SACRE).
[57] 'Remedial Orders', UK Parliament, 2021. https://guidetoprocedure.parliament.uk/articles Htt2atZR/remedial-orders

months to consider remedial orders before they become effective, we are concerned that efforts to 'enhance' Parliament's role might in actuality result in unnecessary delays to the resolution of human rights abuses.

Moreover, remedial orders are not used often enough to be a cause for concern for parliamentary sovereignty or to be unduly burdensome. Statistics published by the Ministry of Justice suggest that there have only been eight remedial orders since 1998; the consultation document says 11.[58] This represents a small percentage of the declarations of incompatibility that have been made over the same time period, most of which were either resolved through primary legislation or overturned on appeal. It is important that areas of incompatibility are resolved as quickly as possible. To remove or weaken the power of remedial orders would simply damage one of the ways that this can be achieved without gaining anything in exchange. We recommend that the Government take heed of the recommendation of the IHRAR that only modest reform is needed in this area in line with option b above.

Statement of Compatibility – Section 19 of the Human Rights Act

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

The suggestion that the requirement for ministers to make a statement about the human rights compatibility of prospective bills somehow undermines 'space for innovative policies' is absurd.[59] This requirement is not overly burdensome and has the normative benefit of embedding human rights thinking throughout the legislative process – reducing the potential for challenges and adverse findings later on. It is also the case that a Minister can still proceed with a bill even if they are unable to make this statement. Therefore it does not undermine executive or parliamentary powers as it doesn't take away the power to bring legislation forward, but enhances the level of scrutiny, accountability, and transparency within the process. It is simply a matter of good practice. This is also the conclusion of the IHRAR, which dismissed all options for reform of Article 19 stating;

> 'Section 19 plays an important role… in helping to ensure that Government and Parliament consider the application of [the rights in the Human Rights Act]… to new legislation… [T]here can be no doubt that it has had a major, transformational and beneficial effect on the practice of Government and Parliament in taking account of human rights issues when preparing and passing legislation.'[60]

The motivation behind this question deserves unpacking. If the Government is suggesting that there should not be a requirement for bills to be compatible with the HRA, then we would contend that this is a moot point so long as the UK is a signatory to the ECHR.

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[58] 'Responding to human rights judgments Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020', Ministry of Justice, December 2020. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf

[59] *Human Rights Act reform* p74.

[60] *The Independent Human Rights Act Review*, p224.

Application to Wales, Scotland and Northern Ireland

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?

Firstly, the governments of the devolved nations have made it clear that they do not support wide reform of the HRA or the introduction of a new 'Bill of Rights'. Scotland's Deputy First Minister made the feelings of the Scottish Government very clear in a letter to the UK Minister for Justice, where he stated:

> 'I thought it might therefore be helpful to put on record the Scottish Government's principled objection to the proposition that the Human Rights Act requires to be "reformed" or replaced by a "modern Bill of Rights". I also want to make very clear from the outset that much of what is proposed in the consultation intrudes, whether directly or indirectly, into matters which lie firmly within the devolved competence of the Scottish Parliament. These matters are not confined to proposals such as those relating to trial by jury which are self-evidently for the Scottish Parliament, and for it alone, to determine… Indeed, the Scottish Government has an explicit manifesto commitment to bring forward legislation during the current parliamentary session which will incorporate further human rights treaty obligations into Scots law, so that they become justiciable in the Scottish courts… The Human Rights Act is, in its current form, woven directly into the fabric of the current constitutional settlement. Any change to the existing statute would therefore itself be a constitutional matter with specific and direct implications for the exercise of both legislative and executive competence by devolved institutions. As such, I am very clear that proposals of this nature would require the legislative consent of the Parliament under the Sewel Convention.'[61]

The opposition of the Scottish Government to these reforms could not be plainer. Not only does this consultation create unanswered questions and confusion as to the devolved nature of human rights in Scotland and what consent is needed from the Scottish Parliament, but it also pulls against the direction of travel of human rights thinking in Scotland, which has consistently moved towards building and improving upon the rights laid out in the HRA and incorporating more human rights treaties into Scots law.

Jane Hutt MS, Welsh Minister for Social Justice, has laid out similar concerns:

> 'We are disappointed by the pejorative and leading nature of the report and the consultation questions. It remains our firm view that human rights are, and should continue to be, irreducible and apply equally to all persons. The consultation, in places, seems to veer off course from this important and fundamental principle. The Human Rights Act 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights into domestic law. The Welsh

[61] John Swinney MSP, *Human Rights Act: letter to the Lord Chancellor*, 21 December 2021. https://www.gov.scot/publications/human-rights-act-letter-to-the-lord-chancellor/

> Government is committed to defending the rights of the people of Wales against any diminution and is not convinced of the need to replace the Human Rights Act.'[62]

Further, the UK Government cannot ignore the detrimental impact these proposals will have upon the Good Friday Agreement in Northern Ireland. This agreement is safeguarded by continued membership and access to the ECHR. This means the HRA has an elevated constitutional position in Northern Ireland. Undermining it or creating a parallel set of rights under a new Bill of Rights is likely to not only undermine the peace process. More immediately, it will have an impact upon confidence in policing, as the HRA provides the oversight framework needed to effectively and fairly police the divided communities. As the Good Friday Agreement is also an international treaty overseen by the UN, changes to its framework would both undermine the UK's desire to be a world leader in human rights and would require consultation with the Irish Government. Neither of these considerations have been expanded upon in this consultation. Finally, these proposals haven't taken into account the process of creating a supplementary Bill of Rights for Northern Ireland, which the UK Government is obliged to do under the Good Friday Agreement. Not only does this proposal ignore the fact that a report on the progress of this bill is due imminently, but it undermines the direction of travel that Stormont has been going in with its own bill of rights for decades.

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

Although we believe that the definition of public authority in the HRA is broadly correct, we think that section 6 should go further and clarify that all organisations when carrying out 'public functions' on behalf of the government are subject to the Act. We believe that section 6 of the HRA has not been successful in protecting public service users from discrimination because its definition of which bodies fall under its provisions is too narrow and does not cover many organisations that are providing public services under contract. A feature of the contemporary UK is the increasing contracting out of public services, from housing to transport, social care services to welfare and employment services, and to private and third sector providers. This means that increasing numbers of service users are left in a lottery as to whether they are covered by the HRA or not. Human rights have not adapted to the changing situation in UK service provision and increased involvement of non-state bodies.

Increasingly such services are being delivered by religious organisations, who are not defined as public bodies. If a service user, who has no choice over which organisation is providing the service, believes that their rights have been violated by that organisation on the basis of religion or belief, sex, or sexual orientation, they will not be able to use the HRA as a mechanism of redress. The belief systems of various religious organisations and the tenets of the HRA can be in conflict and this can affect the level of service experienced by users. Otherwise legally mandatory standards can easily be compromised if religious motivations are allowed to colour the service provided. Whereas secular services focus on addressing the causes of problems and on actualising human capacity, regardless of who the individual is, or of their beliefs, there is evidence that religiously motivated

[62] Jane Hutt MS and Mick Antoniw MS, *Written Statement: UK Government Proposal to Reform the Human Rights Act 1998.* 12 January 2022.https://gov.wales/written-statement-uk-government-proposaL-reform-human-rights-act-1998

individuals and organisations can be as interested in the promotion of their religion as addressing the practical needs of service users. For example, in a memorandum to the Joint Committee on Human Rights in 2006 the Salvation Army, an evangelical Christian organisation, stated, 'whilst it is appropriate for the state to be religiously neutral, this is impossible for an organisation such as The Salvation Army, which delivers its services as a direct outworking of the Christian faith.'[63] The Salvation Army, which holds contracts to provide services to vulnerable trafficked women, openly propagates discriminatory views about homosexuality and openly admits that its mission is to proselytise.

We recommend that section 6 of the HRA is enhanced to ensure that the definition of a public body is extended to include all organisations carrying out any function on behalf of a public authority under contract.

Public authorities – section 6 of the Human Rights Act

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

None of these options

Please explain your reasons:
Please see our answer to question 12, regarding reform to section 3, which should be read in conjunction with the answer below. We reject both options. Section 6(2) of the HRA provides that if a public body has no choice but to act incompatibly with an individual's rights because it was required to do so by primary legislation, then it has not acted unlawfully. This is generally considered to be a reasonable defence. However, there seems to be no evidence to support this defence being extended. It is a reasonable expectation that a public authority performing a public function is aware and keeps up with the legal requirements placed on it, not only through acts of parliament but also how those acts have been interpreted by the Courts, for example under section 3 powers. Where confusion might arise in this regard it would be reasonable for the public authority to take legal counsel before reaching a decision on how to carry out its functions.

Moreover, it is the clear will of Parliament that public authorities do not act in a way that is incompatible with the HRA. This is evident in its passing of the HRA. Therefore there should be no occasions where a public authority acting in a way incompatible with the HRA would somehow be seen as enacting the clear will of Parliament. It is a contradiction.

[63] *Quality and Equality: Human Rights, Public Services and Religious organisations,* Humanists UK, 2007. https://humanism.org.uk/wp-content/uploads/BHA-Public-Services-Report-Quality-and-Equality.pdf

Extraterritorial jurisdiction

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

We believe that the Government should heed the recommendation of the IHRAR, that although further clarity is needed with respect to extraterritorial jurisdiction, this is not best achieved through inclusion in a new Bill of Rights or amendment to the HRA. The IHRAR commented:

> 'A unilateral solution, for instance by legislative amendment of the HRA, would not resolve the position under the Convention, which would remain binding on the UK internationally and would risk damaging vital UK interests (particularly in the Military and Intelligence spheres) in cases before the ECtHR. The matter cries out for a national conversation, as suggested to IHRAR during the Armed Forces Roundtable, together with inter Governmental negotiations, augmented by judicial dialogue between UK Courts and the ECtHR.'[64]

Qualified and limited rights

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

We reject both options. Option 1 seeks to instruct courts, through guidance, on how to determine proportionality. The courts do not require 'guidance' from politicians about how to balance qualified rights. This is an area that they are better placed to determine. The imposition of 'guidance' on how to determine proportionality would amount to political interference with the role of the courts. Option 2 goes further to suggest that because Parliament has passed legislation it is by definition in the public interest and/or necessary in a democratic society. Again, this is the role of the courts and not Parliament to determine. Such interference risks undermining the independence of the judiciary.

[64] *The Independent Human Rights Act Review*, p337.

Deportations in the public interest

24. How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.
Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment;
Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights; and/or
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.

We reject all three options as they contradict fundamental human rights principles. Before turning to the options, it is hard to understand why this question is in a consultation about reforming the HRA. Firstly, the IHRAR did not identify any issues with deportation in its review, so it is unclear on what basis the Government is evidencing its claim that reform of the HRA is needed in regard to this problem. Moreover, the mechanics of when someone can be deported, how long it takes, etc are not matters for a Bill of Rights. Such issues are better addressed through ordinary legislation. The Government is currently pushing ahead with the Nationality and Borders Bill, which addresses many of these concerns and is subject to full parliamentary scrutiny. [65]

Turning to option 1, this must be rejected out of hand because it undermines the fundamental principle that human rights are universal. The consultation states that 'it could be clarified that certain rights, such as the right to family life, cannot prevent the deportation of a certain category of individuals (emphasis added).'[66] It goes without saying that human rights apply equally to all people by virtue of their being irrespective of, as this consultation suggests, how much they are liked by society at large. Whatever other merits or problems with this proposal, it cannot be accepted on this basis.

Options 2 and 3 both would undermine or even remove the role of independent judges in determining human rights and other questions of law. Instead, politically unpopular groups would have their rights determined by government ministers and officials only. This is likely to lead to discriminatory practices as well as undermining Article 13 rights to receive an effective remedy. Ultimately, it will result in more people taking appeals against their deportations to Stasbourg, which would significantly delay the process even further.

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

[65] Nationality and Borders Bill, https://bills.parliament.uk/bills/3023
[66] *Human Rights Act reform*, p81.

We reject the framing of this question as it implies that migrants to this country would enjoy access to fewer rights and protections, as well being excluded from having independent judges adjudicate on their cases. It is not the case for UK citizens that their rights are solely determined by a government minister without judicial oversight, and it should not be the case for foreign nationals whilst in the UK. This undermines that principle of the universality of human rights and is ultimately discriminatory on the basis of nationality. The Government has already consulted on proposals to alter the UK's obligations under the Refugee Convention as well as the HRA in its New Plan for Immigration. We submitted a response to that consultation stating that we did not feel that such changes could be made while still respecting our domestic and international obligations.[67] The Government has, despite these concerns, pressed ahead with many of these changes under the Nationality and Borders Bill, which is still in Parliament. It is worth highlighting that the United Nations High Commissioner for Refugees,[68] multiple UN Special Rapporteurs,[69] and legal experts[70] have all stated the Bill is likely to violate the UK's international obligations, with devastating consequences.

Emphasising the role of responsibilities within the human rights framework

26. We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:
a. the impact on the provision of public services;
b. the extent to which the statutory obligation had been discharged;
c. the extent of the breach; and
d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.
Which of the above considerations do you think should be included? Please provide reasons.

I have another answer

Please provide reasons:

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[67] *Home Office Consultation: New Plan For Immigration Response from Humanists UK*, Humanists UK, April 2021.https://humanists.uk/wp-content/uploads/2021-04-15-RTR-Home-Office-New-Plan-for-Immigration.pdf

[68] 'UK asylum bill would break international law, damaging refugees and global co-operation', UNHCR, September 2021,https://www.unhcr.org/uk/news/press/2021/9/614c163f4/unhcr-uk-asylum-bill-would-break-international-law-damaging-refugees-and.html

[69] 'United Kingdom Nationality and Borders Bill undermines rights of victims of trafficking and modern slavery, UN experts say,' OHCHR, 14 January 2022,https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28027&LangID=E; 'United Nations Special Rapporteurs express concerns over impact of Nationality and Borders Bill on the human rights of victims of trafficking', Electronic Immigration Network, 15 November 2021, https://www.ein.org.uk/news/united-nations-special-rapporteurs-express-concerns-over-impact-nationalityand-borders-bill

[70] Raza Husain QC, Jason Pobjoy, Eleanor Mitchell, Sarah Dobbie, *Joint Opinion: Nationality and Borders Bill*, Freedom from Torture, October 2021,https://www.freedomfromtorture.org/sites/default/files/2021-10/Joint%20Opinion%2C%20Nationality%20and%20Borders%20Bill%2C%20October%202021.pdf, Stephanie Harrison QC, Emma Fitzsimons, Ubah Dirie and Hannah Lynes, *Nationality and Borders Bill: Advice to Women for Refugee Women*, Women for Refugee Women, 23 November 2021, https://www.refugeewomen.co.uk/wp-content/uploads/2021/11/Garden-Court-legal-opinion-on-Nationality-and-Borders-Bill.pdf

We reject the proposal to alter the way in which courts can determine how to award remedies. It is not the role of the Government nor Parliament to set criteria for how the courts make decisions about what remedies are awarded when a court finds that public bodies (including the Government) have breached human rights. We have an independent courts system in this country. These courts are better placed to determine remedies on a case by case basis taking into account the facts in each case. The Judicial Review and Courts Bill is already seeking to limit the remedies that victims can be awarded. Further restrictions, as proposed here, will undermine access to justice and encourage a *laissez faire* attitude on the part of public authorities towards ensuring their conduct is compatible with the HRA. If a public authority is concerned about the impact of damages from losing a human rights case, then it should prioritise ensuring compliance with the HRA in the first instance.

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

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

As stated above, both options 1 and 2 must be rejected on the grounds that they undermine the universality of rights. Moreover, this ignores the principle that compensation is awarded based on damage to the claimant, who is established as a victim of a human rights violation. The claimant is not on trial and it is the conduct of the public authority that is relevant to the case. Taking into account the victim's conduct in damages skews the balance of proceedings in favour of the public authority. Such a rebalancing cannot be said to create a fair or equitable situation.

With option 2, there is no indication in the consultation as to what kind of conduct would be considered or if it has to be relevant to the case in hand. This proposal would perversely punish the victim for conduct which may have nothing to do with the human rights violation that they have experienced. It also ignores the fact that most human rights cases are not brought for the purpose of awarding damages and that damages are generally much smaller than those awarded in civil cases. This creates a worrying distinction between 'deserving' and 'undeserving' victims, which is simply not how any just legal system should work, and sets up a troubling slippery slope where damages could be increasingly restricted.

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

We reject the proposal to create an affirmative procedure, including potentially a vote, in Parliament when the UK receives an adverse judgment from the ECtHR. The implication of this question and the likely outcome of its implementation would be to slow down or block remedying adverse

findings with which the Government disagrees. The contention that the Government wants to use this mechanism 'to test the temperature of Parliament, either on a proposed course of action to address an adverse ruling, or by holding a vote on a particular issue' is absurd. The Government could schedule a debate in Parliament if it wanted to on an adverse judgment without there being a required mechanism for doing so. Also Parliament would have a say on any legislative changes that would be required as a result of an adverse judgment anyway. Either through new legislation being brought forward or remedial orders, parliamentary scrutiny would occur. In extreme circumstances the Government could also choose to derogate from a duty in this situation. The only purpose served by creating a new parliamentary mechanism would be to frustrate the implementation of Strasbourg findings.

Impacts

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

- **What do you consider to be the likely costs and benefits of the proposed Bill of Rights?**
- **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)**
- **How might any negative impacts be mitigated? (Please give reasons and supply evidence as appropriate)**

We are restricting our answer to this question to the equality implications of these proposals on the non-religious, as laid out in our answer to questions 12 and 21 of this consultation. The repeal or weakening of sections 3 and 6 powers could potentially result in the diminishing of protections for non-religious people in prior legislation where the term 'religion' is understood to be inclusive of humanists and other non-religious people. This is not an intended outcome of these reforms, nor is it a desirable one. It would result in the rolling back of the normative effect created by this interpretation, which has seen discriminatory barriers removed for non-religous people in employment, education, and marriage law, amongst other things. It is also likely to result in more cases being brought to the ECtHR, and declarations of incompatibility resulting in extra costs and additional resources being spent by Parliament fixing them, and frustrating citizens' access to speedy justice.

We recommend that the Government mitigate these concerns, which are ones of fairness and equality, by dropping plans to repeal or weaken sections 3 and 6 of the HRA. It should also develop a database, as recommended by the IHRAR, to dispel the misconception that the section 3 power is being misused by judges. Overall sections 3 and 6 are sensible measures that respect the will of Parliament and allow for errors in legislation to be easily and painlessly corrected as far as it is possible to do so without relegislating the issue. It is good for victims and it is good for Parliament.

APPENDIX ONE: HUMAN RIGHTS ACT AND JUDICIAL REVIEW COALITION

Our commitment to human rights has seen us organise a coalition over the last year of more than 250 charities, trades unions, human rights organisations, and religion or belief groups in opposition to any weakening of the Human Rights Act (HRA) or judicial review, at https://humanrightsact.org.uk/.

Concerned at the UK Government's intentions to review the human rights framework and judicial review, the coalition's signatories have come together to state:

> 'While every system could be improved, and protecting rights and freedoms for all is a balancing act, our Human Rights Act is a proportionate and well-drafted protection for the fundamental liberties and responsibilities of everyone in this country.
>
> 'The Act guarantees the rights to free speech and expression, to life, to liberty, to security, to privacy, to assembly, and to freedom of religion or belief. It prohibits torture and guarantees fair trials and the rule of law.
>
> 'Judicial review is an indispensable mechanism for individuals to assert those rights and freedoms against the power of the state.'

1. A B Charitable Trust
2. Accord Coalition
3. Action on Armed Violence
4. ACTION:FGM
5. AdviceUK
6. Advocacy Focus
7. African Rainbow Family and Manchester Migrant Solidarity
8. All Wales People First
9. Alliance for Choice
10. Alliance for Inclusive Education (Allife)
11. Amnesty International UK
12. Another Europe is Possible
13. Antenatal Result and Choices (ARC UK)
14. Article 12 in Scotland
15. Article 19
16. Article 39
17. Association for Teaching Citizenship
18. Asylum Link Merseyside
19. AVA (Against Violence and Abuse)
20. Ban Conversion Therapy
21. Barrow Cadbury Trust
22. BASW (British Association of Social Workers)
23. Belfast Islamic Centre
24. Best for Britain
25. Beyond Skin (Northern Ireland)
26. Big Brother Watch
27. Biofuelwatch
28. Birthrights
29. Black2Nature
30. Bond
31. BPAS
32. British Association of Journalists
33. British Institute of Human Rights
34. British Muslims for a Secular Democracy
35. British Youth Council
36. Business and Professional Women
37. Campaign against Climate Change
38. Campaign against the Arms Trade
39. Campaign for Freedom of Information
40. Campaign for Nuclear Disarmament
41. CARAS
42. Catholic Agency for Overseas Development
43. Centre for women's justice
44. Changing Our Lives
45. Children England
46. Children in Scotland

47. Children's Rights Alliance for England
48. Christian Solidarity Worldwide
49. Chronic Illness Inclusion Project
50. Coalition for Racial Equality and Rights
51. Committee on the Administration of Justice
52. Common Wealth
53. Community
54. Compass
55. Compassion in Politics
56. Compassion in World Farming
57. Coram
58. Cycling UK
59. Dignity in Dying
60. Disability Action (NI)
61. Disability Equality Scotland
62. Disability Law Service
63. Disability Rights UK
64. Discrimation Law Association
65. Doctors for Choice UK
66. Downs Syndrome Association
67. Each Other
68. ECPAT UK
69. Emmaus
70. Engender
71. English PEN
72. Environment SMART
73. Environmental Rights Centre for Scotland
74. Equal Rights Trust
75. Equality Network
76. Equality Trust
77. Equally Ours
78. EVAW
79. Fair Play South West
80. Fair Vote UK
81. Fairness Respect Equality Shropshire (FRESh) Ltd
82. Family Rights Group
83. Fawcett Society
84. Feedback
85. Filia
86. Focus on Labour Exploitation (FLEX)
87. Foxglove
88. Frack Free United
89. Free the Night
90. Freedom from Torture
91. Fridays For Future Scotland
92. Friends at the End
93. Friends Families Travellers
94. Friends of the Earth
95. Fuel Poverty Action
96. Galop
97. Gender Identity Research and Education Society
98. Gendered Intelligence
99. Glass Door
100. Glitch
101. Global Justice Now
102. Good Thinking Society
103. Greenpeace UK
104. Health and Social Care Alliance Scotland (the ALLIANCE)
105. Helen Bamber Foundation
106. Hft's Family Carer Support Service
107. Howard League for Penal Reform
108. Human Rights Consortium
109. Human Rights Consortium Scotland
110. Humanade
111. Humanist Society Scotland
112. Humanists UK
113. IKWRO
114. Inclusion London
115. Inclusion Scotland
116. Index on Censorship
117. Inquest
118. Institute of Race Relations
119. Internews
120. Jewish Council for Racial Equality (JCORE)
121. Joint Council on the Welfare of Immigrants
122. Journey to Justice
123. Jubilee Debt Campaign
124. Just fair
125. Just for Kids Law
126. Just Right Scotland
127. Kaleidoscope
128. Latin American Women's Rights Service
129. Law Centre NI
130. Law Centres Network

131. LEAP Sports
132. Learning Disability England
133. Leonard Cheshire
134. Lesbian Immigration Support Group
135. LGBT Consortium
136. LGBT Foundation
137. Locum Doctors' Association
138. LSE Human Rights
139. Lyrix Organix
140. Mary Ward Legal Centre
141. Maternity Action
142. Medical Justice
143. Mencap Liverpool & Sefton
144. Mermaids
145. Metro Charity
146. Migrants Organise
147. Migrants Rights Network
148. Minority Rights Group International
149. Mosaic LGBT Youth Centre
150. Musicians' Union
151. Muslim Engagement and Development (MEND)
152. My Death My Decision
153. National Aids Trust
154. National Children's Bureau
155. National Deaf Children's Society
156. National Survivors User Network
157. NCVO
158. NDTi
159. Network for Police Monitoring (Netpol)
160. Network of Sikh Organisations (UK)
161. NI Council For Racial Equality
162. nia
163. Nurses United UK
164. Omega Research Foundation
165. OneKind
166. Open Rights Group
167. Open Space Society
168. Palestine Solidarity Campaign
169. Paul Hamlyn Foundation
170. Peace Pledge Union
171. People First
172. People First (Scotland)
173. Pesticide Action Network
174. Peter Tatchell Foundation
175. PILS Project
176. Positive Money
177. Possability People
178. Prison Reform Trust
179. Psychologists for Social Change Cyu
180. Psychotherapy and Counselling Union
181. Quakers in Britain
182. Race Equality First
183. Race Equality Foundation
184. Race on the Agenda
185. Rainbow Migration
186. Rainbow Project
187. RAMFEL (Refugee & Migrant Forum of Essex and London)
188. Refuge
189. Refugee Action
190. Refugee Council
191. Release
192. Rene Cassin
193. Reporters without Borders
194. Reprieve
195. Restorative Justice for All
196. Revolving Doors
197. Rights and Security
198. RNIB
199. Safe Passage
200. Samaritans
201. Save the Children
202. Scotland's International Development Alliance
203. Scottish Legal Action Group
204. Scottish PEN
205. Scottish Refugee Council
206. Scottish Womens Rights Centre
207. Security Women
208. Sheila Mckechnie Foundation
209. Shelter
210. Small Charities
211. Soroptimist International Great Britain and Ireland
212. Southall Black Sisters
213. Spinal Injuries Association
214. Statewatch
215. Stonewall
216. StreetDoctors
217. Student Christian Movement
218. Students for Global Health

219. Students organising for Sustainability
220. Tai Pawb
221. Talk Fracking
222. Tearfund
223. Terrence Higgins Trust
224. The Aplastic Anaemia Trust
225. The Baring Foundation
226. The Big Issue Foundation
227. The Centre for Education and Youth
228. The Judith Trust
229. The Proud Trust
230. The Ramblers
231. The Traveller Movement
232. The Western Sahara Campaign
233. The Wildlife Trusts
234. Together Scotland
235. Townswomen's Guild
236. TransActual
237. Tzedek
238. UK Black Pride
239. Unlock Democracy
240. Uplift
241. Voluntary Organisations Disability Group
242. Water Witness International
243. We Own It
244. Welsh Refugee Council
245. WILPF UK
246. Wish: A voice for women's mental health
247. Womankind Worldwide
248. Women and Girls Network
249. Women for refugee women
250. Women's Aid
251. Women's Budget Group
252. Women's Resource Centre
253. Zero Tolerance

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