



Ministry
of Justice

Human Rights Act Reform: A Modern Bill Of Rights

**A consultation to reform
the Human Rights Act 1998**

December 2021

CP 588



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Human Rights Act Reform: A Modern Bill Of Rights

A consultation to reform the Human Rights Act 1998

Presented to Parliament
by the Deputy Prime Minister,
Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

December 2021



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About this consultation

To: This consultation is aimed at legal practitioners, experts and academics in human rights law, human rights advocates, and anyone else interested in our framework of human rights law.

Duration: From 14/12/21 to 08/03/22

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How to respond: Please submit your response by 8 March 2022 by filling in the online response form which can be found here: <https://consult.justice.gov.uk/human-rights/human-rights-act-reform>

Alternatively, you can also send your response via post or email to:

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Response paper: A response to this consultation exercise will be published in due course at: <https://consult.justice.gov.uk/>

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Foreword

The United Kingdom has a long, proud, and diverse history of freedom. This stretches from Magna Carta in 1215, the 1689 Claim and Bill of Rights, and the Slave Trade Act of 1807, through to the 1918 Representation of the People Act.

The Human Rights Act passed in 1998 has been a further stepping-stone along the path of that tradition. No law, however, is ever the last word on the subject.

This consultation marks the next step in the development of the UK's tradition of upholding human rights. It has been informed by the work done by Sir Peter Gross, and the Panel he chaired which conducted the Independent Human Rights Act Review – the report which we are publishing alongside this consultation. I want to thank Sir Peter, the Panel and their team for their hard work, insights, and contribution to our thinking at the Ministry of Justice.

Our proposals, which form the basis of this consultation, reflect the government's enduring commitment to liberty under the rule of law. The government remains committed to the European Convention on Human Rights – and, indeed, the UK's tradition of human rights leadership abroad, as demonstrated by the introduction of our Magnitsky global human rights sanctions regime.

Equally, our system must strike the proper balance of rights and responsibilities, individual liberty and the public interest, rigorous judicial interpretation, and respect for the authority of elected law-makers. In this consultation, we assess how the Human Rights Act has operated in practice, and how it can be revised and improved.

We make far-reaching proposals for reform, with a particular focus on those quintessentially UK rights, such as freedom of speech and the right to trial by jury. We examine problematic areas, including the challenges in deporting foreign national offenders. We consider in detail the procedural framework of the Human Rights Act. And we look at the relationship between the UK courts and Parliament and the European Court of Human Rights in Strasbourg.

We intend to revise and reform the flaws we have identified, and replace the Human Rights Act with a modern Bill of Rights, one which reinforces our freedoms under the rule of law, but also provides a clearer demarcation of the separation of powers between the courts and Parliament.

Our proposals recognise the diverse legal traditions across the UK, alongside our common heritage. We will be seeking the views of each of the devolved administrations, and across all four nations of the UK, to ensure we safeguard our human rights protections in accordance with a common framework, whilst reflecting our diversity and devolved competences.

We will carefully consider all the responses we receive, as the government takes forward the proposals in this consultation. The task of nurturing the UK's tradition of liberty and rights is never finished. This consultation turns the first page of the next chapter in our long history of human rights – and begins the work to refine our law, curtail abuses of the system, restore public confidence, reinforce the independence of the judiciary, and shore up the sovereignty of elected law-makers in Parliament.

The Rt Hon Dominic Raab MP

Deputy Prime Minister, Lord Chancellor, and Secretary of State for Justice

Executive summary

1. This command paper sets out, and seeks views on, the government's proposals to revise and replace the Human Rights Act 1998 with a Bill of Rights.
2. The government's 2019 manifesto pledged to:

'[...] update the Human Rights Act and administrative law to ensure there is a proper balance between the rights of individuals, our vital national security and effective government.'
3. We will overhaul the Human Rights Act passed by the then Labour government in 1998 and restore common sense to the application of human rights in the UK. We will remain faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights ('the Convention'). The Bill of Rights will protect essential rights, like the right to a fair trial and the right to life, which are a fundamental part of a modern democratic society. But we will reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society.
4. Our reforms will be a check on the expansion and inflation of rights without democratic oversight and consent, and will provide greater legal certainty.
5. The Queen's Speech of May 2021 confirmed that the government will continue to uphold human rights and democracy across the world.
6. The Bill of Rights will make sure a proper balance is struck between individuals' rights, personal responsibility, and the wider public interest. It will strengthen the role of the UK Supreme Court in the exercise of the judicial function, preserve Parliament's democratic prerogatives in the exercise of the legislative function, and support the integrity of the UK, while respecting the devolution settlements.
7. The Bill of Rights will continue to respect the UK's international obligations as a party to the Convention. The UK will also continue to support further reforms to the European Court of Human Rights in Strasbourg (also known here as the Strasbourg Court), as well as the wider system of the Convention. This includes further embedding the reforms agreed in the Brighton Declaration of 2012 and later declarations of the Council of Europe's member States, intended to ensure that the Strasbourg Court handles efficiently those cases that have not been effectively addressed at national level. Protocol No.15 to the Convention, which came into force this year, gives particular effect to the Brighton Declaration by embedding in the

Convention itself the principle of subsidiarity and the doctrine of the margin of appreciation.

8. This command paper sets out the strong legacy of protection for rights in the UK, on which the proposed reforms will build (pages 8-15), the international context within which the reform proposals lie (pages 16-28), and the case for reform, including the ways in which public trust in the human rights framework has been undermined (pages 29-56). The government's proposals are set out on pages 56-88 and fall into a number of categories, designed to:
 - make sure our common law traditions and Parliamentary sovereignty are respected, and to strengthen the role of the UK Supreme Court;¹
 - provide a sharper focus on protecting fundamental rights;
 - prevent the incremental expansion of rights without proper democratic oversight;
 - emphasise the role of responsibilities within the human rights framework; and
 - facilitate dialogue with Strasbourg, while guaranteeing Parliament its proper role.

9. Specifically, the Bill of Rights will:
 - retain all the substantive rights currently protected under the Convention and the Human Rights Act 1998. Some rights, such as the right to freedom of expression (paragraph 204 onwards), will be strengthened and others, such as the right to trial by jury, added, reflecting the UK's specific history and traditions (paragraph 202 onwards);
 - empower domestic courts to apply human rights in the UK context, taking into account our common law traditions and judicial practice amongst other common law nations, not merely the case law of the Strasbourg Court, and strengthen the primacy of the UK Supreme Court in determining the proper interpretation of such rights (paragraph 190 onwards);
 - provide greater clarity regarding the interpretation of certain rights, such as the right to respect for private and family life, by guiding the UK courts in interpreting the rights and balancing them with the interests of our society as a whole (paragraph 282 onwards);
 - implement a permission stage, similar, but not identical, to those in other branches of law, to ensure that spurious cases do not undermine public confidence in human rights (paragraph 219 onwards); and strengthen the courts' discretion when granting remedies for human rights breaches (paragraph 224 onwards);
 - restrain the ability of the UK courts to use human rights law to impose 'positive obligations' onto our public authorities without proper democratic oversight (paragraph 229 onwards);

¹ The Scottish legal system is generally regarded as 'mixed', having strong common law influences whilst also retaining Roman law roots.

- make sure that the UK courts are not required to alter or interpret legislation contrary to Parliament’s clearly expressed democratic will (paragraph 233 onwards);
 - provide more certainty for public authorities to discharge the functions Parliament has given them, without the fear that this will expose them to costly human rights litigation (paragraph 266 onwards);
 - safeguard the vital protection for the right to life and the absolute prohibition on torture, confirming that people should not be deported to face torture (or inhuman or degrading treatment or punishment) abroad, whilst ensuring that other rights in the Act cannot be used to frustrate the deportation of serious criminals and terrorists (paragraph 292 onwards);
 - recognise that responsibilities exist alongside rights, and that these should be reflected in the approach to balancing qualified rights and the remedies available for human rights claims (paragraph 302 onwards); and
 - enact a process, centred on Parliament, for assessing the implications of judgments from the Strasbourg Court for the UK, including providing a ‘democratic shield’ preserving Parliamentary sovereignty in the exercise of the legislative function (paragraph 309 onwards).
10. We want to protect our armed forces from human rights claims for actions taking place overseas, and avoid the uncertainty of applying different rules in an area already covered by the law of armed conflict. Therefore, our proposals also explore how we can seek to address with partners in Strasbourg the question of the extraterritorial application of the Convention (paragraph 277 onwards).
11. The government is seeking views on key aspects of these reforms. Our questions are summarised from page 108 onwards and are set out in more detail in the section on ‘The Government’s Proposals’ (pages 57-88). We ask that responses to this consultation are received by 8 March 2022. Details of how to respond are at page 116.
12. After we have received and considered the responses, we will in due course put forward legislative proposals to Parliament to revise and replace the Human Rights Act with a Bill of Rights.

Chapter 1 – The Legacy of Rights in the UK

Summary

The UK has protected individual rights and liberties over many centuries.

Both legislation passed by Parliament and our common law systems developed by the courts have offered and continue to offer protection.

The UK's tradition of rights protection has been exported abroad and is reflected in various international human rights treaties.

There have been many calls in the past, from across the political spectrum, to reform the UK's human rights framework, and various consultations on which this current consultation builds.

13. The UK's tradition of human rights and civil liberties stretches back over the centuries. In 2015 we celebrated the 800th anniversary of the sealing of Magna Carta at Runnymede. While a great deal of the document is concerned with the immediate dispute between King John and the barons, it contains within it the seeds of the freedoms enjoyed by all of us today: jury trial, legal certainty, the rule of law, and *habeas corpus*, (the right not to be detained without charge indefinitely or for protracted periods). Similar bedrock documents can be found in other parts of the UK. The legacy of rights protection in Northern Ireland, for example, can be traced to the Magna Carta Hiberniae in 1216. These concepts remain embedded in domestic law, and in international instruments such as the United Nations (UN) Universal Declaration of Human Rights and the European Convention on Human Rights.
14. It is easy both to understate and overstate Magna Carta's impact on the subsequent course of liberties in this country. Yet successive generations in this country and around the world have looked to it as the starting point of their freedoms and rights.
15. Most notably, the 17th century saw a renewed interest in Magna Carta as the foundation of liberty while successive generations struggled with a central government seeking to claim increasing powers for itself. The framers of the Petition of Right 1628 and the Bill of Rights 1689 looked to Magna Carta as their inspiration as they sought to put on a clear footing limits on the Crown's prerogative. In doing so, they put in place a set of civil liberties broadly recognisable to us today.
16. In the Petition of Right, we see the safeguards against imprisonment without trial strengthened, and for the first time something like a right to respect for private

property in the prohibition on billeting of soldiers. Likewise, the Bill of Rights (in England) and the Claim of Right 1689 (in Scotland) represented a leap forward in recognising the civil liberties and political freedoms that are almost universally accepted today: free elections to regular parliaments, a ban on cruel and unusual punishments, free and fair trials, freedom of speech in Parliament, and no suspending or dispensing of the laws, without Parliament's consent. Importantly, these rights are generally framed as limitations on the government, not as rights pertaining to individuals. This would prove to be a distinction between rights as conceived in a UK context, and as they would develop in time on the Continent.

17. Alongside these developments, the common law was evolving its own protections. For example, the right to life was protected by the offences of murder and manslaughter in England and Wales, and the right to personal security was protected by the tort of assault and battery. Famously, in *Somerset v Stewart* in 1772, Lord Mansfield found that the law did not permit someone to be forcibly removed from England and sold into slavery. In 1687, in *Reid v Scot of Harden and His Lady* (the so-called Tumbling Lassie case)², Scotland's Court of Session declared, 'But we have no slaves in Scotland, and mothers cannot sell their bairns'. Over the centuries, the common law also established procedural rules related to ensuring a fair trial, which we would now recognise as expressions of human rights. These included the right to be tried in public, the right to know the evidence against oneself, and the right to *habeas corpus*. The common law continues to evolve rights protections, although some have questioned how far these can develop within the current human rights legal framework.³
18. Through the 19th century and into the 20th, various reforms established, protected, and enhanced the rights of individuals. These included the Slave Trade Act 1807, the Roman Catholic Relief Act 1829, the Reform Acts of 1832, 1867 and 1884, the Race Relations Act 1965, the Sex Discrimination Act 1975, and the Disability Discrimination Act 1995. In 1998, the devolution settlements and the Belfast (Good Friday) Agreement continued a trend of embedding fundamental rights protections in law throughout the UK. Further reforms have been enacted to protect marginalised individuals in UK law, such as the Equality Act 2010 which incorporated some of the aforementioned developments. Equally, since then, devolved legislation has also added to the UK's human rights protections within devolved policy areas. A non-exhaustive list of examples of how human rights are protected in domestic law is set out in Appendix 1.

² [1687] Mor 9505

³ Richard Clayton QC, 'The Empire Strikes Back: common law rights and the Human Rights Act' (2015) *Public Law* 3.

Different approaches to rights

Karl Marx presented a critique of the Rights of Man proclaimed during the French Revolution in his 1843 article *On the Jewish Question*. Marx was amongst the early critics of the liberal tradition of civil and political rights, like the right to free speech, a fair trial, freedom of worship and habeas corpus, reflecting what Isaiah Berlin defined as 'negative liberty'.⁴ In the 20th century, amidst the struggle of the Cold War, a movement grounded in the communist, socialist and social democratic traditions began to push for recognition of economic, social and cultural rights, including specific rights to education, healthcare and housing.

This culminated in the United Nations' International Covenant on Economic, Social and Cultural Rights (ICESCR), opened for signature in 1966. As well as being conceptually different from civil liberties, the rights were defined as aspirational goals to be progressively realised. Many Western governments thought that, whilst noble aims, they reflected fluid and diverse public policy considerations with far-reaching financial implications, requiring collective decision-making through democratic institutions, rather than being individual rights, judicially enforceable through the courts.

Responding to both the American struggle for independence and later the French Revolution, Edmund Burke provided an alternative critique of liberal rights grounded in conservative thinking. Burke warned of the risks of extreme liberalism, and the weakness in the capacity of unfettered individual freedom to deliver personal or social well-being.⁵

Whilst the government proposals will fully protect the fundamental civil and political liberties as individual rights, we also wish to preserve proper democratic oversight over the development and realisation of economic and social public policy.

The European Convention on Human Rights

19. The principles lying behind Magna Carta, the Petition of Right, the Bill of Rights and the Claim of Right inspired the writers of the Declaration of Independence, the US Constitution and subsequent Bill of Rights.
20. The horrors of the Second World War and the mass human rights abuses perpetrated by the Nazis, the Soviets and others in the middle years of the 20th century led to a number of international instruments and treaties on human rights. First and foremost amongst these was the UN Universal Declaration of Human Rights, adopted in 1948.

⁴ For a discussion of 'negative' and 'positive' conceptions of liberty, see Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed.), *Liberty* (2002).

⁵ Jesse Norman, *Edmund Burke: The Visionary who Invented Modern Politics* (2014).

21. At the same time, Europe sought to develop its own declaration and in 1950 the Council of Europe's member States adopted the Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights, the ECHR, or simply the Convention. The UK, under the Attlee administration, was the first country to ratify the Convention and several British lawyers – notably David Maxwell-Fyfe, later Lord Kilmuir – were involved in its drafting. The UK's signature was not without controversy, however, and several commentators (including the then Lord Chancellor, Lord Jowitt) expressed serious reservations about what its long-term implications would be.⁶
22. The drafters of the Convention necessarily had to reconcile different countries' traditions on the nature of rights and the nature of law. On the one hand, many countries of continental Europe took a purposive approach, seeing rights as norms to which civilised nations should aspire in their laws and actions. The classic common law approach, on the other hand, was to ensure that the scope of the rights was determined in advance as clearly as possible for legal certainty.⁷ On the question of how judgments of the proposed European court would ultimately be enforced against member States, Winston Churchill stated, during the formal negotiations, that:

'Such a court, of course, would have no sanctions and would depend for the enforcement of its judgments on the individual decisions of the States now banded together in this Council of Europe. But these States would have subscribed beforehand to the process, and I have no doubt that the great body of public opinion in all these countries would press for action in accordance with the freely given decision.'⁸
23. Since 1953, when it entered into force, the operation of the Convention has evolved. For example, while the Convention did provide for the right of individual petition to the European Court of Human Rights in Strasbourg – established in 1959 – this applied only where the State Party accepted that right. Initially, cases could be brought against the UK only by the States which had ratified the Convention and not by individuals. Successive UK governments were apprehensive about allowing an international court to determine the adequacy of the implementation of their rather general and opaque obligations under the Convention. Eventually, Harold Wilson's government accepted the right of individual petition in 1966; in 1998, it became mandatory for all countries that had ratified the Convention.

⁶ Geoffrey Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights 1950' (1993) 42 *International and Comparative Law Quarterly* 796.

⁷ *Travaux Préparatoires*, Conference of Senior Officials on Human Rights, Council of Europe (8 June, 1950). The *travaux préparatoires* (negotiating record) to the Convention are available at: https://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf.

⁸ *Travaux Préparatoires*, First Session of the Consultative Assembly, Council of Europe (17 August, 1949).

Continuing Calls for a Bill of Rights

24. From the 1960s onwards, alongside this international framework, calls grew from across the political spectrum for a domestic Bill of Rights so that infringements of people's human rights could be considered by the domestic courts. Members of Parliament (MPs) and peers from all the main parties attempted to introduce such bills from the 1960s to the 1990s, including Lord Lester, Lord Wade, and Sir Edward Gardner MP. The manifestos of the Conservative Party in 1979 and the Labour Party in 1992 both made references to the possibility of a Bill of Rights.
25. The question of whether the Convention should be, or needed to be, incorporated into UK law had been debated since it came into force, with some concluding that it should not.⁹ In 1998 the Human Rights Act was passed, which made it possible for the first time for alleged infringements of the specific rights in the Convention to be brought directly before the UK's own courts. The right of individual petition to the European Court of Human Rights remained and applications to the Court are still made against the UK on a regular basis.
26. Calls for reform continued after the Human Rights Act came into force in 2000. In 2006, the then Leader of the Opposition, Rt Hon David Cameron MP, called for the Human Rights Act to be replaced with 'a modern British Bill of Rights to define the core values which give us our identity as a free nation'.¹⁰ Around the same time, the Liberal Democrats called for a Bill of Rights as part of their proposals for a written constitution.¹¹ The then government, led by Gordon Brown, also saw a Bill of Rights as a natural next step to continue from the Human Rights Act, and published two green papers containing ideas for one in 2007 and 2009.¹²
27. In 2008, the cross-party Joint Committee on Human Rights published a report recommending that the UK should adopt its own 'Bill of Rights and Freedoms'.¹³ This diversity of recommendations on how to approach a Bill of Rights illustrates a healthy ongoing debate, and the wide range of views, about what should count as a human right, and how human rights should be properly implemented in UK law.
28. The 2010 Coalition agreement pledged to set up a Commission to investigate the creation of a British Bill of Rights. This Commission consulted twice, in 2011 and

⁹ See, for example, Sir John Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' (1993) *Public Law* 59.

¹⁰ Speech to the Centre for Policy Studies (26 June, 2006).

¹¹ 'For the People, By the People', *Liberal Democrat Policy Paper 83* (August, 2007).

¹² 'The Governance of Britain', CM7170 (July, 2007); and 'Rights and Responsibilities: Developing our constitutional framework', CM7577 (March, 2009).

¹³ Joint Committee on Human Rights, 'A Bill of Rights for the UK?', Twenty-ninth Report of Session 2007-08 (HL165-1; HC150-1).

2012, on whether there should be a UK Bill of Rights and what it might look like. In the subsequent 2012 report 'A UK Bill of Rights? The Choice Before Us', the majority of the Commission's members concluded that there was a strong argument in favour of a UK Bill of Rights. No members concluded 'that the idea of a UK Bill of Rights in principle should be finally rejected at this stage'.¹⁴ The Conservative Party manifesto of 2015 committed to introducing a British Bill of Rights, and proposals for this Bill were developed in 2015 and 2016, prior to the referendum on the UK's membership of the European Union (EU).

29. In 2019, the government pledged in its manifesto to update the Human Rights Act. In 2020, the then Lord Chancellor, Rt Hon Robert Buckland QC MP, therefore commissioned Sir Peter Gross to chair an independent Panel to conduct the Independent Human Rights Act Review (IHRAR). The Review's Terms of Reference required the Panel 'to examine the framework of the Human Rights Act, how it is operating in practice and whether any change is required', focusing on two key themes: the relationship between domestic courts and the Strasbourg Court, and the impact of the Human Rights Act on the relationship between the judiciary, the executive and the legislature.
30. The Panel reported back to the government on 29 October 2021. The government has considered its recommendations and has carefully taken them into account in preparing this consultation.
31. The government is now building on previous consultations, including the IHRAR, by seeking views on its proposals for a Bill of Rights which will strengthen the UK's long and proud tradition of protections.

Human rights under the UK's devolution settlements

32. The UK has three distinct legal systems: those of England and Wales, Scotland, and Northern Ireland. The devolution settlements and the distinct powers of the legislatures and executives in Scotland, Wales and Northern Ireland are, in particular, set out in the Scotland Acts 1998 and 2012, the Government of Wales Acts 1998 and 2006 and the Wales Acts 2014 and 2017, and the Northern Ireland Act 1998. Following the 2014 referendum on independence in Scotland and the recommendations of the Smith Commission, the Scotland Act 2016 has made changes to the devolution settlement for Scotland.
33. The existing devolution settlements also explicitly recognise the rights in the Convention, by stating that the devolved institutions have no power to legislate or act incompatibly with the Convention rights. This limit on the exercise of devolved power

¹⁴ 'A UK Bill of Rights? The Choice Before Us', Volume 1 (December, 2012), pages 26 and 175.

is in addition to section 6(1) of the Human Rights Act under which it is unlawful for public authorities in any part of the UK to act in a way which is incompatible with the Convention rights.

34. When the Human Rights Bill was introduced to Parliament, the constitutional arrangements of the UK looked very different. A Bill of Rights therefore presents an opportunity for people in all parts of the UK to look afresh at what rights mean for them, and how they would like to see those rights reflected and applied.
35. The values that will underpin the Bill of Rights are not the sole preserve of any one part of the UK. Rather, the government believes that everyone in the UK ought to benefit from improvements to our human rights framework. The government has a clear mandate to reform the UK's human rights framework, under the terms of its manifesto commitment. Our intention is to create a Bill of Rights for the whole of the UK, founded on principles common to us all. The UK will remain party to the Convention, and the rights protected under the Bill of Rights will continue to be based on the rights protected under the Convention.
36. Human rights cut across a vast range of policy areas. This means that, whilst the Human Rights Act can only be repealed or modified by the UK Parliament, the devolved legislatures can legislate in relation to human rights within the policy areas devolved to them. For example, the Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, an Act of the Scottish Parliament. The remit of the Commission, however, covers only human rights issues relating to devolved matters.
37. The protection of human rights is at the heart of the peace settlement in Northern Ireland. It is woven into the terms of the 1998 Belfast (Good Friday) Agreement. The government remains fully committed to the Belfast (Good Friday) Agreement and our proposed reforms will not undermine that Agreement.
38. The multi-party agreement which forms part of the Belfast (Good Friday) Agreement provides that '[t]he British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention...' The UK and Ireland committed to implementing the multi-party agreement in a bilateral agreement between the two governments.¹⁵ The Belfast (Good Friday) Agreement does not specify how the Convention is to be incorporated into the law of Northern Ireland, and any reform will keep the Convention rights incorporated into the Northern Ireland law and indeed UK law. Individuals will retain direct access to the courts to pursue

¹⁵ The inter-State agreement forms the other part of the Belfast (Good Friday) Agreement and provides that the governments of the UK and Ireland 'affirm their solemn commitment to support, and where appropriate implement, the provisions of the multi-party agreement.'

remedies for breaches of those rights. The clear ambition was for the UK to ensure that all people of Northern Ireland enjoy the protection of the rights in the Convention in domestic law.

39. Elsewhere, the Belfast (Good Friday) Agreement provides that '[t]he [Northern Ireland] Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to...the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void'.¹⁶ The Northern Ireland Act 1998 accordingly provides that the Assembly has no power to legislate in breach of the Convention rights. The Belfast (Good Friday) Agreement also envisages a Bill of Rights for Northern Ireland, agreed by the Northern Ireland parties and enacted by the UK Parliament, although in the event this has not proved possible so far.¹⁷
40. The Joint Committee on Human Rights received evidence in 2008 that Bill of Rights processes for the UK generally, and for Northern Ireland specifically, could run in parallel and be mutually reinforcing. We agree, and believe that our proposals for reform, working within the bounds of the Convention, will have no adverse impact on any future developments towards a Northern Ireland Bill of Rights.

¹⁶ The multi-party agreement also provides that: 'There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including ... (b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission; (c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland...'

¹⁷ 'The new Northern Ireland Human Rights Commission will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the European Convention on Human Rights – to constitute a Bill of Rights for Northern Ireland.'

Chapter 2 – The International Context

Summary

There is a number of different international agreements which form the backdrop to the protection of human rights at national level.

There is a variety of different ways in which States protect rights and they are not necessarily protected in one statute like the Human Rights Act.

The relationship between the UK and the European Court of Human Rights in Strasbourg has evolved and, thanks in part to the UK's leadership, is continuing to evolve to reflect better the Strasbourg principle of subsidiarity.

41. The UK's human rights framework does not operate in isolation. There is a range of international treaties and obligations, often at least partly inspired by the UK's rights protections, all of which work in different ways. Indeed, the countries that are signed up to them meet those obligations and protect rights in a wide variety of ways, often based on their own constitutions and legal traditions. The UK, for example, signed up to the Convention in 1950, but did not give further effect to the Convention in domestic law via a principal piece of legislation until the Human Rights Act in 1998.¹⁸

United Nations

42. All members of the Council of Europe, including the UK, are members of the UN. The Universal Declaration of Human Rights, adopted by the UN in 1948, sets out the fundamental rights that should be given universal protection, but it does not impose legal obligations on States. Many of the principles contained in the Declaration, however, such as the right to liberty and security, and the prohibition of torture, were later developed and given effect in the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

¹⁸ The Scotland Act 1998, which restricts the executive and legislative competence of the Scottish Government and the Scottish Parliament by reference to the Convention rights, came into force prior to the Human Rights Act 1998.

The Council of Europe

43. The Council of Europe was established by the Treaty of London in 1949 and is based in Strasbourg in France. Originally made up of ten member States, it now has 47 members stretching from Iceland to Azerbaijan. It has adopted a number of human rights treaties, most notably the Convention.
44. The Convention largely contains civil and political rights. In most cases, these reflect rights which have long been protected in domestic UK law in a variety of ways. Additional rights have been added over the years which are contained in protocols that are optional for States already party to the Convention.
45. In 1959 the Council of Europe established the European Court of Human Rights to determine alleged violations of the rights set out in the Convention by the 47 Council of Europe member States that have now ratified the Convention.

The UK's relationship with Strasbourg

46. The nature and approach of the Strasbourg Court has evolved over the years, as has the Court's relationship with Council of Europe member States, including the UK.
47. Of those developments, the most far-reaching has proved to be the development of the 'living instrument' doctrine by the Strasbourg Court, on its own initiative, from the 1970s onwards.¹⁹ The doctrine has no express basis in the Convention. The justification offered by the Strasbourg Court for the development of the doctrine is to allow the Convention to keep up with changes in society and with the cultural norms of Council of Europe member States. In order to achieve this, the Strasbourg Court has adapted and extended the express rights set out in the Convention. As a result, the meaning and scope of many particular aspects of some Convention rights have changed substantially over the years without meaningful democratic oversight, in some cases going well beyond what the drafters and original signatories had intended or could have reasonably anticipated. This general risk was foreseen by some at the time that the UK signed up to the Convention.²⁰ Equally, it has been the subject of criticism since its inception, including by judges on the Strasbourg Court.
48. There is a further, important, distinction to make between those countries which are 'monist' and those which are 'dualist'. In monist countries, international legal obligations apply directly in their national law: there is no need for separate legislation to incorporate them into national law. Many European countries that are

¹⁹ *Tyler v United Kingdom* (1979-80) 2 EHRR 1 is an early example.

²⁰ Geoffrey Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights 1950' (1993) 42 *The International and Comparative Law Quarterly* 796.

party to the Convention operate under this system. Dualist countries, like the UK and Ireland, and some Nordic countries, require international law to be incorporated domestically before it can take effect in national law, although there is no requirement that this be done through one specific piece of legislation, like the Human Rights Act.

49. The ‘living instrument’ doctrine creates a particular tension for dualist countries, like the UK. It means that the Strasbourg Court can develop and expand the scope of rights through its own case law, without any means for national parliaments to debate or define those rights in the context of their own legal systems. The definition of the rights originally signed up to by a member State can be substantially expanded without any democratic scrutiny. Lord Hoffmann, a Lord of Appeal in Ordinary from 1995 to 2009, has expressed his concern about this development:²¹

‘The proposition that the Convention is a “living instrument” is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by “European public order”. I would entirely accept that the practical expression of concepts employed in a treaty or constitutional document may change. ... But that does not entitle a judicial body to introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them, simply because it would be more in accordance with the spirit of the times.’²²

50. Lord Sumption, who was a Justice of the UK Supreme Court from 2012 to 2018, has commented in similar terms:

‘The problem is that the case law of the Strasbourg Court has derived from [the Convention’s general principles] by a process of implication and extension a very large number of derivative sub-principles and rules, addressing the internal arrangements of contracting states in great detail. Many of these sub-principles and rules go well beyond what is required to vindicate the rights expressly conferred by the Convention... A principled objection to extreme exercises of state power, such as military government, torture or imprisonment without trial is no doubt common to every state party to the Convention. But the Strasbourg Court has treated the

²¹ Throughout this command paper, past and present members of the judiciary are cited to highlight constitutional issues presented by the development of human rights law, which provide context to our proposed reforms. Such citations are not intended to indicate any view by the judiciary, individually or collectively, on the content of the government’s proposed reforms.

²² Lord Hoffman, ‘The Universality of Human Rights’, Judicial Studies Board Annual Lecture (19 March, 2009).

Convention not just as a safeguard against arbitrary and despotic exercises of state power but as a template for most aspects of human life.’²³

51. One area where the Strasbourg Court has been particularly active, under the ‘living instrument’ doctrine, is in developing and expanding implicit ‘positive obligations’ on governments to act in certain ways, rather than merely to exercise restraint in interfering with individual liberties. Professor Mowbray, a Professor of Public Law at the University of Nottingham, has charted the expansion of such ‘implicit’ positive obligations, by the Strasbourg Court, since the 1970s.²⁴ The implications for national governments are far-reaching. As Professor Merrills, who was Emeritus Professor at the University of Sheffield, observed:

‘Every government is aware that by subscribing to the Convention, it places itself in a position in which domestic laws and practices may have to be modified to avoid impinging on various liberties the Convention was brought into being to protect. What a government may not bargain for is to find itself put to considerable trouble and expense as a result of an obligation to advance particular social or economic policies which it may not wholly support. While this is not a conclusive objection to the Court’s employing the principle of effectiveness to develop the law and identify positive obligations in the Convention, it unquestionably argues for caution in so doing.’²⁵

52. Likewise, Professor Feldman QC, an Emeritus Professor at the University of Cambridge who also served on the Constitutional Court of Bosnia and Herzegovina from 2002 to 2010, noted the ‘more extensive and less clearly defined set of positive obligations’ that has, over time, been implied into the Convention by the Strasbourg Court, which has imposed ‘more extensive obligations on states than are immediately obvious from a superficial perusal of the text’.²⁶
53. From the earliest days of the Convention system,²⁷ the Strasbourg Court has developed another concept by way of counterweight, namely the ‘margin of appreciation’. This means that the Court should respect the fact that different countries may have different ways of implementing and interpreting the Convention within their own societies, history and traditions.

²³ Lord Sumption, ‘Judicial and Political Decision-Making’, The F.A. Mann Lecture (2011).

²⁴ See Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

²⁵ J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (1993), page 106.

²⁶ David Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd Ed. (2002), page 53.

²⁷ *Greece v United Kingdom* (Application 176/1956, Report of the European Commission of Human Rights of 26 September, 1958)

54. Linked with this is the principle of ‘subsidiarity’ developed by the Strasbourg Court as a doctrine of self-restraint: the idea that national authorities have the primary obligation for implementing and protecting the Convention, as they are better placed to evaluate local needs and conditions.²⁸ The Strasbourg Court made this clear in the early case of *Handyside v United Kingdom*:
- ‘The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines.’²⁹
55. The Strasbourg Court, as the now Leader of the Opposition Sir Keir Starmer QC MP noted, is:
- ‘...primarily concerned with supervision and its role is therefore subsidiary to that of the domestic authorities: it has no role unless the domestic system for protecting human rights breaks down.’³⁰
56. This conception of the relationship is intended to enable a ‘dialogue’ between national courts and governments, and the Strasbourg Court, about how to implement the Convention. This can involve States Parties taking a different stance from the Court and legitimately seeking to engage with it and persuade it to take a different approach in future, or to recognise the specific context of the application of rights domestically. Especially where there is a democratic mandate on a contentious issue of public policy, States Parties are entitled to ‘push back’ in this way.
57. The idea that different countries may have differing views on human rights has been recognised by the Strasbourg Court itself. For example, in the *Animal Defenders* case it upheld the UK’s ban on broadcast political advertising,³¹ and in *SAS* it upheld the French ban on wearing the niqab in public,³² in both cases deciding it was for national parliaments to take those difficult decisions and not the Court itself.
58. This welcome change of emphasis has been acknowledged and described by Judge Spanó, now the President of the Strasbourg Court, as ‘the age of subsidiarity’:

²⁸ *Brighton Declaration on the Future of the European Court of Human Rights* (2012), paragraph 11.

²⁹ *Handyside v United Kingdom* (1979-80) 1 EHRR 737, paragraph 48.

³⁰ Keir Starmer QC, *European Human Rights Law* (1999), paragraph 4.89.

³¹ *Animal Defenders International v UK* (2013) 57 EHRR 21.

³² *SAS v France* (2015) 60 EHRR 11.

‘...the Court is in the process of developing a more robust and coherent concept of subsidiarity as well as attempting to reformulate the conditions for allocating deference to the Member States.’³³

59. This emerging shift in outlook has been incorporated into various declarations from the States Parties to the Convention to reflect better the principle of subsidiarity.
60. As well as continuing much-needed reform of the Strasbourg Court, the Interlaken Conference in February 2010 called for a strengthening of subsidiarity, with rights being secured at national level, and intervention by the Court only when necessary. It also called for effective new ways for the Court to filter out inadmissible applications and to address repetitive violations.
61. The following year, the İzmir Declaration stressed, amongst other things, the importance of subsidiarity in the context of interim measures in immigration cases:

‘...recalling that the Court is not an immigration Appeals Tribunal or a Court of fourth instance, emphasises that the treatment of requests for interim measures must take place in full conformity with the principle of subsidiarity.’
62. The Declaration called for greater restraint, in unusually direct language, by:

‘[Inviting] the Court, when examining cases related to asylum and immigration, to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, to avoid intervening except in the most exceptional circumstances.’³⁴
63. The UK has led the way in securing agreement from all Council of Europe member States to a number of reforms to the Strasbourg Court to define better when the Court should become involved in cases.
64. These reforms were agreed in the Brighton Declaration of April 2012, under the UK’s Chairmanship of the Council of Europe. The Declaration was prepared during several months of negotiations between the 47 States Parties to the Convention, based on contributions from the Strasbourg Court and the expert committees of the Council of Europe, reflecting consultations with civil society. The Declaration was agreed by ministers from the 47 States at a conference in Brighton on 19-20 April 2012 chaired by the then Justice Secretary, Rt Hon Kenneth Clarke QC MP.

³³ Judge Spanó ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’, (2014) 14 *Human Rights Law Review* 487.

³⁴ *İzmir Declaration* (27 April, 2011), ‘Follow-up plan: ‘Right of Individual Petition’, paragraph 3.

65. The Brighton Declaration included a commitment in principle to amend the Convention in five respects:
- to add a reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble to the Convention, giving visibility to these key concepts that define the boundaries of the Strasbourg Court's role;
 - to change the rules on the age of judges of the Strasbourg Court, to ensure that all judges are able to serve a full nine-year term;
 - to remove the right of parties to a case before the Strasbourg Court to veto a Chamber's relinquishing jurisdiction to the Grand Chamber, a measure intended to improve the consistency of the Court's case law;
 - to reduce the time limit for applications to the Court from six months to four months; and
 - to tighten the admissibility criteria in the Convention.
66. Protocol No.15 to the Convention, which gives legal effect to these parts of the Declaration, entered into force on 1 August 2021 following its ratification by all 47 States Parties to the Convention.
67. These reforms, inspired by and negotiated under the UK's stewardship, send a clear message that the Strasbourg Court should not usually be reconsidering cases already dealt with properly by domestic courts in Council of Europe countries, unless they raise important questions about the interpretation of rights set out in the Convention. They create space for State Parties to assert the margin of appreciation over matters which, particularly in a mature liberal democracy, should be left to national courts and elected legislatures. This provides important context for the government's proposals for a Bill of Rights. We have an opportunity to avail ourselves of this commitment to an increased margin of appreciation, and to make sure it is properly adhered to in the future.

The UK's arrangements with the EU after EU Exit

68. The UK left the EU on 31 January 2020. The Agreement on the Withdrawal of the UK from the EU established the terms of the UK's departure from the EU. The Northern Ireland Protocol to the Withdrawal Agreement includes a commitment to ensure that the UK's withdrawal from the EU does not result in any diminution of rights, and safeguards or equality of opportunity, as set out in the relevant part of the Belfast (Good Friday) Agreement.
69. The EU-UK Trade and Cooperation Agreement (TCA), which established the arrangements for the future relationship between the UK and the EU, reaffirms the Parties' commitment to the shared values and principles of democracy, the rule of

law, and respect for human rights, and includes commitments to continue to uphold those principles.

70. The UK will remain party to the Convention and will continue to fulfil its international obligations. Our proposals for a Bill of Rights will ensure that human rights continue to be fully protected in Northern Ireland and throughout the rest of the UK, through an improved framework that provides greater legal certainty and respects our constitutional principles. These proposals will be fully in line with our commitments under the Withdrawal Agreement, the Northern Ireland Protocol and the TCA.

Human rights frameworks in other countries

71. In most liberal democracies, human rights are protected principally by reference to constitutional bills of rights. International human rights treaties are relied upon to differing degrees in different countries, but they do not displace domestic bills of rights. Our proposals for a Bill of Rights will not prevent UK judges from being assisted in the application and interpretation of individual rights by the experiences drawn from other jurisdictions, particularly those most similar to the jurisdictions in the UK. But the UK, which has led the world on rights and liberties, should develop a constitutional jurisprudence on rights and liberties that is centred, first and foremost, around our own unique history, legal traditions and constitution.
72. All countries in the world are party to international human rights instruments of some kind and there are many ways in which countries meet the standards and obligations set out in them. Many do not have a single statute like the Human Rights Act to incorporate these obligations, but rather they are met in various pieces of legislation, procedural rules and, where relevant, through the common law. These different methods are often informed by that country's constitution and traditions.
73. Often, countries' national constitutions will contain protections akin to a Bill of Rights. For instance, the Swedish Instrument of Government, the *Regeringsform*, has included specific protections for fundamental rights and freedoms since 1974. The Convention and the *Regeringsform* overlap, but there are differences. For example, the *Regeringsform* does not contain anything about access to a court or the conditions for a fair trial.
74. South Africa's 1996 constitution is heavily informed by its recent history, in particular the memory of apartheid. Human rights are prominent in the constitution and feature in the preamble with its stated intention of establishing 'a society based on democratic values, social justice and fundamental human rights'. Among the rights stipulated are those of equality, freedom of expression and association, political rights and access to courts, but also social and economic rights like housing, health care and education.

75. The United States' Bill of Rights, ratified in 1791, is the collective name for the first ten amendments to the US Constitution. These amendments guarantee a number of personal freedoms, limit the government's power in judicial and other proceedings, and reserve some powers to the state and the public. Originally, the amendments applied only to federal government; most, however, were subsequently applied to the government of each state by way of the Fourteenth Amendment.
76. Canada has a federal Charter of Rights and Freedoms, a Bill of Rights and a Human Rights Act, as well as provincial legislation like the Quebec Civil Code and the Quebec Charter of Rights and Freedoms. Each of these varies in its scope. For example, the national Charter applies to state actions both at the federal and provincial levels. The Quebec Charter applies to actions by the Quebec government as well as individuals within the province's jurisdiction.
77. Other countries also hold their core rights protections in standalone pieces of legislation. The New Zealand Bill of Rights Act 1990, for example, affirms New Zealand's obligations under the UN International Covenant on Civil and Political Rights. It sets the standards for the courts as well as all governmental conduct.
78. Some countries do not have any one specific piece of law which safeguards human rights. Australia is one such country where there is no national human rights law, although some civil and political rights are provided for in its 1901 constitution. These include the right to vote, right to jury trial for indictable offences, freedom of religion, and freedom from discrimination on the basis of state residence. In addition, two of Australia's states and territories have their own human rights legislation: the Human Rights Act 2004 in the Australian Capital Territory and, in Victoria, the Charter of Human Rights and Responsibilities of 2006. Both cover a range of rights, mainly derived from the ICCPR.
79. There are different rules in different countries on when rights cases can be brought and what remedies are available. In Victoria, Australia, an individual cannot take legal action if his or her sole reason is a breach of its Charter. The Charter does, however, allow someone to raise a human rights argument in a court case involving a claim that a decision or act of a public authority is unlawful on other grounds.
80. By contrast, in the Australian Capital Territory it has been possible for people to bring rights claims against a public authority since 2009.³⁵ The Supreme Court there can grant remedies for a breach of a human right as it sees fit, such as ordering a decision to be changed or an apology to be made, but it cannot make an order for compensation to be paid.

³⁵ When amendments to the Human Rights Act 2004 made by the Human Rights Commission Legislation Amendment Act 2005 came into force.

81. The superior courts of each province of Canada have jurisdiction to hear applications under the Canadian Charter of Rights and Freedoms. It has been found, however, that the courts should exercise their discretion not to hear a Charter claim where the legislature has provided other more specific and effective means to have it determined, or if relief is sought as a substitute for obtaining a ruling in a criminal case.³⁶
82. The Canadian Charter gives the courts the power to order a remedy when the Charter has been breached. In one case it was noted that someone could theoretically seek compensation under the Charter, but that the common law doctrine of limited immunity created a balance between rights and effective government.³⁷ In that case, the judge concluded that laws must be given their full force and effect until they are declared invalid, and damages may be awarded only if government conduct under such laws is clearly wrong, in bad faith, or an abuse of power.

How are international obligations incorporated?

83. The relative status of international obligations and domestic law (including constitutions) is particularly important when it comes to the question of how the courts in different countries interpret the law.
84. South Africa, for example, is monist (although a form of legislative approval is required for some types of international treaty) and the courts often invoke international law in the context of constitutional interpretation. The Constitution states that 'when interpreting the Bill of Rights, a court, tribunal or forum... must consider international law; and may consider foreign law'. The Constitutional Court has adopted the view that the 'spirit, purport and objects of the bill of rights are inextricably linked to international law and the values and approach of the international community.'³⁸
85. New Zealand, on the other hand, is a dualist system and so international treaties must be formally incorporated into statute in order to become part of the domestic legal system and actionable in the courts. New Zealand's established principle of statutory interpretation means that the courts must interpret all legislation consistently with its international treaty obligations, but only so far as the wording of the legislation allows.

³⁶ *Kourtessis v Minister of National Revenue* [1993] 2 SCR 53, pages 85-90.

³⁷ *Guimond v Quebec (Attorney General)* [1996] 3 SCR 347.

³⁸ David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009), page 462.

86. Looking to Europe, the Convention has been incorporated in Germany, a dualist state, since 1952. Within the German legal order, the Convention has the same status as ordinary (federal) statute. That means it overrides laws enacted by the *Länder* (federal states) and has binding effect on executive bodies and the courts, but is subordinate to Germany's codified constitution, the Basic Law.
87. On the question of *how* to interpret the Convention, the Italian Constitutional Court has held that it must be interpreted within the context of judgments handed down by the Strasbourg Court. But the Constitutional Court has not considered itself bound by Strasbourg in all respects. It can review Strasbourg judgments for their compliance with the Italian Constitution. It can also determine whether a particular weighting of interests remains within the boundaries of the Constitution. Under Italian law, the Constitutional Court's interpretation of the Constitution is authoritative.

Interpreting legislation and dealing with incompatible law

88. A country's constitution and the status of international law may determine the ways in which the courts can act when they find legislation passed by Parliament to be incompatible with domestic or international human rights law. Linked to this is the critical question of how far the courts can go in interpreting statute to make it compatible with human rights law.
89. For example, under the Irish constitution, the courts cannot strike down legislation on the basis that it is incompatible with the rights in the Convention. As with the UK's Human Rights Act, under Irish law judges can seek to interpret legislation in line with the Convention and, when this is not possible, declare the statute incompatible.³⁹ Similarly, in Austria, where the Convention enjoys constitutional status, the Constitutional Court has indicated that it would depart from the case law of the Strasbourg Court if it would otherwise entail a violation of the constitution.⁴⁰
90. The Australian Capital Territory's Human Rights Act requires the Supreme Court there to interpret legislation consistently with the rights in it 'so far as it is possible to do so consistently with [the law's] purpose'. If a consistent interpretation is not possible, the Supreme Court may make a declaration of incompatibility, but it cannot strike the law down. Similarly, section 32 of the Victorian Charter requires that all statutory provisions must be interpreted in a way that is compatible with human rights so far as is possible to do so consistently with their purpose.
91. In Europe, the German Constitutional Court has ruled that in exceptional circumstances it would be possible for the *Bundestag* (the German parliament) to

³⁹ The European Convention on Human Rights Act 2003.

⁴⁰ *Miltner*, VfSlg 11500/1987.

legislate incompatibly with the Convention, but never with the rights that are set out in the Basic Law:

'There is... no contradiction with the aim of openness to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which the violation of fundamental principles of the constitution can be averted.'⁴¹

92. The question of parliamentary sovereignty is notable in the Canadian context. Before the Charter of Rights and Freedoms, the Canadian system was characterised by a strict regime of Supremacy of Parliament.
93. There is, however, a number of restrictions written into the Canadian Charter. First, section 1 allows a legislative body to issue a law infringing on the Charter rights as long as the objective of the law is not to infringe the Charter, and the infringement can be justified in a free and democratic society.⁴² Second, several articles of the Charter are written with a qualifier that effectively narrows the range of rights and freedoms granted.⁴³ Finally, section 33 gives the federal and provincial legislatures power to override many of the requirements in the Charter. The last of these is seen as the most significant restriction, with supporters arguing that it allows for democratically elected representatives to have the final word.
94. In summary, there are many differing, legitimate, approaches to human rights across Council of Europe member States, other common law nations and well beyond, drawing on countries' particular legal and constitutional traditions. This diversity of approaches can be found not just in the application and interpretation of human rights laws, but also in how breaches of human rights should be remedied, and in how the constitutional balance between the executive, the legislature and the courts can best be struck. In many cases, we can see continuous reform and attempts to balance the overarching constitutional framework while assuring respect for individual rights. The next chapter sets out the UK's current approach to these questions, and the case for reform.

⁴¹ *Görgülü v Germany* [2004] 1 FLR 894.

⁴² Section 1 applies in cases of limitation or restriction of a guaranteed right and not in cases of derogation or modification of this right (see Henri Brun and Guy Tremblay, *Droit Constitutionnel*, 4th Ed. (2002), page 943).

⁴³ For example, section 11 provides that upon arrest the accused must be informed of the charge not immediately but without unreasonable delay; an individual may not be denied reasonable bail without just cause.

Chapter 3 – The Case for Reforming UK Human Rights Law

Summary

The government wants to strengthen the UK's long tradition of protecting human rights.

It supports the fundamental rights set out in the Convention but believes that the framework for the application of human rights has proved flawed. In particular, we have seen:

- the growth of a 'rights culture' that has displaced due focus on personal responsibility and the public interest;
- the creation of legal uncertainty, confusion and risk aversion for those delivering public services on the frontline;
- public protection put at risk by the exponential expansion of rights; and
- public policy priorities and decisions affecting public expenditure shift from Parliament to the courts, creating a democratic deficit.

This section sets out how these problems have distorted the proper protection of human rights in the UK, and undermined public confidence.

95. The government will continue this country's long tradition of protecting people's rights and freedoms. We are proud of the example shown by the UK in establishing, and then fighting to maintain, a fair, free and tolerant society.
96. The government remains committed to the rights reflected in the Convention that the UK signed up to in 1950. We also want to ensure these rights should be protected in a way that does not invite abuse, respects areas of public service delivery that should be decided by professionals on the frontline or elected legislators, and commands public confidence.
97. In that regard, the majority of the 2012 Commission on a Bill of Rights concluded that:

'[e]ven the most enthusiastic advocates of the UK's present human rights structures accept that, as Liberty said in its response to the Commission's first consultation paper, there is a lack of public understanding and 'ownership' of the Human Rights Act. If that is true of the Human Rights Act... it is equally, if not even more, evident in relation to the European Convention on Human Rights and the European Court of Human Rights with the result that many people feel alienated from a system that they

regard as 'European' rather than British. In the view of [the majority on the Commission] it is this lack of 'ownership' by the public which is, in their view, the most powerful argument for a new constitutional instrument.⁴⁴

98. Additionally, the more recent IHRAR Panel noted that:

'We are in little doubt that there is much room for increasing understanding of the UK's constitution, and particularly, of the HRA, of the Convention and the ECtHR (not least, as noted above, that they originate from international obligations that pre-date and are entirely distinct from the UK's former membership of the European Union), and the role of the Judiciary more generally. A greater role for the common law has obvious attractions in countering a lack of ownership of rights, just as it could equally counter the notion that the HRA is some alien imposition on UK law. Moreover, increased emphasis on the common law is not in any way inconsistent with the practice of other Convention states and is readily intelligible and acceptable to the ECtHR in terms of the doctrine of subsidiarity.'⁴⁵

99. Certain problems have arisen as a result of the 'living instrument' doctrine, the Strasbourg Court's concerted attempt to pioneer, expand, and innovate human rights law beyond the rights set out in the Convention.

100. Some of the cases which illustrate this expansion are well known. In the case of *Abu Qatada*,⁴⁶ the Strasbourg Court overruled the House of Lords (as the then final appellate court)⁴⁷ in finding, for the first time in a particular case before it, that the right to a fair trial (Article 6) could be asserted by a claimant, regarded by a State Party as involved in serious terrorist activity, to defeat a deportation order. While the facts were specific to the particular case, the ruling opened up the case law to further incremental judicial expansions in the use of Article 6 to frustrate deportation orders, well beyond the terms of the Convention, or previous case law from Strasbourg.

101. Similarly in *Hirst* the Grand Chamber of the Strasbourg Court implied into the duty on States Parties to hold free elections, under Article 3 of Protocol No.1 to the Convention, a specific right to vote that must in principle be extended to prisoners.⁴⁸ The Strasbourg Court did so contrary to the clear wording of Article 3 and the specific

⁴⁴ 'A UK Bill of Rights? The Choice Before Us', Volume 1 (December, 2012), page 29.

⁴⁵ Report of the Independent Human Rights Act Review, paragraph 53.

⁴⁶ *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1.

⁴⁷ *RB (Algeria) (FC) and another v Secretary of State for the Home Department and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110.

⁴⁸ *Hirst v The United Kingdom (No.2)* [2004] 38 EHRR 40.

intentions of the architects of the Convention (as demonstrated in the *travaux préparatoires*), and despite the views of the UK courts.

102. The *travaux préparatoires* to the Convention record the discussions and conclusions on the text that eventually became Article 3 of Protocol No.1. On 29 August, 1949, the French delegate proposed draft text on the right to free elections, incorporating the words ‘universal suffrage.’⁴⁹ It was subsequently rejected. One of the principal objections was raised by the British delegate, Sir Oscar Dowson (a former Home Office legal adviser). On 2 February, 1950, he stated:

‘It is probable that the suffrage is as wide in the United Kingdom as in any other country; yet even in the United Kingdom as in any other country it is inaccurate to speak of the suffrage as ‘universal’. In no State is the right to vote enjoyed even by citizens without qualifications. The qualifications required differ from State to State, and it is our view that the variety of circumstances to be considered may justify the imposition of a variety of qualifications, as a condition of the exercise of suffrage.’⁵⁰

103. At that time, the UK barred the vote from ‘peers, felons and the insane’. So, the restrictions and discretion envisaged were clear. The UK argument was accepted by the negotiating parties. The French proposal was withdrawn in its entirety. When the ‘right to free elections’ re-appeared in the final text of Protocol No.1 two years later, the words ‘universal suffrage’ had been deleted to take into account the intentions of the negotiating parties.

104. In their dissenting judgment in *Hirst*, five of the 17 judges of the Court stated:

‘[I]t is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions. An ‘evolutive’ or ‘dynamic’ interpretation should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case.’⁵¹

105. As regards the bar on prisoner voting, the minority noted:

‘Nor do we find that such a decision needs to be taken by a judge in each individual case. On the contrary, it is obviously compatible with the

⁴⁹ *Travaux Préparatoires*, First Session of the Consultative Assembly, Council of Europe (29 August, 1949).

⁵⁰ *Travaux Préparatoires*, Committee of Experts on Human Rights, Council of Europe (3 February, 1950).

⁵¹ *Hirst v The United Kingdom (No.2)* [2004] 38 EHRR 40, joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, paragraph 6.

guarantee of the right to vote to let the legislature decide such issues in the abstract.’⁵²

106. The minority concluded:

‘Taking into account the sensitive political character of this issue, the diversity of the legal systems within the Contracting States and the lack of a sufficiently clear basis for such a right in Article 3 of Protocol No. 1, we are not able to accept that it is for the Court to impose on national legal systems an obligation either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent.’⁵³

107. The tendency of the ‘living instrument’ doctrine to expand the scope of rights, and effectively create new rights in some instances, can also be seen in other less notorious cases down the years. The wording of the Article 8 right to respect for private and family life has been stretched to give rise to human rights capable of stipulating environmental policy, for example, in the context of noise from airports, as we saw in *Hatton*.⁵⁴

108. Similarly, the Convention has enabled successful human rights claims to be brought both against the government for not acting quickly enough to remove children from abusive parents, and to allow parents to bring litigation against social services where they do intervene to protect children.⁵⁵ Nor is the government’s responsibility limited to family custody arrangements in the UK. It can now in principle also be sued on human rights grounds, when families from abroad are living in the UK, for failing to take ‘adequate and effective’ measures to enforce custody arrangements set in their home countries.⁵⁶

109. Far from merely applying the Convention, these judicial extensions of human rights have enabled the Strasbourg Court to prescribe domestic principles and rules in a wide range of social policy areas, without any meaningful democratic mandate or accountability.

⁵² Ibid., paragraph 4.

⁵³ Ibid., paragraph 9.

⁵⁴ *Hatton and others v United Kingdom* (2003) 37 EHRR 28; see also *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355. Subsequent litigation under the Convention has argued for an even wider inclusion of environmental policy in Article 8: see the judgment of the Dutch Supreme Court in *Urgenda v Staat der Nederlanden* (Application No.19/00135), Supreme Court of the Netherlands, judgment of 20 December, 2019; and the ongoing Strasbourg case of *Duarte Agostinho and others v Portugal and 32 other States* (Application No. 39371/20).

⁵⁵ See, for example, *W v United Kingdom* (1988) 10 EHRR 29; and *Eriksson v Sweden* (1990) 12 EHRR 183.

⁵⁶ *Ignaccolo-Zenida v Romania* (2001) 31 EHRR 7; see also *Z v United Kingdom* (2002) 34 EHRR 3.

110. Professor Mowbray has charted the ‘substantial creativity’ in the judicial expansion in the scope of rights, and imposition of express and implied ‘positive obligations’ on our public services.⁵⁷
111. The ‘living instrument’ doctrine, it is argued, has also served as a lever for political reform in many States that have joined the Convention more recently. Equally, the number of cases where the Court directly finds the UK to be in breach of its obligations is low. However, in those cases, the Court is often straying into very sensitive areas of public policy and blurring the separation of powers, something some members of the Court itself have acknowledged.⁵⁸
112. The domestic implementation of the Convention has also given rise to concerns. The Human Rights Act 1998 was a well-intentioned attempt to enhance rights protections in the UK. We accept that there was a case for setting out the substantive rights listed in the Convention in our domestic law. Equally, we propose to leave in place those aspects of the Human Rights Act that have not proved problematic in practice. We believe, however, that the structure of the Human Rights Act is flawed in certain key respects, which have opened the door to the expansive role taken by the Strasbourg Court being mirrored, and sometimes surpassed, in the UK. Take two illustrations.
113. First, the Human Rights Act contains a requirement for the UK courts to ‘take into account any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights’ so far as it is relevant to the proceedings (section 2).
114. In practice, this led the UK courts to conclude that Parliament had instructed them to keep up with, and match, the Strasbourg Court’s case law, rather than apply the Convention rights in a UK context, and within the margin of appreciation that the Convention allows.⁵⁹ Whilst the courts have retreated a little from this maximalist position,⁶⁰ the ambiguity of section 2 continues to give rise to legal uncertainty and promote an over-reliance on the Strasbourg case law, at the expense of promoting a home-grown jurisprudence tailored to the UK tradition of liberty and rights.

⁵⁷ Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004), pages 222-230.

⁵⁸ See the dissenting opinion in *Hirst* above at paragraph 6; and Judge Matscher quoted at paragraph 174 below.

⁵⁹ See, for example, Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323; and Lord Hoffmann in *AF v Secretary of State for the Home Department* [2009] UKHL 28, [2010] 2 AC 269. The UK Supreme Court re-stated its approach in *Ullah in R (AB) v Secretary of State for Justice* [2021] UKSC 28, [2021] 3 WLR 494.

⁶⁰ See, for example, *Manchester City Council v Pinnock* [2011] UKSC 6; *R v Abdurahman* [2019] EWCA Crim 2239; and *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279.

115. As Lord Toulson, who served as a Justice of the UK Supreme Court from 2013 to 2016, said in 2014, 'It is now generally recognised that in the early years after the Human Rights Act the courts went too far in regarding themselves as virtually bound to follow every Strasbourg decision.'⁶¹ The former Lord Chief Justice, Lord Judge, explicitly suggested that section 2 should be amended 'to express (a) that the obligation to take account of the decisions of the Strasbourg Court did not mean that our Supreme Court was required to follow or apply those decisions, and (b) that in this jurisdiction the Supreme Court is, at the very least, a court of equal standing with the Strasbourg Court.'⁶²
116. Second, the Human Rights Act requires the courts to alter the meaning of primary legislation in order to make it compatible with the Convention rights, whenever it is possible to do so (section 3). It is one thing for the UK courts to declare legislation incompatible with human rights, but quite another for them to be required to revise that legislation, in material respects, in order to ensure compatibility without there being any direct or meaningful Parliamentary oversight.
117. In practice, these provisions have given rise to a significant constitutional shift in the balance between Parliament, the executive and the judiciary – diverting the courts from their normal function in the interpretation of legislation into straightforward judicial amendment. Even before the Act came into force, some commentators recognised the risks that these provisions could bring.⁶³ In practice, the way in which they have been given effect has justified those fears, compelling the courts to displace the role of Parliament in determining difficult questions of public policy.
118. Section 3 of the Act has resulted, for example, in the Malicious Communications Act 1988, which clearly prohibited people from sending indecent or grossly offensive communications, being limited by the courts to make it compatible with the right to freedom of expression (in a case where the applicant had sent pictures of aborted fetuses to pharmacies selling the morning-after pill).⁶⁴ It has also resulted in the courts, for example, changing the balance struck by Parliament in section 41 of the Youth Justice and Criminal Evidence Act 1999, to expand the circumstances in which evidence or questioning about a complainant's sexual history can be admitted in rape

⁶¹ Lord Toulson, 'International influence on the Common Law', speech at London Common law and Commercial Bar Association (11 November, 2014).

⁶² Lord Judge, 'Constitutional Change: Unfinished Business', lecture at University College London (4 December, 2013).

⁶³ Lord Hoffmann (March, 1999), 'Human Rights and the House of Lords', 62 *Modern Law Review* 159.

⁶⁴ *Connolly v DPP* [2007] EWHC 237 (Admin), [2008] 1 WLR 276. Although the court found that sometimes sending such material might be protected by Article 10, they held that, on the particular facts of the case, the prosecution of the applicant was in compliance with Article 10.

cases.⁶⁵ This judgment is often regarded as the high-point of the courts' expansive approach to section 3.

119. In 2019 the UK Supreme Court overturned the decisions of the Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal, when it used section 3 to change the scope of employment rights under the Employment Rights Act 1996 by reading 'worker' much more widely than its natural meaning to include judicial office holders, to avoid incompatibility with Article 14 read with Article 10.⁶⁶
120. The Court of Appeal in Northern Ireland used section 3 last year to 'read in' a new exception to the conditions for receiving a particular benefit under an Act of the Northern Ireland Assembly, though that exception was not in the text of the Act itself. That approach has raised a question about how to interpret nearly identical provisions in different legislation covering England, Wales and Scotland, which was not the subject of the case.⁶⁷
121. In applying section 3 in various cases, the courts have held the following: the phrase 'so far as is possible' can be interpreted as meaning 'unless it is plainly impossible';⁶⁸ section 3 can be used even where there is no ambiguity in the legislation;⁶⁹ even if the legislation is very clear, section 3 can be used to require that the legislation be given a different meaning;⁷⁰ and section 3 can be used to adopt an interpretation of legislation which 'linguistically may appear strained' and that the courts may 'read in' additional words to the legislation, or may 'read down' so as to apply a narrow interpretation of the legislation and render it compatible with Convention rights.⁷¹
122. Francis Bennion, a former Parliamentary Counsel and leading authority on statutory interpretation, concluded that the Human Rights Act:

'...instructs the courts to falsify the linguistic meaning of other Acts of Parliament, which hitherto has depended on legislative intention at the time of enactment – giving domestic judges a broad licence to re-write British law to give effect to new rights made in Strasbourg.'⁷²

⁶⁵ *R v A (No.2)* [2001] UKHL 25.

⁶⁶ *Gilham v Ministry of Justice* [2019] UKSC 44, [2019] 1 WLR 5905.

⁶⁷ *O'Donnell v Department for Communities* [2020] NICA 36.

⁶⁸ *Ibid.* at paragraph 44.

⁶⁹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

⁷⁰ *Ibid.*

⁷¹ *R v A (No.2)* [2001] UKHL 25, [2002] 1 AC 45; and *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

⁷² Francis Bennion, 'Human Rights: A Threat to Law?', [2003] 26 *University of New South Wales Law Journal* 418, at page 433.

123. The government believes that these systematic problems with the current framework have manifested themselves in a number of ways, which our proposals will seek to address.

A ‘rights culture’ that displaces personal responsibility and the public interest

124. The international human rights framework recognises that not all rights are absolute and that an individual’s rights may need to be balanced, either against the rights of others or against the wider public interest. Many of the rights in the Convention are ‘qualified’, recognising explicitly the need to respect the rights of others and the broader needs of society.

125. The idea that rights come alongside duties and responsibilities is steeped in the UK tradition of liberty, but is also reflected in the qualifications in the Convention and is explicit in Article 29 of the UN Declaration of Human Rights (‘Everyone has duties to the community in which alone the free and full development of his personality is possible’). The increasing reliance on human rights claims over the years has, however, led to a culture of rights decoupled from our responsibilities as citizens, and a displacement of due consideration of the wider public interest.

126. Since 2000, human rights claims have been brought by many people who have themselves showed a flagrant disregard for the rights of others. We have seen, for example, the right to respect for a family and private life used to avoid deportation by foreign offenders who have committed serious crimes.⁷³ The case against the UK on prisoner voting was originally brought by John Hirst, convicted of manslaughter for killing his landlady with an axe.⁷⁴ The government believes that the policy decision as to whether prisoners ought to vote in elections ought to lie with elected representatives rather than the courts.⁷⁵ We have also seen the right to a family life used to challenge the separation of sexual partners in prison,⁷⁶ and to challenge the refusal of all telephone contact and inter-prison visits between a couple who married in one prison but were later separated.⁷⁷

127. Other claims from prisoners also reveal the extent to which there is a perception that it is worth making a human rights claim, even on flimsy grounds. One prisoner made

⁷³ See the section ‘Foreign National Offenders’ further below.

⁷⁴ *Hirst v United Kingdom (No.2)* [2004] 38 EHRR 40.

⁷⁵ The UK Parliament has an elected House of Commons, and an unelected House of Lords. The elected Commons has primacy, and the Lords acts as a scrutiny and revising chamber.

⁷⁶ *R (Bright and another) v Secretary of State for Justice* [2014] EWCA Civ 1628; *O’Neill and Lauchlan v Scottish Ministers* [2015] CSOH 93, [2015] 1 WLR 723.

⁷⁷ *R (MA) v Secretary of State for Justice* [2021] EWHC 1266 (Admin).

a claim for religious discrimination in 2011 after he was excluded from communal worship after allegedly trying to kick a prison officer. Although the claim failed, this cost the government £28,000 in legal fees.⁷⁸ In another instance, a prisoner with medical dietary requirements claimed a breach of his human rights in 2012 when a substitute meal was offered to him. Although the meal met his medical needs, it was not the specific meal he had wanted. The court struck out the claim, but the government's legal costs came to over £4,500 in this one minor case.

128. In 2020, a prisoner claimed that his exclusion from Friday prayers pending a risk assessment was a breach of his right to freedom of religion contrary to Article 9, despite having been involved in a violent incident in Friday prayers the previous week. The same prisoner brought a claim later the same year alleging a breach of his right to privacy contrary to Article 8 when the prison opened two of his letters, one of which did not come under the category of mail which the prison is not allowed to open, and the other of which was not properly marked as such. Both of these claims were struck out but the elastic expansion of the parameters of human rights law has created widespread uncertainty, which has encouraged patently unmeritorious claims, requiring substantial amounts of taxpayers' money to defend them. In this case, ultimately government litigators were forced to apply for a Civil Restraint Order in relation to the prisoner.
129. Although the prisoner was unsuccessful, dealing with repeated spurious claims takes up the valuable time of those working in the prison, and incurs costs for the public purse: over £10,000 for these two cases alone. The fact that the same prisoner brought a series of spurious claims relying on breaches of his human rights illustrates the rights culture that has developed. Relying on the government seeking Civil Restraint Orders is not the appropriate way to deal with this issue.
130. These claims were unsuccessful, but often the fact that they can be brought at public expense serves to undermine public confidence in the Human Rights Act. Between 2009 and 2015, 648 prisoners claimed that the ban on prisoner voting violates their rights under Article 3 of Protocol No.1 to the Convention. The government's litigation costs in these cases alone were approximately £130,000.⁷⁹ This does not include the further litigation costs of defending prisoner voting cases in Strasbourg. For cases which are considered by the UK courts, the Human Rights Act gives little positive steer on areas where the public interest should be located. In the absence of this, the courts themselves have had to develop jurisprudence, which can make the law uncertain.

⁷⁸ Source: Government Legal Department.

⁷⁹ Ibid.

131. Whilst human rights are universal, a Bill of Rights could require the courts to give greater consideration to the behaviour of claimants and the wider public interest when interpreting and balancing qualified rights. More broadly, our proposals can also set out more clearly the extent to which the behaviour of claimants is a factor that the courts take into account when deciding what sort of remedy, if any, is appropriate. This will ensure that claimants' responsibilities, and the rights of others, form a part of the process of making a claim based on the violation of a human right.

Foreign National Offenders (FNOs)

Case X⁸⁰

Case X was a foreign national who had leave to remain in the UK, and who committed a series of crimes including common assault, battery, destruction of property and grievous bodily harm.

Whilst Case X was serving a custodial sentence for possession of cocaine with intent to supply, the Home Secretary made a deportation order against Case X. Case X appealed, claiming it would violate their Article 8 right to a private and family life. The Asylum and Immigration Tribunal found that it would be a disproportionate interference with the appellant's rights to deport them, given their relationship with their child.

The immigration tribunal noted that they had relatives in their native country, they did not provide care or funds for their child's maintenance, and they were not a reliable witness. Nevertheless, the tribunal upheld Case X's appeal against deportation on Article 8 grounds. Case X's former partner commented publicly that they had not seen their child since they had been released from prison.

Immigration Act 2014

The Immigration Act 2014 sought to address cases such as Case X and to strengthen the public interest in the deportation of FNOs. The Act set out the approach to be taken by a UK court or tribunal when deciding whether a decision made under the Immigration Act breaches a person's Article 8 Convention right. The court has to balance the interference with the person's right to family life with the wider public interest to decide whether the interference is justified.

⁸⁰ The specific details of this case have been omitted in view of other legal proceedings.

In the case of FNOs, the 2014 Act provided that their deportation will be required by the public interest except where specific exceptions are met. However, the discretion left to the courts to 'balance' the respective criteria has enabled the Human Rights Act to be used to dilute the intended impact, intended and articulated by Parliament through the passage and enactment of the 2014 Act, namely to deport FNOs who have shown little or no regard for the rights of others by committing crimes in the UK. A number of cases since 2014 help to demonstrate this.

*AD (Turkey)*⁸¹

In 2018, a Turkish national was convicted of an offence of grievous bodily harm and sentenced to 54 months' imprisonment. In September 2019, the First Tier Tribunal allowed his appeal against deportation, on human rights grounds. After protracted litigation, relying on his period of lawful residence and marriage to a UK national, the Upper Tribunal allowed the appeal on Article 8 Convention grounds.

*OO (Nigeria)*⁸²

In 2016, a Nigerian national was convicted at trial of two counts of the possession of Class A drugs, namely crack cocaine and heroin, with the intention to supply, and the concealment or conversion of criminal property. He was sentenced to a total term of imprisonment of four years. In 2017, he pleaded guilty to two offences of violence; assault occasioning actual bodily harm and battery. He was sentenced to a total of eight months' imprisonment, to run concurrently with the four-year sentence he was already serving for his earlier convictions.

In 2020, the First Tier Tribunal allowed his appeal against deportation on Article 8 grounds. Before the Upper Tribunal, the Home Secretary argued that insufficient weight had been given to the public interest in deportation and that the findings that very significant obstacles would be encountered in integrating in Nigeria were not made out. The Upper Tribunal upheld the findings relying on OO's 'very significant obstacles' to integrating back in Nigeria.

Confusion and risk aversion for frontline public services

132. Everyone serving the public must act within the law and respect people's human rights. Equally, those charged with delivering vital public services on the frontline need clarity as to what their obligations are, and what they can and cannot do within the bounds of human rights law, in order to do their jobs properly and serve the public. The ability to challenge public authorities before the domestic courts is not

⁸¹ Appeal number: HU/01512/2019, <https://tribunalsdecisions.service.gov.uk/utiac/hu-01512-2019>

⁸² Appeal number: HU/16908/2018, <https://tribunalsdecisions.service.gov.uk/utiac/hu-16908-2018>

something we propose to change. The state must be held to account. It is important, however, to remember that in delivering vital services to help and protect people, public authorities face varied, and competing, operational priorities which they are required to reconcile with finite resources.

133. The domestic application of the Human Rights Act, under sections 2 and 3, and the wider development of 'positive obligations' on government authorities, has given rise to considerable legal uncertainty, with incrementally expanding interpretations of the scope of certain rights and judicial amendment of legislation.
134. For example, in the case of *Rabone*,⁸³ the UK Supreme Court held that the state had breached the positive obligation to protect life under Article 2 in respect of a voluntary psychiatric patient who died by suicide when on medically approved leave from the hospital, and awarded the applicants damages for the breach. In doing so, the Supreme Court noted that the Strasbourg case law in this area was young and the boundaries were still being explored. The Supreme Court went further than the Strasbourg Court by expanding the 'operational duty' under Article 2 to voluntary patients as well as detained patients, so placing an obligation upon the hospital which did not exist under previous case law. The scope of this obligation under Article 2 remains uncertain and it is not always clear when it applies, creating operational difficulties for medical practitioners on the front line.⁸⁴
135. In *Ziegler*, the UK Supreme Court this year set aside several protestors' convictions for wilfully obstructing a highway, holding that in light of Articles 10 and 11 of the Convention, protestors can have a 'lawful excuse' for deliberate physically obstructive conduct even where it prevents other users from exercising their rights to pass along the highway.⁸⁵ The case highlights the problems that the Human Rights Act creates when assessing proportionality in relation to the Convention rights, as demonstrated by the different approaches adopted in the judgments of the District Judge, the Divisional Court, and different members of the Supreme Court. In this case, it enabled a group of protestors to disrupt the rights and freedoms of the majority.
136. The House of Lords (as the then final appellate court) has highlighted the haphazard nature of some of the Strasbourg case law.⁸⁶ If this uncertainty has created

⁸³ *Rabone and another v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72.

⁸⁴ For example, in *R (Kent County Council) v HM Coroner for Kent (North West District) and others* [2012] EWHC 2768 (Admin), the court thought a local authority could owe this duty to a child whom it was required to protect by section 17 of the Children Act 1989.

⁸⁵ *Director of Public Prosecutions v Ziegler and others* [2021] UKSC 23, [2021] 3 WLR 179.

⁸⁶ *Al-Skeini v Secretary of State*, [2007] UKHL 26, [2008] 1 AC 153, per Lord Rodger, at paragraph 67. For a further example of the difficulties in following the Strasbourg case law, see *N (FC) v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296.

difficulties for the UK courts, it has sometimes led public authorities to take a cautious approach, contrary to the public interest.

137. As considered above, the expansion of the right to family life has created uncertainty in the scope for deporting foreign national offenders. In addition, *R (Ellis) v Chief Constable of the Essex Police* concerned a case where that police force had issued posters with the names and faces of offenders as a way of demonstrating that the local police were convicting criminals in the area, and to deter people from committing crime.⁸⁷ The court found that there had not been a breach of Article 8, on the facts of the case, but in doing so the court found that there was the potential for the Article 8 rights to be engaged.⁸⁸ This has led to the situation where police forces face a real risk of legal challenge, where they wish to publicise the results of criminal activity or deter others by issuing posters identifying offenders who have been convicted for very serious crimes. In 2009, when Greater Manchester Police published posters of offenders to show the value of public information in securing convictions, they were threatened with legal challenge by lawyers acting on behalf of the criminals and their families.⁸⁹
138. Whilst neither previous governments nor the devolved administrations have established a comprehensive means to record the volume of, or rise in, domestic human rights litigation after the enactment of the Human Rights Act, it is evident that the increase in litigation was not confined to the immediate years after its entry into force.⁹⁰

Prisons' provision of drugs treatments

Between 2005 and 2011, the Prison Service in England and Wales faced successful claims from over 600 prisoners who claimed that their human rights were breached by the failure to provide them with methadone, Valium or other particular forms of treatment for their drug addictions.

The Prison Service has settled claims alleging a combination of negligence, inhuman and degrading treatment (under Article 3), the violation of the right to a privacy (under Article 8) and discrimination (under Article 14). This has cost the taxpayer around £7 million, including compensation paid out and legal costs.

⁸⁷ [2003] EWHC 1321 (Admin), [2003] 2 FLR 566. See also *Judicial Review (Northern Ireland)* [2015] UKSC 42, [2016] AC 1131.

⁸⁸ *Ibid.*, at paragraph 37.

⁸⁹ Reported in Manchester Evening News, <http://www.manchestereveningnews.co.uk/news/local-news/gangsters-families-posters-breached-our-human-922100>, accessed 5 November, 2021.

⁹⁰ See, for example, 'Human Rights Arguments Used in 400 Cases in the Last Year', a review by Thomson Reuters, 9 November, 2015.

139. The government believes that the Human Rights Act has created additional legal uncertainty and costs for public authorities in carrying out the functions that Parliament has specifically entrusted to them. The government wants to ensure those professionals delivering vital public services on the frontline have the legal certainty to enable them to discharge their duties effectively.
140. Under our proposals there will be less scope for ambiguity in interpreting claimants' rights, and less scope for judicial amendment of the statutory frameworks. That will help give officials and frontline public servants the confidence they need to serve and protect the public, whilst respecting people's human rights. It will also give greater effect to the will of elected and accountable law makers in Parliament.

Undermining public protection

141. We want to support those public services, from the police to our armed forces, who are dedicated to protecting the public. These organisations have always had to make difficult choices about when to act and how to focus their resources. Of course, they must remain subject to the rule of law, and held accountable for their actions.
142. Since the Human Rights Act came into force, the legal framework within which public authorities operate has been rendered less certain, and they are more likely to find operational decisions challenged and to have a court retrospectively second-guess their professional judgement exercised under considerable pressure. This uncertainty has affected those services operating within devolved competence, like police forces, and those operating within reserved competence, like the armed forces. In addition, the courts, in the UK and Strasbourg, have created principles that dictate how such a public authority should discharge its operational duties. This means that authorities are often compelled to carry out measures solely to mitigate against the risk of costly litigation, rather than exercising common sense and professional judgement to determine operational priorities. Individual judgments inevitably highlight compelling cases and some of the case law has emerged from extreme cases on the facts. In the *Osman* case, for example, a teacher became obsessed with one of his pupils. He shot the boy, injuring him, and killed his father. The family claimed that the police had violated the father's right to life, by failing to prevent his death.
143. The claim of negligence against the police failed in the UK courts. The claim was then taken to the Strasbourg Court in 1998. The family's claim was rejected on the facts of the case, but the court nonetheless held that the right to life placed a general duty on the police to do everything 'that could be reasonably expected of them to

avoid a real and immediate risk to life of which they have or ought to have knowledge'.⁹¹

144. In doing so, the Strasbourg Court ruled that limits on negligence claims against the police under domestic law were unduly restrictive and amounted to a violation of the claimants' right of access to court.⁹² While the principle articulated by the judgment seems reasonable at first sight, the effect of turning common sense guidance into a human right that must be universally applied and can be judicially enforced, has placed an onerous burden on police forces and led to unintended consequences.
145. The cost of Threat to Life notifications (previously known as 'Osman warnings') has not been previously quantified, but the duty has added considerable complexity and expense to ongoing policing operations. Often intelligence about such threats will have been obtained as part of covert operations and the police will have to carefully consider the risks of using the information more widely.
146. In 2019, the four biggest police forces in England issued between them 770 Threat to Life notifications, with these notifications having a considerable impact on police resource.⁹³ At the lower end of the scale, management of a notification is likely to require the work of a small team of detectives, as well as the support of emergency response teams over a period of 48 hours to a week. This in itself places a significant burden on forces. However, the impact on resource can be much higher in some cases. As a result of violence between rival gangs in 2014-2015, Greater Manchester Police had two separate operations in train over a significant period of time, both of which needed to be staffed on a 24-hour basis over certain periods. One of these operations lasted 18 months, during which time the force issued 100 Threat to Life notifications.
147. More recently, an urban police force reported running three Threat to Life operations, believed to relate to subjects involved in gang violence or with links to organised crime. All three cases centre around disputes over drugs or firearms. By the time these threats are managed and mitigated the force will have spent hundreds of hours of officer and specialist staff time.
148. Given that, in such cases, substantial police time and effort is engaged in carrying out measures for serious criminals, this displaces the policing resources available for other serious crime perpetrated against law-abiding citizens, which inadvertently skews policing priorities.

⁹¹ *Osman v United Kingdom* (2000) 29 EHRR 245, paragraph 116.

⁹² See also *Z v United Kingdom* (2002) 34 EHRR 3, in which the Strasbourg Court adapted its approach in *Osman*.

⁹³ Source: police force management information.

149. Since those engaged in serious crime are disproportionately likely to face ‘a real and immediate risk to life’, they (rather than ordinary members of the public) are more likely to need the protective services required by the *Osman* ruling. One force reported that up to 75% of all Threat to Life notifications – required by the *Osman* ruling – may be issued to serious criminals or gangs. As a result of the straitjacket approach required by human rights case law, a substantial amount of police time is being diverted to provide witness protection to serious criminals. This inevitably displaces police resources allocated to protecting wider society and means that forces are constrained to act in a risk-averse way, taking measures to prevent costly litigation rather than spending resources on protecting the public.
150. The expansion of human rights law by courts, imposing overly prescriptive ‘positive obligations’ on police forces, and other frontline public services across the UK, risks skewing operational priorities and requiring public services to allocate scarce resources to contest and mitigate legal liability — when that public money would be better spent on protecting the public. We take a principled view that decisions on the allocation of resources should be determined by elected law-makers, and by operational professionals in possession of the full facts, who are answerable to the public.

Expanding the territorial scope of rights

The extension of human rights law to armed conflict has also resulted in the actions of our armed forces being subject to increasing legal challenge. This has in turn created considerable legal and therefore operational uncertainties for our armed forces.

It is clear from the *travaux préparatoires* to the Convention that the drafters intended the Convention to apply only on States Parties’ territories. However, despite being presented with strong arguments to the contrary, the courts have ruled that the Convention, in certain circumstances, extends to overseas armed conflict. As a result of judgments such as *Al-Skeini v UK* and *Smith v Ministry of Defence*,⁹⁴ the actions of troops and military decision makers can now be subject to human rights challenges, even though the Convention was not intended to apply extraterritorially and was never designed to regulate conflict situations.

⁹⁴ *Al-Skeini and others v United Kingdom* [2011] 53 EHRR 18 *Smith and others v Ministry of Defence* [2013] UKSC 41, [2014] AC 52.

As Lord Sumption observed in his leading UK Supreme Court judgment in *Mohammed*,⁹⁵ the extension of jurisdiction to any extraterritorial exercise of force goes well beyond the ordinary concept of extraterritorial jurisdiction in international law and requires the application of the Convention to the conduct of military operations for which it was not designed and is ill-adapted. Similarly, the Court of Appeal, deciding on the same matter, noted the difficult legal and practical questions ‘as to how the ECHR protections, designed to regulate the domestic exercise of state power, are to be applied in the very different context of extraterritorial military operations’.⁹⁶

These human rights obligations come on top of the military’s long-established obligations under the law of armed conflict, including the Geneva Conventions, which were designed for the unique circumstances of war and represent a considerable body of law governing armed conflict. Human rights obligations continue to develop on a case-by-case basis, creating a position of considerable uncertainty for our armed forces.

As Lord Rodger said when the *Al-Skeini* case went before the House of Lords (as the then final appellate court):

*‘The problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice. If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality, however, some of them appear much more serious and so present considerable difficulties for national courts which have to try to follow the jurisprudence of the European Court.’*⁹⁷

Operational and strategic decisions need to be taken against a clear legal framework rather than the legal uncertainty that has resulted from the extension of the territorial scope of the Convention in this regard. Indeed, the Council of Europe itself has referred to the need for clarity in relation to applicable law:

*‘The desirability of establishing clarity as to the applicable law is of course a constant in all situations, but it has an obvious and particular importance in armed conflict situations. This underlines the need for reconciliation between the different bodies of law to the extent that they are both applicable.’*⁹⁸

⁹⁵ *Mohammed v Secretary of State for Defence* [2017] UKSC 2, [2017] AC 821, paragraph 48; see also Lord Wilson’s comments at paragraphs 142 and 143.

⁹⁶ *Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843, [2016] 2 WLR 247, paragraph 96.

⁹⁷ *Al-Skeini and others v Secretary of State for Defence*, [2007] UKHL 26, [2008] 1 AC 153.

⁹⁸ ‘The Place of the European Convention on Human Rights in the European and International Legal Order: Report of the Steering Committee for Human Rights’, 29 November, 2019, paragraph 253.

Beyond operational uncertainty, there is also the cost to the taxpayer of defending litigation arising from military operations, including the compensation payments made to claimants. This litigation can also significantly affect the morale of armed forces personnel.

Public protection: foreign national offenders (FNOs)

The Strasbourg Court and UK courts have incrementally expanded the restrictions on deporting serious foreign offenders under Articles 3, 6 and 8. In particular, since the Human Rights Act, the UK courts have expanded the scope for challenging deportation orders under Article 8, the right to family life (see pages 36 to 39, above).

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

Furthermore, a review of a sample of recent cases indicates that a high proportion of successful human rights appeals at First Tier Tribunal are on Article 8 grounds. In the period 1 April 2016 to 8 November 2021, of 1,011 appeals against deportation by FNOs that were allowed on human rights grounds at First Tier Tribunal, an estimated 70% were allowed solely on Article 8 grounds.⁹⁹

These figures do not include those foreign national offenders who, after case law has been relatively well established on points related to the right to family life, are not served with deportation orders at all.

The expanding human rights restrictions on the government's ability to deport serious foreign offenders engages the government in costly litigation, and puts the public at additional risk by enabling dangerous criminals to frustrate the process.

Some progress has been made in confronting the use of the Human Rights Act to prevent deportation of FNOs, most notably through the changes in the Immigration Act 2014, but serious problems arising from the Human Rights Act remain.

⁹⁹ Source: internal Home Office data. The estimate is based on the review of a random sample of 296 First Tier Tribunal cases from a total of 1,011 relevant cases: 206 were allowed solely on Article 8 grounds; 45 were allowed for another reason plus Article 8; and another 45 were allowed for a non-Article 8 reason.

Public policy priorities and decision-making affecting public expenditure has shifted from Parliament to the courts, creating a democratic deficit

151. Responding to the *Osman* case, Lord Hoffmann expressed an additional concern. He characterised such rulings as ‘essentially... about the obligations of the welfare state’, warning ‘I am bound to say that this decision fills me with apprehension’, because it involves the Strasbourg Court ‘challenging the autonomy of the courts and indeed the Parliament of the United Kingdom to deal with what are essentially social welfare questions involving budgetary limits and efficient public administration’.¹⁰⁰ He stated that this kind of case ‘serves to reinforce the doubts I have had for a long time about the suitability, at least for this country, of having questions of human rights determined by an international tribunal made up of judges from many countries’, adding:

‘I accept that there is an irreducible minimum of human rights which must be universally true. But most of the jurisprudence which comes out of Strasbourg is not about the irreducible minimum... It is often said that the tendency of every court is to increase its jurisdiction and the Strasbourg court is no exception. So far as the margin of appreciation accommodates national choices, the jurisdiction of the European court is unnecessary; so far as it does not, it is undesirable.’

152. Lord Hoffmann concluded:

‘...the jurisprudence of the Strasbourg court does create a dilemma because it seems to me to have passed far beyond its original modest ambitions and is seeking to impose a Voltairean uniformity of values upon all member States. This I hope we shall resist.’

153. Lord Sumption has analysed the development of Article 6 of the Convention, as a ‘revealing case-study of the way in which the jurisprudence of the European Court of Human Rights tends to expand the scope of the Convention’.¹⁰¹ Lord Sumption concluded:

‘My object in making these remarks is not to rubbish Article 6. Its express provisions are among the core principles of any civilised society. It has undoubtedly brought benefits both to the United Kingdom and to other member states of the Council of Europe... The problem really lies with the appetite that the Strasbourg Court has demonstrated over the past

¹⁰⁰ Lord Hoffmann, ‘Human Rights and the House of Lords’, (1999) 62 *Modern Law Review* 159.

¹⁰¹ Lord Sumption, ‘The right to a court: Article 6 of the Human Rights Convention’, James Wood Lecture, University of Glasgow, 13 November, 2015.

half-century or so to transform the Convention into what in *Loizidou v Turkey* it called an “instrument of the European public order”. This has resulted in the application of Article 6 in areas well beyond its core values, which appear to have little to do with the fairness of proceedings or even access to a court.

In his dissent in *Golder*, Sir Gerald Fitzmaurice warned that the implication into the Convention of rights which were not expressed there would lead to the development of a class of human rights with no exact definition and no principled limits. That prophecy has been borne out by events. Opinions will differ about whether these additional rights are desirable. Like, I suspect most lawyers, I think that the picture is mixed. Some are while others are not. What seems clear, however, is that the result has been to expose the European Court of Human Rights to accusations of altering principles of civil liability in ways that are practically incapable of amendment or repeal by national legislatures. It is open to doubt whether Article 6 was ever intended to serve such a purpose.’

154. We accept that government should be restrained by the protection of fundamental rights. The incremental expansion of rights into novel areas, however, creates a democratic tension with the prerogative of elected representatives to determine what may amount to finely balanced questions of public policy. Deciding policy in these areas affects everyone in our society, not merely the claimants to any individual litigation. The issues are often complex, fluid and polycentric, and may often require the balancing of diverse and competing considerations, rather than the adversarial adjudication of a binary dispute.
155. Such issues may also involve questions about the allocation of finite public funds which require debate at a political level by elected representatives, accountable to taxpayers. Litigation by lawyers in a courtroom is often a narrow prism within which to settle such inherently subjective and value-driven matters of public interest. Our courts are expert in adjudication. They do not, however, have the capacity, resources nor the democratic mandate to engage in wider policy-making. While much of the problematic case law cited here arises in respect of services delivered in England, where responsibility for those services is devolved, the principles at stake are equally important in respecting the democratic role of the devolved legislatures to allocate resources or make policy within their competence. The principles which underpin our proposals, therefore, are relevant to the whole of the UK.
156. For example, the government’s welfare reforms have been the subject of a number of challenges based upon the Human Rights Act. In the case of *SG* a claim was brought that the benefit cap indirectly discriminated against single parents.¹⁰² The issue was

¹⁰² *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449.

argued all the way up to the UK Supreme Court, where, by a majority of three to two, the Court upheld the policy. The government was still, however, engaged in protracted and costly litigation to defend a key area of its social policy, enacted following extensive Parliamentary scrutiny and public debate. In addition, a substantial minority of judges concluded it was a breach of human rights law, raising concerns and uncertainty around the risks of future litigation.

157. This uncertainty about the appropriate role of the courts in reviewing these decisions can be seen in subsequent cases. In the case of *Daly*,¹⁰³ a number of applicants successfully challenged the cap on housing benefit on the basis that it was discriminatory under Article 14 read with Article 1 of Protocol No.1. The UK Supreme Court ruled against the legislation enacted by Parliament, despite acknowledging that finely balanced cases involving questions of economic and social policy should generally be left to elected law-makers to determine.
158. The UK Supreme Court recently revisited its position on the application of the Human Rights Act to welfare-related cases in the case of *SC*.¹⁰⁴ The UK Supreme Court dismissed the claim, recognising that it was for Parliament to decide the issue of proportionality. In doing so, Lord Reed commented: 'In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign.'¹⁰⁵ This welcome ruling demonstrates the ebb and flow of case law, between more and less activist approaches to judicial legislation on human rights grounds, and reinforces the case for reform so that Parliament can clarify and codify the appropriate test in law.
159. In *Cheshire West* (and linked cases) the UK Supreme Court considered whether various placements of mentally ill individuals with foster carers or in small homes constituted a deprivation of liberty under Article 5 of the Convention, even though there was no suggestion that the placements were not in the best interests of the individuals or that they would have wanted to live elsewhere.¹⁰⁶ The Court concluded that it would be a breach.

¹⁰³ *R (Carmichael and others) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550.

¹⁰⁴ *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428.

¹⁰⁵ *Ibid.*, at paragraph 162.

¹⁰⁶ *P v Cheshire West and Chester Council; P and Q v Surrey County Council* [2014] UKSC 19, [2014] AC 896.

160. A minority of the UK Supreme Court thought that there should not be a 'universal test' for deprivation of liberty. They believed it was a matter of degree and decisions should focus on the 'concrete situation', arguing that 'nobody using ordinary language would describe people living happily in a domestic setting as being deprived of their liberty'.¹⁰⁷ At the time, Jon Holbrook, a specialist practitioner in the field noted: 'Substantial quantities of time, money and energy will be diverted from providing care to completing forms and engaging lawyers.' Observing that this judicial change to social policy took place without public discussion or debate in Parliament, Holbrook concluded:

'Viewed through the distorting lens of human rights, care homes and hospitals, providing comfortable living arrangements, may look like gilded cages. Those deciding social policy need better and clearer vision. It's time for social policy to be liberated from the distorting influence of human rights laws.'¹⁰⁸

161. *Manchester City Council v Pinnock and others* is another case with far-reaching practical implications for public authorities.¹⁰⁹ The UK Supreme Court held that, where a local authority brought possession proceedings in relation to a 'demoted tenancy', any defence to that possession claim could include the occupier's entitlement to have the proportionality of his eviction assessed by a court under his or her Article 8 rights (right to respect for a private and family life), even though his or her entitlement to remain had ended.

162. In doing so, the Court overrode Parliament's intention, as set out in the Housing Act 1996, that the court must make an order for possession unless the procedures had not been followed. This increased the uncertainty around the eviction process for local authorities seeking to remove anti-social tenants in England and Wales.

163. In the case of *Tigere*,¹¹⁰ the UK Supreme Court held that a foreign national had been discriminated against on the basis of her immigration status, because she could not access a student loan. Even though the court recognised that, as the case concerned a question of the distribution of finite resources, respect must be accorded to the primary decision maker, they nevertheless held that the Secretary of State should consider a more carefully tailored criterion which would avoid breaching the Convention rights of other applicants. Lord Sumption and Lord Reed dissented, noting that in such cases the degree of respect paid by the court to the judgment of

¹⁰⁷ Amendments were made by the Mental Capacity (Amendment) Act 2019.

¹⁰⁸ Jon Holbrook, 'A Distorted View', *New Law Journal*, 7 May, 2014.

¹⁰⁹ *Manchester City Council v Pinnock and others* [2011] 2 AC 104, [2001] UKSC 6.

¹¹⁰ *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57.

the legislature or executive, and the consequent margin of discretion afforded to the primary decision-maker, must be substantial.

R (Baiai) v Home Secretary¹¹¹

This case demonstrates both the difficulties of the courts' power to alter legislation under section 3 of the Human Rights Act, and the effects of human rights judgments on important areas of public policy.

It concerned the powers to operate the Certificate of Approval scheme, set out in the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, which aimed to tackle sham marriages. The scheme required those subject to immigration control to have permission to marry from the Secretary of State before giving notice to marry to a registrar. The applicants (one of whom was from Algeria, the other from Poland) wished to marry in the UK, where both were living.

The House of Lords (as the then final appellate court), while accepting that it was legitimate for the government to seek to stop marriages of convenience, relied on Article 12 (the right to marry) to insert additional wording into the 2004 Act, which had the effect of imposing onerous requirements on the UK authorities to investigate and assess the genuineness of the relationship. Rather than declare the relevant part of the legislation incompatible with Convention rights, the House of Lords felt compelled under section 3 to amend the relevant provisions of the 2004 Act.

This substantially changed the nature of the legislation and presented the Home Office with significant operational difficulties, in moving from a clear-cut system to one requiring extensive qualitative investigation and evaluations.

164. In another case, *Re S (Minors)*, it was ultimately determined that the courts had overstepped the mark by moving into an area of public policy.¹¹² This case concerned care orders under the Children Act 1989. In attempting to make the process compatible with the rights of parents to respect for private and family life, the Court of Appeal introduced a new procedure after the court had made a care order. This involved 'starring' milestones in a care plan: if not reached on time, the local authority had to inform the guardian who could then reapply to court.
165. The House of Lords (as the then final appellate court) later overturned the decision, acknowledging that the Court of Appeal had crossed the line into amendment rather than interpretation. Lord Nicholls said the starring system:

¹¹¹ *R (Baiai and others) v Secretary of State for the Home Department* [2008] UKHL 53, [2009] 1 AC 287.

¹¹² *Re S (Minors) and others* [2002] UKHL 10, [2002] 2 AC 291.

‘...would have far-reaching practical ramifications for local authorities and their care of children. The starring system would not come free from additional administrative work and expense. It would be likely to have a material effect on authorities' allocation of scarce financial and other resources. This in turn would affect authorities' discharge of their responsibilities to other children. Moreover, the need to produce a formal report whenever a care plan is significantly departed from, and then await the outcome of any subsequent court proceedings, would affect the whole manner in which authorities discharge, and are able to discharge, their parental responsibilities.’¹¹³

166. He added that, ‘These are matters for decision by Parliament, not the courts. It is impossible for a court to attempt to evaluate these ramifications or assess what would be the views of Parliament if changes are needed.’¹¹⁴ Although the issue was ultimately resolved by the House of Lords, it required substantial litigation. The case illustrates the legal uncertainty and costs for public services arising from the Human Rights Act.
167. Ultimately, the expansion of ‘positive obligations’, stemming from the Strasbourg Court, is one reason why many questions of public policy have come to be decided by the courts, rather than Parliament.
168. The Leader of the Opposition, Sir Keir Starmer QC MP, explains in his textbook how some ‘positive obligations’ are written into the Convention while others:
- ‘...arise more discreetly. Their foundation lies in the recognition that the acts of private individuals can threaten human rights just as much as the acts of state authorities. Since, under the Convention, no liability can be imposed on private individuals as a matter of international law, the European Court and Commission [of Human Rights] have chosen to impose positive obligations on states and state authorities to take steps to protect individuals from the actions of other individuals.’¹¹⁵
169. Professor Mowbray has charted in detail some of the areas where human rights protections have been expanded to impose broader burdens across a broad range of public service providers.¹¹⁶

¹¹³ Ibid., paragraph 43.

¹¹⁴ Ibid., paragraph 44.

¹¹⁵ Keir Starmer QC, *European Human Rights Law* (1999), paragraph 5.3.

¹¹⁶ Alistair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004), page 229.

170. In these areas, the courts have expanded the scope of human rights from protecting individuals to prescribing how public services must be delivered, with significant operational and financial implications. In addition, the growth in such obligations comes without proper democratic oversight from Parliament or the benefit of public policy decisions taken in the broader public interest by those elected to do so. This has created a democratic deficit, blurring the boundaries between the legislature and judiciary – which is arguably pronounced for a country without a single written constitution.

171. Whilst there are varied views amongst the UK judiciary, notable senior members have recognised the democratic deficit created by the judicial expansion from Strasbourg of human rights law. Speaking in 2011, Lord Neuberger, then President of the UK Supreme Court, stated:

‘The fact remains though that when Strasbourg speaks, it is ultimately for Parliament to consider what action needs to be taken... Because implementation lies in the hands of Parliament, the debate about fundamental rights, a debate on which vehement and legitimate disagreement can ensue, is conducted in Parliament. It’s there that the ultimate decision lies – not with the judges... Placing such decisions in the hands of the judicial branch of the state poses a danger for the judiciary and for liberal democracy, because it removes the debate from the public and their elected representatives.’¹¹⁷

172. This was followed, in 2013, by Lord Judge, the Lord Chief Justice of England and Wales from 2008 to 2013, who argued:

‘My profound concern about the long-term impact of these issues on our constitutional affairs is the democratic deficit. As I emphasised at the outset, in our constitutional arrangements Parliament is sovereign. It can overrule, through the legislative process, any decision of our Supreme Court. In relation to the Strasbourg Court, and the Convention, is this principle negated by our accession to the treaty obligation contained in Article 46? Do we, can we, accept the obligation recently announced in *Del Rio Prada* that when a UK case arises, our Parliament must take “general measures in its domestic legal order to put an end” to the violations found by the European Court? Can that possibly be required if Parliament disagrees? For me the answer is, of course not. But these observations clearly indicate the intended route, and the future is long as well as short.’

¹¹⁷ Lord Neuberger, ‘Who are the masters now?’, Second Lord Alexander of Weedon Lecture, (6 April, 2011).

This is not a pro- or anti-European stance. It is a constitutional issue... You can argue for and against prisoner voting rights. You can argue for and against the whole life tariff. Reasonable people will take different views. My personal belief is that parliamentary sovereignty on these issues should not be exported, and we should beware of the danger of even an indirect importation of the slightest obligation on Parliament to comply with the orders and directions of any court, let alone a foreign court. Ultimately, this is a political, not a judicial, question. In the meantime, the House of Commons is answerable to the electorate, and our judiciary will continue to apply properly enacted legislation.¹¹⁸

173. Lord Sumption has expressed similar concerns:

‘I would be the first to acknowledge that some degree of judicial lawmaking is unavoidable... It is a question of degree how far this can go consistently with the separation of powers.’

‘The process by which democracies decline is more subtle than that. They are rarely destroyed by a sudden external shock or unpopular decisions. The process is usually more mundane and insidious. What happens is that they are slowly drained of what makes them democratic, by a gradual process of internal decay and mounting indifference, until one suddenly notices that they have become something different, like the republican constitutions of Athens or Rome or the Italian city-states of the Renaissance.’¹¹⁹

174. Judges of the Strasbourg Court have made similar observations. Judge Matscher, a judge between 1977 and 1998, has argued:

‘I also concede that the Convention organs have in this way, on occasion, reached the limits of what can be regarded as treaty interpretation in the legal sense. At times they have perhaps even crossed the boundary and entered territory which is no longer that of treaty interpretation but is actually legal policy-making. But this, as I understand it, is not for a court to do; on the contrary, policy-making is a task for the legislature or the Contracting States themselves, as the case may be.’¹²⁰

175. In 2014, Judge Spanó wrote of the criticism of Strasbourg activism which ‘are not, in any sense, to be considered as wholly without foundation’, and of how the recent

¹¹⁸ Lord Judge, ‘Constitutional Change: Unfinished Business’, University College London (4 December, 2013).

¹¹⁹ Lord Sumption, ‘The Limits of Law’, 27th Sultan Azlan Shah Lecture (20 November, 2013).

¹²⁰ Judge Matscher, ‘Methods of Interpretation of the Convention’, in MacDonald, Matscher and Petzold, *The European System for the Protection of Human Rights* (1993).

adoption of Protocol No.15 'created an important incentive for the Court in recent years to develop a more robust and coherent concept of subsidiarity.'¹²¹

176. Of course, the application of the Strasbourg case law to the UK has been magnified by the operation of the Human Rights Act. The relationship is complex, but the proper relationship has been characterised by Lord Justice Laws, who was a Lord Justice of Appeal from 1999 to 2016, as follows:

'The Strasbourg case law is not part of the law of England; the Human Rights Convention is. The Convention can be and should be a great force for good in this jurisdiction... If we develop it according to the methods and principles of the common law, it will enrich us. Any threat to the common law's catholicity will be dissipated. As for the common law's restraint, we are entitled to think that human rights are like the human heart: the bigger they get, the weaker they get.'¹²²

Summary

177. The shift of law-making power away from Parliament towards the courts, in defining rights and weighing them against the broader public interest, has resulted in a democratic deficit. The human rights inflation we have seen over the past decade and more, has led to a sense among many that the system has lost touch with common sense, extending beyond the oversight and control of democratically elected representatives.

178. This matters because the basic principles which the UK has protected down the centuries, and to which we have signed up in various UN and Council of Europe instruments, remain as important as ever, as a way of protecting the individual from abuse by the state. But our human rights framework also needs to command broader public confidence. By protecting fundamental rights, but curbing the rights inflation, and restoring democratic control over the growth of human rights law, we can restore some balance and common sense to our human rights framework, and re-build public confidence.

179. Our proposals, taken as a whole, will allow our courts to interpret and apply rights in a UK context. We want a clearer separation of powers, to allow the voice of everyone in our society to be heard through their elected representatives in answering inherently difficult and subjective questions about public policy and public spending.

¹²¹ Judge Spanó 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', (2014) 14 *Human Rights Law Review* 487.

¹²² Lord Justice Laws, Lecture III: 'The Common Law and Europe', The Hamlyn Lectures 2013 (27 November, 2013).

And we want to ensure that, when people claim rights, there is a genuine balance struck between their responsibilities, the rights of others, and the broader needs of our communities.

180. Moving in this direction chimes with the way Strasbourg is beginning to approach matters. The new Protocol No.15 has embedded the concepts of subsidiarity and the margin of appreciation into the Convention, recognising explicitly that the primary responsibility for protecting rights falls to each individual country within the Council of Europe.
181. The UK has pressed hard for these developments and we hope they will continue. Our Bill of Rights will reflect, support and encourage this trend by protecting fundamental rights and enhancing Parliament's role in a way that is consistent both with the direction of the institutions in Strasbourg, and our much longer history of human rights in the UK.

Chapter 4 – The Government’s Proposals

Summary

The government is proposing to reform UK human rights law by:

- respecting our common law traditions and strengthening the role of the UK Supreme Court;
- restoring a sharper focus on protecting fundamental rights;
- preventing the incremental expansion of rights without proper democratic oversight;
- emphasising the role of responsibilities within the human rights framework; and
- facilitating dialogue with Strasbourg, while guaranteeing Parliament and the devolved legislatures their proper roles.

We also are consulting on possible impacts of our proposals, including any equalities impacts.

This section gives an overview of the government’s proposals and asks questions on specific proposals.

182. The government wants to introduce a Bill of Rights in a way that protects people’s fundamental rights whilst safeguarding the broader public interest. For that framework to work, it must command public confidence, and provide greater legal certainty and respect for the separation of powers between the judicial and legislative branches of government.
183. Under these proposals, the UK would remain party to the Convention, with the rights in the Convention sitting at the heart of a Bill of Rights. As we have seen, the basic Convention rights are not alien to our law. Many of the Convention rights, as drafted, have been protected under the UK’s legal systems for centuries. Indeed, our proposals for a Bill of Rights would ensure that those rights can be interpreted in the UK context, with respect for our unique common law traditions and history.
184. The rights as set out in Schedule 1 to the Human Rights Act will remain. We regard the Convention as offering a common-sense list of rights. The key problems have arisen from the way in which those rights have been applied in practice, at both the Strasbourg and domestic levels.
185. These proposals will not, therefore, create any fundamental conflict with the Convention, nor necessitate our withdrawal. Nor will we seek to add broad new categories of rights, in areas such as economic or social policy, which rightly remain

areas of public policy to be determined by elected governments, assemblies, and parliaments.

186. These proposals will strengthen our common law traditions, reduce reliance on the Strasbourg case law and reinforce the supremacy of the UK Supreme Court in the interpretation of rights. They will restore sharper focus on fundamental rights, including by ensuring unmeritorious cases are filtered earlier, and giving the UK courts greater clarity regarding the interpretation of qualified rights and imposition by implication of 'positive obligations'. They will prevent the incremental expansion of rights without proper democratic oversight, including by limiting the duty on UK courts to 'read down' legislation enacted by Parliament, and by clarifying restrictions on deportation. They will emphasise the role of responsibilities in interpreting qualified rights and awarding compensation. They will make clear and reinforce Parliamentary sovereignty in the exercise of the legislative function, whilst remaining in dialogue with Strasbourg and devolved administrations.
187. This section of the consultation sets out the government's proposals for a Bill of Rights and seeks your views on them. We also have questions on the wider potential impacts of these changes which can be found on page 89.
188. The government has also carefully considered the options examined by the IHRAR Panel in their report and the government has decided to consult on a range of the Panel's recommendations.

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

189. This section of the consultation looks at the government's proposals to help strengthen our common law tradition, reduce our reliance on Strasbourg case law and help to reinforce the supremacy of the UK Supreme Court in the interpretation of human rights. In particular, we welcome thoughts on the following areas: the interpretation of Convention rights (section 2 of the Human Rights Act); the position of the Supreme Court; trial by jury; and freedom of expression.

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

190. The Human Rights Act made a genuine, but we believe misplaced, attempt to ensure Strasbourg case law was reflected in UK judgments. Under section 2 of the Act, courts in the UK must 'take into account' any relevant Strasbourg jurisprudence. In the years following the introduction of the Act, this meant that domestic judgments strived to match Strasbourg decisions.¹²³ In some more recent cases, the courts have indicated a somewhat greater willingness to depart from the Strasbourg line.¹²⁴ This is welcome, but there remains an over-reliance on Strasbourg case law, as well as too much uncertainty about how section 2 should be applied in practice.

191. The IHRAR Panel considered, as one of their key themes, 'the relationship between domestic courts and the European Court of Human Rights'. This included how section 2 had been applied in practice and whether there was a need for amendment. The IHRAR Panel recommended that section 2 be amended to clarify the priority of rights protection, by providing that domestic courts must first consider whether a rights issue can be resolved by reference to a specific domestic statute or the common law, before considering Convention rights and Strasbourg case law.

192. Other options that were considered by the IHRAR Panel included: to amend section 2 to declare in the Human Rights Act that UK courts are not bound by Strasbourg decisions; to amend section 2 to introduce a requirement to consider case law from other jurisdictions; and to provide guidance on the non-exhaustive circumstances to be taken into account when considering whether to depart from Strasbourg case law.

193. There is no express requirement, as a matter of international law or the Convention, to follow all Strasbourg case law, and since there is no strict doctrine of precedent in Strasbourg, the case law has at times proved inconsistent and haphazard. Equally,

¹²³ See, for example, *R (Alconbury Developments Ltd) v Environment Secretary* [2001] UKHL 23, [2003] 2 AC 295, and *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.

¹²⁴ For example, *R v Horncastle* [2009] UKSC 14 paragraph 11, [2010] 2 AC 373; *Manchester City Council v Pinnock* [2011] UK 6, [2011] 2 AC 104; *R v Abdurahman* [2019] EWCA Crim 2239, [2020] 4 WLR 6; and *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279.

whilst there is a role for the case law of the Strasbourg Court in assisting the domestic courts, it is not the only relevant or authoritative source of guidance for the application of rights in the UK. Where the scope of rights remains unclear, then, following their strict interpretation in accordance with domestic UK precedent, reference can and should also be made to wider common law principles and perspectives from other common law jurisdictions, rather than simply following the distinctive and expansive case law from Strasbourg.

194. There is also the risk that a domestic court might take a more expansive interpretation of a right than would be taken by the Strasbourg Court. Since public authorities, unlike applicants, cannot take their case from the domestic courts to the Strasbourg Court, there would be no way to correct this. As Lord Reed said in a recent UK Supreme Court case, ‘if domestic courts go further than they can be fully confident that the European court would go, and the European court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected’.¹²⁵
195. The starting point for the courts’ interpretation of rights should therefore be the text of the rights themselves, together with past decisions of the domestic courts on the point. The courts could also be directed explicitly, as the IHRAR Panel proposed, to consider first other statutory provisions and the common law. The rules of domestic precedent, as now, will continue to be the primary mechanism for giving a consistent meaning to the legislation, although the UK courts may also have recourse to the *travaux préparatoires* of the Convention in determining the scope of rights. This would itself help to address the risk of domestic courts running ahead of the Strasbourg jurisprudence, but there may additionally be a case to codify Lord Reed’s approach in primary legislation, on which we would welcome views.
196. It is right, though, that the courts should have recourse to a wider range of jurisprudence to assist them in reaching decisions, as they do across all branches of law. We would like to establish a formulation that emphasises the primacy of domestic precedent, while setting out a broader range of case law – including, but not confined to, the Strasbourg case law – that UK courts may consider, if they so choose.
197. This would help to mitigate the incremental expansion of rights driven by the Strasbourg Court, and promote a more autonomous approach to human rights, in line with the UK’s common law principles.

¹²⁵ *AB v Secretary of State for Justice* [2021] UKSC 28, [2021] 3 WLR 494, at paragraph 57

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

The position of the UK Supreme Court

198. The principle that our Parliament and devolved legislatures should make law, and our courts should interpret it, is a key element of our democratic system, and recognising the sovereignty of Parliament and the autonomy of our domestic courts is fundamental to the government's proposed reforms. Under the Human Rights Act, the domestic courts have generally treated Strasbourg case law as having presumptive authority, which should be followed unless there are special circumstances. This approach has indirectly resulted in the supremacy of the UK Supreme Court being undermined by Strasbourg.
199. Other countries in Europe have protections to preserve their sovereignty and constitutions, and to make sure domestic and also international institutions do not overstep their authority. For example, the Constitutional Court in Germany reserves the right to review legal acts by European institutions and courts against the fundamental principles of the German Constitution. A Bill of Rights will seek to restore, with certainty and clarity, the role of the Supreme Court in interpreting UK human rights law.
200. There are good reasons why the domestic courts are better placed than international courts to determine our laws, including relating to the training, calibre, experience, outlook and legitimacy of our senior judiciary. Equally, the UK's own constitutional history and law can be best understood and given effect by the UK's own courts.
201. That said, there are limits to the competence of our domestic courts. In its report, the IHRAR Panel commented that there is a 'need for our courts to apply (as they generally do) the sure yardstick of comparative institutional competence and to not only exercise judicial restraint in contentious moral or ethical issues but also such areas as national security, diplomatic relations, resource allocation or where there is no social consensus'.¹²⁶ The Panel therefore considered, but ultimately did not recommend, the option of clarifying in statute the matters that fall outside the institutional competence of the UK courts, noting that it would in principle be possible, but could undermine appropriate judicial restraint.¹²⁷ We would welcome views on this proposal.

¹²⁶ *Report of the Independent Human Rights Act Review*, Chapter Three, paragraph 32(d).

¹²⁷ *Ibid.*, Chapter Three, paragraphs 62-64.

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights.

How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

Trial by Jury

202. Many of the principles of a fair trial are contained in the common law and our constitutional heritage. Magna Carta provided that ‘to no one will we [the monarch] sell, to no one deny or delay right or justice’. The Bill of Rights in 1689 set out further provisions including prohibitions on excessive fines, bail and protecting jury trial. The Convention recognises the right to a jury trial, but only to the extent that the Strasbourg Court found that jury trials are consistent with the right to a fair trial which is protected by Article 6.¹²⁸

203. The government believes that there may be scope to recognise trial by jury in the Bill of Rights, given its significant historical place in our legal traditions, and the role it plays in securing the fairness of certain trials.¹²⁹ The right could apply insofar as trial by jury is prescribed by law in each jurisdiction, under the control of Parliament for England and Wales, and of the Scottish Parliament and the Northern Ireland Assembly for Scotland and Northern Ireland respectively.¹³⁰

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

Freedom of Expression

204. Freedom of expression is a unique and precious liberty on which the UK has historically placed great emphasis in our traditions of Parliamentary privilege, freedom of the press and free speech. The Human Rights Act sought to recognise this to some degree in section 12(4) of the Act, which directs the courts to have ‘particular regard to the importance of the Convention right to freedom of expression’.

¹²⁸ *Taxquet v Belgium* [2010] ECHR 1806, (2012) 54 EHRR 26.

¹²⁹ Jury trials are a long-standing feature of Scottish criminal procedure, but there is no right to a trial by jury as such. Whether a trial will take place before a jury will generally depend on statutory provisions and the decision of the prosecutor.

¹³⁰ *R v Twomey (John)* [2009] EWCA Crim 1035, [2009] EWCA Crim 1035; *R v Islington North Juvenile Court ex parte Daley* [1983] 1 AC 347. In Northern Ireland, the Justice and Security (Northern Ireland) Act 2007 allows for trial without a jury in certain limited circumstances and the operation of those provisions is a reserved matter.

205. The government believes that the public interest is overwhelmingly assisted by protection for freedom of expression and in a free and vibrant media. Such freedom underpins our democracy, ensures greater transparency and accountability, helps to prevent corruption and preserves the space for wide and vigorous democratic debate.
206. But at the same time, the case law of the Strasbourg Court has shown a willingness to give priority to personal privacy, including in a recent judgment finding that media reporting about a deceased priest's convictions for child sexual abuse and public indecency could interfere with his mother's right to private life, drawing, in part, on the so-called 'right to be forgotten' invented by the Court of Justice of the European Union.¹³¹
207. The challenges for freedom of expression are increasingly also reflected in social media and higher education. The internet has revolutionised our ability to connect with each other and express our views widely. However, the majority of online speech is now facilitated by a small number of private companies, with significant influence over what content appears online.
208. Freedom of expression and the media are essential qualities of a flourishing democracy, and the government is committed to maintaining a free and open internet, in line with our democratic values.
209. The government is committed to ensuring that the biggest social media companies protect users from abuse and harm, and in doing so ensuring that everyone can enjoy their right to freedom of expression free from the fear of abuse.
210. The government is also clear that freedom of speech and academic freedom are fundamental principles, not least in the higher education sector. Academic freedom has rightly enjoyed a special status, reflecting the high level of importance that the courts have consistently placed upon it in the context of the right to freedom of expression. This is due to the special place our universities have historically held as centres of enquiry and intellectual debate.
211. The government wishes to explore ways of strengthening the protection for freedom of expression in the Human Rights Act, mindful as always of the government's primary duty to protect national security and keep its citizens safe.
212. One way in which this could be done is by strengthening section 12 of the Human Rights Act, which applies when a court is considering granting any relief that affects freedom of expression.

¹³¹ *ML v Slovakia* [2021] ECHR 821.

213. Section 12(4) has not had any real effect on the way such issues have been determined by the courts. The government proposes that the Bill of Rights legislation should contain a stronger and more effective provision, making it clear that the right to freedom of expression is of the utmost importance, and that courts should only grant relief impinging on it where there are exceptional reasons.
214. There may also be a case for changing the test currently contained in section 12(3) of the Human Rights Act. The effect of this is that a person applying for an injunction (or interdict in Scotland) to stop publication of material must satisfy the court that in a trial it would be 'likely' that they would establish that the publication should not be allowed. The government is considering whether a higher threshold should be required.
215. The government would also like the Bill of Rights to provide more general guidance on how to balance the right to freedom of expression with competing rights (such as the right to privacy) or wider public interest considerations. The government does not believe such principles should be merely left to the courts to develop. Instead, it believes there should be a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds, clearly spelt out by Parliament. We are considering whether we can draw any lessons or guidance from other strong models of protection for free speech such as those found in the United States, South Africa or other countries.
216. We recognise, however, that freedom of expression cannot be an absolute right when balanced against the need to protect national security, keep citizens safe and take steps to protect against harm to individuals. The criminal law therefore also sets out circumstances in which the freedom of expression is limited in order to protect people from harm. Likewise, when a court is applying the freedom of expression to the particular facts of any case, the government believes that, where Parliament has expressed its clear will on issues relating to the public interest and the exercise of public functions, this should be given great weight.¹³²
217. 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.

¹³² See paragraphs 282-291 below.

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

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

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

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

II. Restoring a sharper focus on protecting fundamental rights

218. This section of the consultation looks at the government's proposals to restore a sharper focus on fundamental rights, including by ensuring unmeritorious cases are filtered earlier, and giving the UK courts greater clarity regarding the interpretation of qualified rights and imposition by implication of 'positive obligations'. In particular, we welcome thoughts on the following areas: a permission stage for human rights claims; judicial remedies (section 8 of the Human Rights Act); and positive obligations.

A permission stage for human rights claims

219. Human rights provide fundamental individual guarantees in our society. It is therefore crucial that our justice system protects people who have genuinely suffered from human rights breaches. People lose trust in that system, however, when frivolous or spurious cases come before the courts. Even when those claims are unsuccessful, the public is left with the sense that human rights are being deliberately misused. This devalues the concept of human rights.

220. The government believes that claims aiming to vindicate rights are serious matters, and the system needs to focus on cases where a genuine harm or loss has been caused. We have witnessed a proliferation of human rights claims under the Human Rights Act, not all of which merit court time and public resources. We also believe rights claims should not be used simply as another avenue of litigation to obtain compensation. The introduction of a permission stage would ensure that courts focus on genuine and credible human rights claims.

221. We believe it is wrong that the burden is on public bodies to apply to courts to strike out frivolous or spurious human rights claims. A permission stage would shift responsibility to the claimant to demonstrate that a human rights claim does, in practice, raise a claim which merits the court's attention and resources.

222. The permission stage would require claimants to demonstrate that they have suffered a significant disadvantage before a human rights claim can be heard in court. Similar case management conditions exist in other jurisdictions, such as the European Court of Human Rights in Strasbourg and the German Federal Constitutional Court. We consider that a significant disadvantage condition would be an effective way to divert trivial and unmeritorious cases away from the courts early on in the process.

223. The framework of the permission stage could include a second 'overriding public importance' limb available in exceptional circumstances where claims fail to meet a 'significant disadvantage' threshold but for some other reason merit consideration by the courts. If a claim does not satisfy the 'significant disadvantage' requirement, the

additional limb would give courts discretion to allow claims to proceed to a full hearing if there is a highly compelling reason on the grounds of public importance.

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

Question 9: Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

Judicial Remedies: section 8 of the Human Rights Act

224. Where human rights claims are brought for trivial matters, or by claimants who have abused their rights or the rights of others, it can bring human rights into disrepute.
225. The government wants a Bill of Rights to refocus rights-based claims on serious cases where a genuine injustice needs to be addressed. Human rights should not be misused to provide a fall-back route to compensation on top of other private law remedies. They should be relied upon when a genuine and serious breach has taken place, and our reforms will aim to clarify this.
226. One step towards achieving this is to strengthen the rule in section 8(3) of the Human Rights Act requiring other claims to be considered when awarding damages. We believe that the existing rule does not go far enough, and our proposals would 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.
227. We would expect this change to reduce the numbers of human rights-based claims being made overall, while preserving people's ability to bring rights claims where justice requires it.

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

228. The government is also considering how a sharper focus on protecting rights can be secured by giving a clear steer to the courts on how to balance the qualified rights in

the Bill of Rights (see paragraph 282 onwards), and by requiring the courts to take responsibilities into account in considering remedies (see paragraph 299 onwards).

Positive obligations

229. The Convention rights have been interpreted and incrementally expanded by the courts to require the state to discharge various 'positive obligations'. Whilst that content can make for common sense policy and guidance to operational decision-making, transforming it into individually judicially enforceable human rights has created significant problems, as described above.¹³³
230. The expansion of such 'positive obligations' has involved extending the Convention by judicial implication, which has created uncertainty as to the scope of the government's (and other public authorities') legal duties, thereby fettering the way it can make operational decisions, determine policy in the wider public interest, and allocate finite taxpayer's resources. The government is interested in looking at ways to restrict the circumstances in which these obligations are imposed by what can amount to judicial legislation.
231. We would like to consider how we can restrain the imposition and expansion of positive obligations, allowing the government and those delivering public services to take appropriate decisions for everyone in society, in order to avoid such decisions and priorities becoming distorted by the outcomes of individual litigation.

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

¹³³ See 'The Case for Reforming UK Human Rights Law' above, at paragraphs 133-150 and 167-170.

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

232. This section of the consultation looks at the government's proposals to prevent the incremental expansion of rights without proper democratic oversight, including by limiting the duty on UK courts to reinterpret legislation enacted by Parliament, and by clarifying restrictions on deportation, but also touching on other aspects of the rights framework. In particular, we welcome thoughts on the following areas:

- respecting the will of Parliament;
- when legislation is incompatible with the Convention rights;
- statements of compatibility;
- application to the devolved administrations;
- public authorities;
- extraterritorial jurisdiction;
- qualified and limited rights;
- deportations;
- illegal and irregular migration; and
- remedies.

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

233. The balance struck between Parliament making legislation and how that legislation is interpreted by the courts sits at the heart of our constitution. The Human Rights Act has given rise to much debate on the subject, especially in relation to section 3 (the duty to interpret legislation compatibly with Convention rights) and section 4 (the power to make a declaration of incompatibility). Our view is that the Act, as it has been applied in practice, has moved too far towards judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament.

234. When interpreting legislation, the courts generally aim to give it the meaning that was intended by Parliament at the time it was passed. Section 3 of the Human Rights Act provides for a different test that applies when the normal approach to statutory interpretation could give rise to potential incompatibility with a Convention right. In that situation, legislation is to be interpreted and, if necessary, the express wording of legislation adapted, to give it a meaning which is compatible with the relevant Convention rights 'so far as it is possible to do so'.

235. The potential for section 3 to alter substantially the meaning of primary legislation was set out earlier in 'The Case for Reforming UK Human Rights Law' in paragraphs 116-123. Section 3 compels the court to expand the scope of its interpretive duty beyond what is appropriate for an unelected body. If a court decides that a clear provision in primary legislation is incompatible with human rights, then its role is to

declare it incompatible with Convention rights. The government believes that Parliament should be the body that then decides on how to address the incompatibility.

236. We believe that section 3 has resulted in an expansive approach with courts adapting legislation.¹³⁴ We think that a less expansive interpretive duty would provide greater legal certainty, a clearer separation of powers, and a more balanced approach to the proper constitutional relationship between Parliament and the courts on human rights issues.
237. We note that the IHRAR Panel did not support repeal of section 3. The government is minded to agree. However, for the reasons set out above, we believe this expansion of the courts' interpretative duty warrants consultation on options for reform.
238. We believe section 3 should be replaced by an alternative provision setting out clearly how to interpret legislation. Additionally, we are interested in responses on the possibility of enhancing Parliamentary oversight and scrutiny of the operation of section 3, taking into account the considerations of the IHRAR Panel. We would welcome comments on these options:

Option 1. Repeal section 3 and do not replace it.

239. If section 3 were repealed, the common law presumption that Parliament does not intend to act in breach of international law, including treaty obligations, would apply. Where legislation was ambiguous, and a meaning that could reasonably be attributed to it was compatible with the Convention and other meanings were not, the compatible meaning would be preferred. This is a settled principle of existing law and would emphasise the need to rely on familiar principles of statutory interpretation in this field. Given the uncertainty in this area, the government is minded to codify the approach under primary legislation, rather than merely repeal section 3. As noted, the IHRAR Panel did not support a repeal of section 3.

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, where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.

240. Two alternative clauses, indicating how option 2 might be drafted in the Bill of Rights, are included after paragraph 8 of Appendix 2 for illustrative purposes.

¹³⁴ *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

241. This approach would be similar to putting the common law presumption as set out above on a statutory footing with regards to the Convention rights. This would address the policy concerns the government has around section 3, but codify it clearly and authoritatively as a principle of human rights interpretation.
242. The two alternative formulations would replace the words ‘so far as it is possible to do so’ with a more restrictive limitation on the power to interpret. This would provide a more balanced position between respecting the will of Parliament and the presumption that legislation should be compliant with human rights.

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

Option 1: Repeal section 3 and do not replace it.

Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.

We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

243. In addition to the options above, we note the IHRAR Panel’s recommendation to improve Parliament’s role, particularly that of the Joint Committee on Human Rights, in scrutinising section 3 judgments. We would welcome views on this proposal, and on the role that Parliament could play in democratically overseeing how section 3 is operating more broadly.

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

244. The IHRAR Panel recommended the creation of a judgments database to increase transparency in the application of section 3. The database could enhance public accessibility and understanding of the use of section 3. It would also be accessible to Parliament (including the Joint Committee on Human Rights), allowing them more easily to monitor and examine section 3 judgments, and aid their understanding of the prevalence of section 3 judgments through access to a robust evidence base.
245. We are interested in responses on whether there is a need for such a database and what form it could take, for us to take into account in future policy development.

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

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

Declarations of incompatibility

246. Where it is not possible for primary legislation to be interpreted compatibly with the Convention rights, section 4 of the Human Rights Act allows the higher courts to make a declaration of incompatibility. This does not invalidate the legislation: it is for Parliament to consider what action, if any, it wishes to take in response to this declaration.
247. The position of devolved legislation is different: the devolution settlements set out that legislation which is incompatible with the Convention rights is outside the competence of the devolved legislatures and is, therefore, not law. In practice, declarations of incompatibility under section 4 have only ever arisen in respect of legislation of the UK Parliament.
248. We believe this has been an effective way of recognising the democratic role of Parliament, facilitating dialogue between the courts and Parliament and reflecting long-standing constitutional principles. We want declarations of incompatibility to be available in the same circumstances in any reform.
249. Under the Human Rights Act, declarations of incompatibility can only be made in relation to secondary legislation (like Regulations and Orders) where the Act of Parliament under which the legislation is made requires the incompatibility. Section 4 does not otherwise apply in relation to secondary legislation. So, under the law as it stands the courts can, amongst other things, declare secondary legislation invalid or disapply the provision in question.¹³⁵
250. We wish to explore whether there is a case for providing that declarations of incompatibility are also the only remedy available to courts in relation to certain secondary legislation.
251. We would welcome views on the risks and benefits of extending declarations of incompatibility in this way and how best this might be achieved.

¹³⁵ See, for example, *R(C) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657; *R(T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, [2014] 3 WLR 96; *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430.

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

252. Clause 1 of the Judicial Review and Courts Bill will (if enacted) allow courts making quashing orders in judicial review proceedings in England and Wales to include provision suspending the effects of the order for a limited period of time, or removing or limiting any retrospective effect of the quashing. The clause sets out a presumption that these powers will be exercised if it appears to the court that including such provision would, as a matter of substance, offer adequate redress. It specifies a number of factors to which the court is required to have due regard. The clause will affect the available remedies where secondary legislation is held to be incompatible with the Convention rights in judicial review proceedings in England and Wales. The IHRAR Panel recommended that these powers should be made available in all proceedings where secondary legislation is challenged under the Human Rights Act. We welcome views on this recommendation.

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

Remedial orders

253. At the moment, where there has been a declaration of incompatibility domestically (and no appeal remains), or an adverse Strasbourg judgment, there are two routes for remedying the incompatibility. The first is amendment by subsequent primary legislation, through the normal Parliamentary stages for consideration of a Bill. The second is via an order-making power set out in section 10 of the Human Rights Act, which allows ministers to ‘make such amendments to the legislation as [they] consider necessary to remove the incompatibility’; these orders are known as remedial orders.
254. Section 10 provides that remedial orders may only be used where ministers consider there are ‘compelling reasons’ to do so. It was included in the Act to provide a means of addressing incompatible legislation more rapidly than is generally possible through primary legislation. Remedial orders are generally subject to a type of ‘super-affirmative’ Parliamentary procedure, although there is a procedure for making and commencing an order before a draft is approved by Parliament where the matter is considered urgent (known as the urgent procedure). This is to facilitate a swift response to adverse judgments presenting significant issues, even when Parliament is not sitting. As a power to make secondary legislation that amends primary

legislation, remedial orders arguably reduce the role of Parliament in the legislative process.

255. Eleven remedial orders have so far been made under the Human Rights Act since it came into force in 2000; only three of those cases involved the use of the urgent procedure. In practice, because of its complexity, the Parliamentary procedure for making a non-urgent remedial order still takes around one to two years, and, as such, offers limited benefits in terms of speed compared to primary legislation. Remedial orders have therefore been of less practical utility than was envisaged when the Act was passed.
256. On balance, we believe there should be a strong presumption in favour of using more commonly used parliamentary procedures when legislating to address legislative incompatibilities with Convention rights. This will ensure that Parliament addresses, takes responsibility for, and properly scrutinises incompatibilities in legislation and the appropriate means of resolving them. There is a case for retaining remedial orders under the urgent procedure only, as a means of addressing urgent (and compelling) cases where leaving the law unamended, even for a short period, could be damaging. The government envisages that there will only be a few cases in which such a power would be needed, but without this, the only option for remedying the incompatibility in primary legislation would be to introduce a new Bill. This must be weighed, however, against the constitutional arguments against executive legislation, which may suggest removing the power entirely.
257. The IHRAR Panel also considered the use of remedial orders. They recommended a more limited reform, by which a remedial order could not be used to amend the Human Rights Act itself.
258. We would therefore welcome views on the extent to which the Bill of Rights should contain a remedial order power.

Question 17:

Should the Bill of Rights contain a remedial order power? In particular, should it be:

- a. similar to that contained in section 10 of the Human Rights Act;
- b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;
- c. limited only to remedial orders made under the 'urgent' procedure; or
- d. abolished altogether?

Please provide reasons.

Statement of compatibility: section 19 of the Human Rights Act

259. Section 19 of the Human Rights Act requires the minister introducing a Bill into Parliament to express his or her view as to the compatibility of the legislation with the Convention rights, by making and publishing one of two statements before Second Reading of the Bill in each House. The minister must state either in his or her view that the Bill is compatible with the Convention rights (section 19(1)(a)), or that, although he or she is unable to make that statement, the government nevertheless wishes Parliament to proceed with the Bill (section 19(1)(b)).
260. The purpose of section 19 is to demonstrate to Parliament that the relevant minister has considered, and come to a view, as to the compatibility of the Bill with Convention rights.
261. There is a debate as to whether section 19 strikes the right constitutional balance between government and Parliament, particularly in relation to ensuring human rights compatibility whilst also creating the space for innovative policies. In particular, is the test set out in section 19 the appropriate test, and if not, how might it be improved?

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

Application to Wales, Scotland and Northern Ireland

262. We recognise that, while we are a Union with shared values, we are also a Union of diverse interests, history and legal traditions. Our existing human rights framework reflects this balance by setting out the same substantive rights guaranteed across the United Kingdom, while allowing, through the devolution settlements, for devolved legislation relating to human rights issues within devolved policy areas and different procedural application in devolved areas. For example, as noted above, Westminster legislation which is incompatible with the Convention rights remains in effect unless and until Parliament remedies the incompatibility, while incompatible devolved legislation is struck down. In addition, there are areas where the implementation of human rights is devolved.
263. The Bill of Rights will seek to strike the correct balance between guaranteeing rights protection to all people across the United Kingdom, and allowing for difference in the application and implementation of the rights framework according to the needs and preferences of the nations of the UK.
264. The government is interested to hear how the Bill of Rights can strike that balance. We want to consider whether some of the reforms to the UK's procedural human rights framework ought to apply differently in different parts of the UK. Is there a need, for example, for the proposed reforms to proceedings and remedies to be

varied to best reflect the different legal systems in Scotland and Northern Ireland? The government would welcome views as to where, if at all, such variation might be sensible and appropriate.

265. We want to hear the views of people throughout the UK. We believe that it is possible to build a consensus for reform which will fulfil the government's mandate while making sure that any human rights reform includes all parts of the UK.

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

Public authorities – section 6 of the Human Rights Act

266. The government believes that the range of bodies and functions to which the obligations under the Human Rights Act currently apply is broadly right, and we intend to maintain this approach.

267. It can be difficult, however, to predict with certainty whether particular functions are of a public nature, given the inherent difficulty of finding an exact dividing line between the public and the private spheres. An example of the lack of clarity can be seen in the case of *Ali* where the Court of Session (Outer House) held that Serco was acting as a public authority when making decisions related to accommodation for asylum seekers which they provided on behalf of the Secretary of State, pursuant to a contract.¹³⁶ However, the Inner House overturned this, finding that Serco was not acting as a public authority in these circumstances. In addition, even where it is clear that a private company is acting as a public authority, it may still be unclear what obligations the government is under. In the case of *LW* despite it being accepted that the contracted-out prison was acting as a public authority, the Ministry of Justice was also found to have breached Article 8 for failing to take sufficient steps to ensure the prison did not breach the applicants' rights.¹³⁷

268. The current formulation in the Human Rights Act has the benefit of flexibility, which has allowed the application of the Act to evolve in line with changes in how public functions are delivered. It is also important, however, that the Bill of Rights affords clarity and certainty as far as possible about its scope.

269. In particular, the government wishes to consider whether there is alternative drafting which might achieve broadly the same application of obligations under the Bill of

¹³⁶ *Shakar Omar Ali v Serco Limited, Compass Sni Limited and the Secretary of State for the Home Department* [2019] CSIH 54. See also *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

¹³⁷ *LW and others v Sodexo and Secretary of State for Justice* [2019] EWHC 367 (Admin), [2019] 1 WLR 5654.

Rights, but in a way which offers more certainty or clarity. For example, alternative drafting could set out a clearer definition of whether a body is a public authority or a function is of a public nature. Such a definition should not add new burdens for private sector bodies and charities.

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

270. Parliament and the devolved legislatures often give public authorities (like police forces, local government, the National Health Service and various regulators) a clear and specific mandate to perform a service for the public. Such democratic oversight of how these authorities discharge their duties is vital.
271. Section 6(1) of the Human Rights Act makes it unlawful for a public authority to act in a manner which is incompatible with rights, and the Bill of Rights will continue this approach. It is also important that public authorities are not subject to litigation where they are acting to give effect to the direction and will of Parliament. This is recognised in section 6(2) of the Human Rights Act, which provides that an act will not be unlawful if the public authority did not, as a result of primary legislation, have any discretion to act differently, or if it was giving effect to statutory provisions which cannot be read compatibly with the Convention rights.
272. Yet, the operation of section 6(2)(b) is undermined by the fact that it only applies where primary legislation cannot be read compatibly with the Convention rights. As noted above on section 3, the case law surrounding when legislation can and cannot be read compatibly with Convention rights has caused controversy. This means that section 6(1) could still require courts to compel the public authority to act in a way that is contrary to the clear will of Parliament.
273. We believe that broad public policy decisions are a matter for Parliament, and that public authorities should not be in the position of having to either act unlawfully or else forced to act contrary to the clear intentions of Parliament. Our proposed changes to section 3 will help to give public authorities confidence about how their duties will be interpreted by the courts. But there are two further ways in which this problem might be tackled.

Option 1: provide that wherever public authorities are clearly giving effect to primary legislation, then they cannot be deemed to be acting unlawfully.

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

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.

275. This would retain broadly the same formulation for the exception currently set out at section 6(2) of the Human Rights Act. But while this option would retain the application to primary legislation which cannot be read compatibly with the rights contained in the Bill of Rights, that test would mirror any changes to how legislation is interpreted. The options for reform of the test currently set out in section 3 of the Human Rights Act are described above: under this option, whichever approach is taken to section 3 would also be mirrored in how section 6(2) operates.

276. As an example, if the Bill of Rights were to provide that legislation ought to be interpreted compatibly with rights where there is ambiguity, that same test would read across to the defences currently set out in section 6(2). The result would be that where there is no ambiguity, it would be a defence to a public authority to enforce or give effect to the clear intentions of Parliament. Only where there is ambiguity in what Parliament intended would the public authority have to choose how to enforce or give effect to legislation and, in that case, they would have to choose the rights-compliant course of action.

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

Option 1: Provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or

Option 2: Retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

Extraterritorial jurisdiction

277. Article 1 of the Convention provides that contracting states shall secure to 'everyone within their jurisdiction' the rights and freedoms set out in the Convention. The Human Rights Act remained silent on the question of its effect on activities abroad, leaving it to be determined by the courts.
278. We have seen how domestic and Strasbourg case law has created uncertainty for our armed forces, with complex legal arguments developing around when the Human Rights Act and indeed the Convention apply abroad and in such challenging situations as armed conflict, and about the interaction between the Convention and the law of armed conflict in such situations (see pages 44-46, above).
279. We fully recognise the importance of this issue, including to our armed forces. The Overseas Operations (Service Personnel and Veterans) Act 2021 amended the limitation period for certain claims under the Human Rights Act, which will help reduce the uncertainty faced by our service personnel and veterans in relation to claims concerning historical events that occurred in the complex environment of overseas operations.
280. However, given the extraterritorial application of the Convention, there is no unilateral domestic legislative solution to this issue and drafting the Bill of Rights to apply only on a restricted territorial basis would not resolve the issue at the international level. For example, if the extraterritorial scope of the Bill of Rights were to be restricted, other legislative changes would be required in order for the UK to continue to meet its obligations under the Convention. Additionally, if any 'gap' were created between the territorial scope of the Bill of Rights and the UK's obligations under the Convention, this would likely give rise to significant issues, including in relation to the procedures for protecting sensitive national security information in human rights proceedings.
281. We therefore consider that this issue would need to be addressed in Strasbourg. This was acknowledged by the IHRAR Panel, which concluded that there is 'a clear case for change' and recommended that the Government raise this issue with other States

Parties to the Convention, augmented by judicial dialogue between our domestic courts and Strasbourg.

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

Qualified and limited rights

282. The Convention recognises certain rights as ‘qualified’, which means they can be balanced with the rights of others and the needs of society in general. These rights include the right to respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); and freedom of assembly and association (Article 11).
283. The Convention sets out the different possible limitations on these rights, but there are general principles which govern these: any interference must be in accordance with law, in pursuance of a legitimate aim, and necessary in a democratic society.
284. The Human Rights Act gave effect to this balancing exercise by allowing the courts to consider the actions of public authorities and decide, firstly, if a right had been infringed and, in the case of a qualified right, if that interference could be justified. This meant the courts were required to exercise broad powers to assess whether a public authority was acting in a proportionate way when its actions had infringed a person’s human rights. In section 12 (see paragraph 204 above), the Human Rights Act also provided some guidance for the courts in weighing the balance between freedom of expression and other rights (most notably, in practice, the right to respect for a private and family life).
285. When assessing questions of proportionality, the courts have recognised to some degree the importance of giving due weight to the views of Parliament.¹³⁸
286. For example, in *Quila* the UK Supreme Court considered a minimum age requirement in the Immigration Rules which was designed to deter or prevent forced marriages.¹³⁹ By a majority the Supreme Court found that the measure was not a proportionate means of achieving the legitimate aim and breached the respondents’ right to family life under Article 8, finding that the Secretary of State had failed to demonstrate that when the measure was introduced there was robust evidence of any substantial

¹³⁸ See, for example in the context of Article 14, *R (SC and others) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, [2021] 3 WLR 428.

¹³⁹ *R (Quila and another) (FC) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621.

deterrent effect on forced marriages. This was despite the fact that a similar age limit had been adopted in other Council of Europe member States.

287. In a powerful dissenting judgment, Lord Brown held that,

‘The extent to which the rule will help combat forced marriage and the countervailing extent to which it will disrupt the lives of innocent couples adversely affected by it is largely a matter of judgment. Unless demonstrably wrong, this judgment should be rather for government than for the courts. Still more obviously, the comparison between the enormity of suffering within forced marriages on the one hand and the disruption to innocent couples within the 18-21 age group whose desire to live together in this country is temporarily thwarted by the rule change, is essentially one for elected politicians, not for judges.’¹⁴⁰

288. In the absence of any clarity in the Human Rights Act, judges’ opinions have differed as to the extent of the powers involved. Some have considered that this depends on the type of law under consideration and the relevant knowledge the court may have of the issue in question.¹⁴¹

289. The government believes that the Human Rights Act did not provide sufficient clarity in this area. We consider that the application of the principle of proportionality by the courts has created considerable uncertainty and impinged on the ability of elected lawmakers to balance individual rights with due respect for the wider public interest. We want decisions regarding human rights to be taken in a fair and balanced way, which consider the needs of the individual who has claimed that their rights have been infringed but also ensures due consideration of the rights of others and the diverse interests of society as a whole.

290. There are other rights in the Convention, known as ‘limited’ rights, which can be subject to restrictions, such as the right to liberty and security (Article 5) and the right to a fair trial (Article 6).

291. In general, in the area of qualified and limited rights, the government believes that whilst the courts are required to determine the application of rights to the particular facts of any case, where Parliament has expressed its clear will on complex and diverse issues relating to the public interest, this should be respected.

¹⁴⁰ Ibid. at para 91.

¹⁴¹ For example, see Laws LJ in *International Transport Roth GmbH v Secretary of State for the Home Department*, [2002] EWCA Civ 158, [2003] QB 728 at paragraphs 81-87. See also *R (Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945.

Question 23: To what extent has the application of the principle of ‘proportionality’ given rise to problems, in practice, under the Human Rights Act?

We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is ‘necessary’ in a ‘democratic society’, legislation enacted by Parliament should be given great weight, in determining what is deemed to be ‘necessary’.

Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

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

Deportations in the public interest

292. The government believes that the confidence of the wider public in our human rights framework is eroded when foreign criminals and others who present a serious threat to our society – including those linked with terrorist activity – can evade deportation, because their human rights are given greater weight than the safety and security of the public. Whilst the government would not deport an individual to face torture (or inhuman or degrading treatment), we intend to ensure that deportations of foreign nationals which are in the wider public interest are not incrementally and systematically frustrated by new and expanding human rights claims, including under Articles 5, 6 and 8 of the Convention.
293. We have already sought to address this balance by making changes in primary legislation to how we and the courts consider Article 8 rights in immigration cases, yet the ongoing challenges to deporting foreign national offenders demonstrate the case for direct reform of the Human Rights Act in this regard.
294. One option would be to insert provisions in the Bill of Rights addressing the limits on claiming human rights grounds to prevent deportation – through either an overarching provision specifically addressing deportation, or on an article-by-article basis. For example, it could be clarified that certain rights, such as the right to family life, cannot prevent the deportation of a certain category of individuals, for example, offenders sentenced to a term of imprisonment, or persons involved in terrorist-related activity.

295. An alternative, in respect of certain rights, including the right to family life, would be to ensure that, where Parliament has made or approved criteria that balance the strong public interest in deportation against such rights, that this balance is respected. For example, if Parliament has passed primary legislation, or approved immigration rules that properly balance these matters, then deportation should be prevented only in accordance with that statutory scheme.
296. A further alternative would be to make clear that deportation decisions can only be overturned if the Home Secretary has obviously failed to take account of human rights considerations when deciding that deportation is in the public interest. The courts would not be permitted simply to substitute their own views for those of the Home Secretary.

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

Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment;

Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights; and/or

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.

Illegal and irregular migration

297. The proposals above focus particularly on the deportation of foreign national offenders. However, elements of these proposals could apply also to the removal of failed asylum seekers, and those who enter the UK through safe and legal routes but overstay their right to remain. The second and third options in particular could be applied to asylum removals; and the first could capture these cases insofar as the sentence length threshold is met. Other proposals in this consultation could also facilitate asylum removals, notably those that constrain the expansion of rights outside democratic control.
298. Equally, there are a number of other challenges to the government's ability to tackle illegal migration, particularly via small boats in the English Channel. These include the operation of the non-refoulement principle of international law and wider international legal instruments, including the 1951 Refugee Convention which

outlines the rights of refugees and the legal obligations of States Parties to protect them.

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

Remedies and the wider public interest

299. The government believes that the compensation system can be used to make sure that the wider public interest is properly protected alongside individuals' rights. We think that where cases are brought against public authorities, the courts should have a responsibility to consider the impact of the award of a remedy on the public authority's ability to discharge its mandate.
300. Where a public authority is found in breach, the extent to which the public authority had discharged its obligations towards the applicant, and the extent of the breach claimed for, could be relevant considerations when deciding on any remedy. It could also be relevant for the court to consider the authority's obligations in general, the resources at its disposal and wider public interest considerations.
301. We would also seek to give courts a discretion not to award damages against authorities when the authority was trying to give effect to the express provisions, or clear purpose of legislation. In doing so, we would expect the courts to consider the wider public interest when they look at human rights claims, limiting the potentially negative impact that individual claims will have on services which are meant to benefit the community as a whole.

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

- a. the impact on the provision of public services;
- b. the extent to which the statutory obligation had been discharged;
- c. the extent of the breach; and
- d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

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

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

302. We all have responsibilities in our society: to society (such as to obey the law and pay taxes), to our families, and to people around us. Everyone holds human rights whether or not they undertake their responsibilities, particularly the absolute rights in the Convention such as the prohibition on torture. Nonetheless, the government believes that our new human rights framework should reflect the importance of responsibilities.
303. As noted above, in the application of the qualified rights, the government believes that Parliament should authoritatively determine what is necessary in a democratic society. In addition, it should be clear that, when a court is considering the proportionality of an interference with a person's qualified rights, it will consider the extent to which the person has fulfilled their own relevant responsibilities. For example, where a person is wanted for a crime, there should be no question of limiting the publication of their name and photograph because of their right to a private life.¹⁴²
304. The government would like to recognise the importance of responsibilities in an overarching provision in the Bill of Rights, whether outlined in a preamble or otherwise.
305. We would also like to re-focus when remedies are provided under the Bill, including by expressly considering the wider behaviour of a claimant in light of their responsibilities to society.
306. Currently, the Strasbourg Court allows compensation to be reduced for 'undeserving' claimants, acknowledging the responsibility that a claimant has towards others.¹⁴³ The domestic courts have also acknowledged the possibility of a claimant's conduct, including criminal conduct, being taken into account when determining remedies.¹⁴⁴ For example, in one case, the claimant challenged delays by the Parole Board in considering his case, arguing it amounted to a breach of Article 5.¹⁴⁵ The claimant had been convicted of murder and sentenced to life in prison. In dismissing the claim, the Court had regard to the seriousness of the original offence which the Court held

¹⁴² *R v Chief Constable of the Essex Police* [2003] EWHC 1321 (Admin), [2003] 2 FLR 566.

¹⁴³ *McCann v United Kingdom* [1995] 21 EHRR 1997.

¹⁴⁴ *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406 at paragraph 65, [2004] QB 1124; *R (Downing) v Parole Board for England and Wales* [2008] EWHC 3198 (Admin), [2009] Prison LR 327, at paragraph 29.

¹⁴⁵ *R (Downing) v Parole Board for England and Wales* [2008] EWHC 3198, [2009] Prison LR 327.

was a matter which 'must be taken into account' in considering the public interest in the exercise of the discretion to award damages.

307. We aim to build an element of responsibility explicitly into the Bill of Rights by permitting UK courts to consider the claimant's conduct in deciding whether or not to award a remedy. The court will be invited to hear about the lawfulness of the claimant's conduct in the circumstances surrounding the claim but could also be empowered to consider relevant past conduct, such as whether the claimant has respected the rights of others.
308. By clearly linking the remedies available under the Bill of Rights to how the claimant has lived by its underlying principles, the courts will be expressly guided to think critically about the redress they offer and avoid rewarding undeserving claimants who may themselves have infringed the rights of others. This will serve to put on a statutory footing those considerations which the courts have already recognised as being relevant to the determination of remedies.

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

Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or

Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

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

309. Under Article 46 of the Convention, States Parties are required to implement final judgments of the Strasbourg Court in cases brought against them. The implementation of judgments is overseen by the Committee of Ministers of the Council of Europe.
310. The government of the State Party concerned is ultimately responsible for answering to the Council of Europe on the implementation of a Strasbourg judgment. At the moment in the UK, the government co-ordinates all of the steps for implementing a final judgment, including, for example, proposing legislative amendments to Parliament if the judgment needs more than an operational or administrative response.
311. Under our system, however, democratic responsibility for legislation, and the power to legislate, lies ultimately with Parliament. The government strongly believes that this should be reflected in our arrangements for responding to Strasbourg judgments.
312. It is also important to recognise that, while the UK as a whole is responsible for responding to Strasbourg judgments, these judgments will sometimes cover policy areas for which responsibility is devolved. We are interested in views as to how best to enhance the role of the devolved legislatures in considering judgments directed at policy areas within their competence.
313. One option would be to do nothing and leave this process untouched, with Parliament able to consider adverse Strasbourg judgments as and when appropriate. However, the government believes there should be a formal way for Parliament to play a stronger role in responding to Strasbourg when the Court makes a final adverse ruling against the UK. First, there could be a formal requirement for government to lay notice of such judgments before Parliament, for the purposes of enabling general Parliamentary consideration.
314. The Bill of Rights could also use ministerial powers to table a motion allowing for a specific debate, which may culminate in a vote where it is deemed appropriate. This may be useful in an instance where the UK is engaging with the Committee of Ministers of the Council of Europe on a judgment, and where the government wishes 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. This would need to be considered carefully for compatibility with Article 9 of the Bill of Rights 1689.

315. Finally, the government intends to include a legislative provision that affirms Parliamentary sovereignty in the exercise of the legislative function, in the context of adverse Strasbourg rulings.
316. Taken together such arrangements would show respect for our international obligations. They would also provide a clear and explicit democratic shield to defend the dualist system in the UK by making clear that Parliament, in the exercise of the legislative function, has the last word on how to respond to adverse rulings. This provision would complement the provisions above, thereby reinforcing the primacy of our Supreme Court in exercising the judicial function in interpreting rights in the UK.
317. We have provided a draft clause to deliver these proposals at paragraph 11 of Appendix 2.

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

318. In this section, we have set out our specific proposals to revise and replace the Human Rights Act with a Bill of Rights and would welcome your views on the questions we have asked. We are aware, however, that other concerns have been raised about the human rights framework in the UK. We want to make sure that we consider all these issues in this consultation process, even if we cannot ultimately address them in the Bill of Rights.

Impacts

319. The government is committed to considering the impact of the policy proposals set out in this consultation document, including on individuals with particular protected characteristics.
320. In accordance with our duties under the Equality Act 2010 and as a matter of policy we have considered the impact of these proposals on individuals sharing protected characteristics in order to give due regard to the three limbs of the Public Sector Equality Duty (PSED); which are the need to:
- eliminate unlawful discrimination;
 - advance equality of opportunity; and
 - foster good relations.
321. Our initial discussion of the potential impact of these proposals is set out in Appendix 3.
322. To help us take full account of all potential impacts, including equality impacts, we shall complete a full Impact Assessment as necessary, once we have considered the responses to the consultation.
323. With this in mind, we welcome responses from consultees on these proposals with regard to the potential impacts, by addressing the question below.

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

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

Appendix 1 – Examples of relevant domestic legislation and common law provisions which cover Articles within the Human Rights Act

The table is not intended as an assessment of whether there are existing mechanisms which provide equivalent protection to the Human Rights Act, but rather to provide some non-exhaustive examples of domestic legislation and common law principles which cover some of the same ground.

	Examples of relevant legislation and common law provisions
Article 2 <i>Right to life</i>	<ol style="list-style-type: none"> 1. Murder (Abolition of Death Penalty) Act 1965. 2. Suicide Act 1961 (Criminal Justice Act (Northern Ireland) 1966) – aiding or abetting suicide. 3. Fatal Accidents Act 1976 (not Scotland or Northern Ireland) – relatives of those killed by wrongdoing of others may recover damages. 4. Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 – where in public interest a public inquiry should be conducted by relevant Procurator Fiscal. 5. Fatal Accidents (Northern Ireland) Order 1977. 6. Domestic Violence Crime and Victims Act 2004 – causing or allowing death of child or vulnerable adult. 7. Corporate Manslaughter and Corporate Homicide Act 2007 – corporate responsibility for death by gross breach of duty of care. <p>Also: Criminal offences, for example murder/manslaughter/culpable homicide; Coroner investigation of death; Office for Police Conduct; Police Investigations and Review Commissioner (Scotland); The Scottish Public Services Ombudsman (deals with complaints about Scottish Prison Service), the Police Ombudsman for Northern Ireland and the Prisons and Probation Ombudsman.</p>

	Examples of relevant legislation and common law provisions
<p>Article 3 <i>Prohibition of torture and inhuman or degrading treatment or punishment</i></p>	<ol style="list-style-type: none"> 1. Bill of Rights 1689 – prohibits cruel and unusual punishment. 2. Offences Against the Person Act 1861 – Actual Bodily Harm / Grievous Bodily Harm. 3. Criminal Justice Act 1988 – prohibits torture by public officials in performance of their duties. 4. Education Act 1996 outlaws corporal punishment in schools. 5. Children (Equal Protection from Assault) (Scotland) Act 2019 – clarifies law on corporal punishment and removed right of ‘reasonable chastisement’ in Scots’ law. 6. Children and Young Persons (Scotland) Act 1937 – prohibits cruelty to those below the age of sixteen. 7. Protection from Harassment Act 1997 and Family Law Act 1996 – preventative civil injunctions, interdicts and interim interdicts in Scotland. 8. Protection from Harassment (Northern Ireland) Order 1997. 9. Family Homes and Domestic Violence (Northern Ireland) Order 1997. 10. Domestic Abuse (Scotland) Act 2011 – domestic abuse interdicts. 11. Domestic Abuse Act 2021 and Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021. 12. Children Act 2004 – removes defence of reasonable chastisement for offences of Actual Bodily Harm or cruelty. 13. Adults with Incapacity (Scotland) Act 2000 – offence of ill-treatment and wilful neglect. <p>Also: Common assault and tort of battery (and now under Criminal Justice Act 1988); common law assault in Scotland; common law breach of the peace in Scotland; evidence obtained under torture is excluded from trial; international treaties, for example, United Nations Convention Against Torture and European Convention Against Torture; regulators including Care Quality Commission, Care Inspectorate (in Scotland), The Scottish Public Services Ombudsman, the Police Ombudsman for Northern Ireland, Office for Police Conduct, Police Investigations and Review Commissioner (Scotland) and HMI Prisons.</p>

	Examples of relevant legislation and common law provisions
Article 4 <i>Prohibition of slavery and forced labour</i>	<ol style="list-style-type: none"> 1. Slavery Abolition Act 1833 – formally abolished slavery. 2. Gangmasters (Licensing) Act 2004 – compulsory licensing scheme for gangmasters and other agricultural agencies. 3. Criminal Justice and Licensing Act 2010 (Scotland) – offence of trafficking. 4. Modern Slavery Act 2015 – offences of human trafficking, slavery and forced labour. 5. Human Trafficking and Exploitation (Scotland) Act 2015 – offence of human trafficking and also requires Scottish Ministers to prepare a trafficking and exploitation strategy. <p>Also: Modern Slavery Human Trafficking Unit, part of the National Crime Agency; National Referral Mechanism set up in 2009 following ratification of Council of Europe Convention on Action against Trafficking in Human Beings to identify victims of trafficking.</p>
Article 5 <i>Right to liberty and security</i>	<ol style="list-style-type: none"> 1. Magna Carta. 2. Magna Carta Hiberniae 3. Police and Criminal Evidence Act 1984 and Codes of Practice – restrictions on powers of police to detain/arrest and to hold. 4. Police and Criminal Evidence (Northern Ireland) Order 1989. 5. Criminal Procedure (Scotland) Act 1995 and Police, Public Order and Criminal Justice (Scotland) Act 2006 in addition to powers under common law – place restrictions on powers of the police to detain and arrest in Scotland. 6. Mental Health Act 1983 and Mental Capacity Act 2005 – deprivation of liberty safeguards. See also Mental Capacity Act (Northern Ireland) 2016. 7. Mental Health (Care and Treatment) (Scotland) Act 2003, Mental Health (Scotland) Act 2015 and Criminal Procedure (Scotland) Act 1995 – deprivation of liberty safeguards in Scotland. <p>Also: Writ of <i>Habeas Corpus</i>; false imprisonment; offence of kidnapping.</p>

	Examples of relevant legislation and common law provisions
Article 6 <i>Right to a fair trial</i>	<ol style="list-style-type: none"> 1. Contempt of Court Act 1981 – limits what can be published about a case while it is ongoing and confidentiality of jury deliberations. 2. Police and Criminal Evidence Act 1984 – right to contact a solicitor. 3. Police and Criminal Evidence (Northern Ireland) Order 1989. 4. Criminal Procedure (Scotland) Act 1995 – rights in criminal proceedings. 5. Criminal Procedure and Investigations Act 1996 and Civil Procedure Rules – duty to disclose all relevant information. 6. Criminal Justice and Licensing (Scotland) Act 2010 and common law – disclosure. <p>Also: rules of natural justice, for example, rules against bias and right to a fair hearing; presumption of innocence and burden of proof on prosecution; trial by jury.</p>
Article 7 <i>No punishment without law</i>	<ol style="list-style-type: none"> 1. Sentences set out in relevant legislation. Coroners and Justices Act 2009, court must follow the relevant sentencing guidelines. 2. Criminal Justice and Licensing (Scotland) Act 2010 – establishes new Scottish Sentencing Council to oversee sentencing guidelines in Scotland. 3. General presumption that law will not be retrospective unless clear in legislation. War Crimes Act 1991 rare example of retrospective criminal liability.
Article 8 <i>Right to respect for private and family life</i>	<ol style="list-style-type: none"> 1. Police and Criminal Evidence Act 1984 – procedure to apply for search warrant. Also Police and Criminal Evidence (Northern Ireland) Order 1989. 2. Criminal Procedure (Scotland) Act 1995 – procedure to apply for a search warrant in Scotland. 3. Data Protection Act 2018. 4. United Kingdom General Data Protection Regulation. 5. Investigatory Powers Act 2016 and Regulation of Investigatory Powers (Scotland) Act 2000 – protection from infringements of privacy in relation to personal data and surveillance. 6. Health and Social Care Act 2008 – introduces Care Quality Commission and requires service providers to meet minimum standards of care. See also the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003. 7. Immigration Act 2014. <p>Also: Common law defamation, confidentiality laws and privacy, tort of trespass.</p>

	Examples of relevant legislation and common law provisions
Article 9 <i>Freedom of thought, conscience and religion</i>	<ol style="list-style-type: none"> 1. Public Order Act 1986 – offence of incitement to religious hatred. 2. Criminal Justice (Scotland) Act 2003 – aggravation of offence where religious prejudice. 3. Criminal Justice and Immigration Act 2008 – abolishes common law offence of blasphemy in England and Wales. 4. Equality Act 2010. 5. Northern Ireland Act 1998 (see sections 75 and 76). <p>No formal restrictions on the freedom of worship.</p>
Article 10 <i>Freedom of expression</i>	<ol style="list-style-type: none"> 1. Contempt of Court Act 1981 – balance freedom of expression with right to fair trial. 2. Bill of Rights – freedom of speech in Parliament 3. Scotland Act 1998 – freedom of speech in the Scottish Parliament. See also the Northern Ireland Act 1998. 4. Education (No 2) Act 1986 – freedom of speech within law for staff, students and speakers at university. 5. Theatre Act 1968 – abolished censorship on theatre. 6. Freedom of information Act 2000 and The Freedom of Information (Scotland) Act 2002. <p>Also: Common law principle of freedom of speech subject only to provisions of common law or statute; Defamation – protection of reputation weighed against the wider public interest; Disclosure of certain documents to the press where referred to in court proceedings; Common law right of access to information from public authorities; Universal Declaration of Human Rights and International Covenant on Civil and Political Rights; Independent Press Standards Organisation.</p>
Article 11 <i>Freedom of assembly and association</i>	<ol style="list-style-type: none"> 1. Public Order Act 1986 – created offences in relation to public order. 2. Civic Government (Scotland) Act 1982 – sets out provisions in respect of public processions. 3. Peaceful assembly is ‘ordinary and reasonable’ use of public highway. 4. Trade Union Act 1871 and Employment Act 1990, consolidated in the Trade Union and Labour Relations (Consolidation) Act 1992; Trade Union Act 2016 – right to join a trade union and right not to join a trade union.

	Examples of relevant legislation and common law provisions
Article 12 <i>Right to marry and found a family</i>	<ol style="list-style-type: none"> 1. No prescribed right to marry. Marriage formalities in: Marriage Act 1949 and Marriage (Scotland) Act 1977 – e.g. marriage under 16 is void. 2. Matrimonial Causes Act 1973 – right to divorce. 3. Adoption and Children Act 2002 – provisions in respect of adoption. 4. Adoption and Children (Scotland) Act 2007 – provisions in respect of adoption in Scotland. 5. Civil Partnership Act 2004. 6. Gender Recognition Act 2004 – allowing trans people to change legal gender. 7. Forced Marriage (Civil Protection) Act 2007. 8. Marriage (Same Sex Couples) Act 2013, Marriage and Civil Partnership (Scotland) Act 2014. 9. Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019 and Marriage and Civil Partnership (Northern Ireland) Regulations 2020. 10. Universal Declaration of Human Rights – right to marry and found a family.
Article 14 <i>Prohibition of discrimination in the protection of other rights</i>	<ol style="list-style-type: none"> 1. Equality Act 2010 – e.g. ‘equality duty’ requiring public bodies to have due regard to the need to eliminate discrimination, to advance equality of opportunity and to foster good relations between people (not Northern Ireland which has various pieces of legislation in relation to discrimination, including section 75 of the Northern Ireland Act 1998).

Appendix 2 – Proposed draft clauses

1. This appendix includes illustrative draft clauses, to give an indication of how some of the government's preferred options in the consultation paper might appear in the Bill of Rights.

Replacement for section 2 of the Human Rights Act (paragraphs 190 to 197)

2. The following clauses are possible approaches to replacing section 2 of the Human Rights Act in the Bill of Rights, as set out in paragraphs 190 to 197 of the consultation paper.
3. Option 1 makes clear that the courts are not required to follow or apply any judgment or decision of the European Court of Human Rights and that the meaning of a right in the Bill of Rights is not necessarily the same as the meaning of a corresponding right in the European Convention on Human Rights. That will be a matter for the UK courts and tribunals to determine. It requires the courts to follow any binding precedent of our domestic courts or tribunals under the Bill of Rights when deciding a human rights question under the Bill. It also provides that the courts may have regard to relevant judgments from other countries and international courts outside the UK.
4. Option 2 reinforces the fact that the UK Supreme Court will have ultimate responsibility for interpreting the rights under the Bill of Rights. The courts, when deciding a human rights question must have particular regard to the text of the right and, in construing that text, may have regard to the *travaux préparatoires* of the Convention. As with option 1, the courts must follow any binding precedent of domestic courts or tribunals under the Bill of Rights. They may also have regard to the development of any similar right under the common law in the UK, a judgment or decision from any common law jurisdiction or a judgment of the European Court of Human Rights. Again, it is made clear that the courts are not required to follow or apply any judgment of the European Court of Human Rights.

Option 1

Interpretation of rights and freedoms

- (1) The meaning of a right or freedom in this Bill of Rights is not determined by the meaning of a right or freedom in any international treaty or repealed enactment.
- (2) In particular, it is not necessary to construe a right or freedom in this Bill of Rights as having the same meaning as a corresponding right or freedom in—
 - (a) the European Convention on Human Rights, or
 - (b) the Human Rights Act 1998.
- (3) The following provisions of this section apply where a court or tribunal is deciding a question in connection with a right or freedom in this Bill of Rights.
- (4) The court or tribunal must follow a previous judgment or other decision given in relation to this Bill of Rights by—
 - (a) that court or tribunal, or
 - (b) any other United Kingdom court or tribunal,if the judgment or other decision is a precedent in relation to the question being decided.
- (5) The court or tribunal may have regard to a judgment or other decision of a judicial authority made under—
 - (a) the law of a country or territory outside the United Kingdom, or
 - (b) international law,so far as the court or tribunal considers that it is relevant to the question being decided.
- (6) The court or tribunal is not required to follow or apply any judgment or other decision of the European Court of Human Rights.
- (7) Evidence of a judgment or other decision to which regard may be had under subsection (5) is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.
- (8) For the purposes of this section a judgment or other decision is a precedent in relation to the question being decided if, or to the extent that, the court or tribunal is required by any law to follow it in making the decision.

Option 2

Interpretation of rights under this Act

- (1) The Supreme Court is the judicial authority with ultimate responsibility for the interpretation of the rights and freedoms in this Bill of Rights.
- (2) The following provisions of this section apply where a court or tribunal is deciding a question in connection with a right or freedom in this Bill of Rights.
- (3) The court or tribunal must have particular regard to the text of the right or freedom, and in construing the text may have regard to the preparatory work of the European Convention on Human Rights.
- (4) The Court or tribunal must follow a previous judgment or other decision given in relation to this Act by—
 - (a) that court or tribunal, or
 - (b) any other United Kingdom court or tribunal,if the judgment or other decision is a precedent in relation to the question being decided.
- (5) Other matters to which the court or tribunal may have regard, so far as it considers them relevant to the question being decided, include—
 - (a) the development of any similar right or freedom under the common law in the United Kingdom;
 - (b) a judgment or other decision of a judicial authority under the law of a common law jurisdiction outside the United Kingdom in connection with a similar right or freedom;
 - (c) a judgment of the European Court of Human Rights.
- (6) The court or tribunal is not required by any enactment, rule of construction or other law to follow or apply any judgment or other decision of the European Court of Human Rights.
- (7) For the purposes of this section a judgment or other decision is a precedent in relation to the question being decided if, or to the extent that, the court or tribunal is required by any law to follow it in making the decision.
- (8) Evidence of—
 - (a) the preparatory work of the European Convention on Human Rights;
 - (b) a matter to which regard may be had under subsection (5)(b) or (c);is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

Replacement for section 3 of the Human Rights Act (paragraphs 233 to 242)

5. The following clauses are possible approaches to reflect option 2, as set out in paragraphs 233 to 242 of the consultation paper.
6. They set the parameters within which the courts, public authorities and others can interpret legislation in a rights-compatible way. Both options require that any such interpretation of a provision of legislation must be both a natural reading of the words used and consistent with the overall purpose of the legislation.
7. The difference between the two options is that option 2A would apply when a statutory provision is ambiguous, whereas option 2B does not explicitly require the provision to be ambiguous in order to apply.
8. We are open to views on whether the definition of legislation should be extended to legislation of the devolved legislatures.

Option 2A

Interpretation of legislation

- (1) Where the words used in a provision of legislation can be given more than one interpretation which—
 - (a) is an ordinary reading of the words used, and
 - (b) consistent with the overall purpose of the legislation,the interpretation to be preferred is one that is compatible with the rights and freedoms in this Bill of Rights.
- (2) In this section 'legislation' means—
 - (a) primary legislation, and
 - (b) subordinate legislation (within the meaning of the Interpretation Act 1978).

Option 2B

Interpretation of legislation

- (1) Legislation must be interpreted in a way that is compatible with the rights and freedoms in this Bill of Rights, but only if that interpretation is both—
 - (a) an ordinary reading of the words used in the legislation, and
 - (b) consistent with the overall purpose of the legislation.
- (2) In this section 'legislation' means—
 - (a) primary legislation, and
 - (b) subordinate legislation (within the meaning of the Interpretation Act 1978).

Guidance on interpreting qualified rights (paragraphs 282 to 291)

9. The following clauses are for guiding the interpretation of qualified rights, considered at paragraphs 282 to 291 of the consultation paper. Option 1, below, requires the court to give great weight to Parliament's views on what is 'necessary in a democratic society' when determining whether legislation, or a decision of a public authority made in accordance with legislation, is compatible with the rights under the Bill of Rights. This would apply to the rights equivalent to Articles 8 to 11 of the Convention. Option 2 could apply more broadly, where the court is required to consider the public interest when deciding whether legislation, or a decision of a public authority made in accordance with legislation, is compatible with the rights under the Bill of Rights. For example, this would cover consideration of whether an interference with rights equivalent to Article 1 of Protocol No.1 (right to property) to the Convention or the limited rights like Article 6 (right to a fair trial) was justified in the public interest. It would also reflect the respect accorded to the will of Parliament by the UK Supreme Court in the *SC* case in the context of the right to non-discrimination in the protection of other rights under Article 14.¹⁴⁶
10. In both options, legislation means both primary and secondary legislation which has been subject to the affirmative resolution procedure (in other words, which has been expressly approved by either or both Houses of Parliament).

¹⁴⁶ *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428: see paragraph 158 above.

Option 1

Assessment of what is necessary in a democratic society

- (1) This section applies in any case where a court or tribunal is required to consider what is necessary in a democratic society for the purpose of determining whether—
 - (a) a provision of legislation, or
 - (b) a decision of a public authority made in accordance with a provision of legislation,is compatible with one or more of the rights and freedoms in this Bill of Rights.
- (2) The court must give great weight to Parliament's view of what is necessary in a democratic society (and the fact that Parliament has enacted the legislation is for these purposes determinative of Parliament's view that the legislation is necessary in a democratic society).
- (3) In this section 'legislation' means—
 - (a) primary legislation, and
 - (b) subordinate legislation (within the meaning of the Interpretation Act 1978) which has been approved by a resolution of either or both Houses of Parliament.

Option 2

Assessment of public interest in determining rights compatibility

- (1) This section applies in any case where a court or tribunal is required to consider the public interest in deciding whether—
 - (a) a provision of legislation, or
 - (b) a decision of a public authority made in accordance with a provision of legislation,is compatible with one or more of the rights and freedoms in this Bill of Rights.
- (2) The court or tribunal must give great weight to the fact that Parliament was acting in the public interest in passing the legislation.
- (3) In this section 'legislation' means—
 - (a) primary legislation, and
 - (b) subordinate legislation (within the meaning of the Interpretation Act 1978) which has been approved by a resolution of either or both Houses of Parliament.

Clause on Parliament's consideration of Strasbourg judgments (paragraphs 309 to 317)

11. The following clause reflects the suggested approach, at paragraphs 309 to 317 of the consultation paper, which sets out a proposal for a Parliamentary process for considering a final adverse judgment from the European Court of Human Rights.

Judgments of the European Court of Human Rights

- (1) The Bill of Rights affirms that the judgments and decisions of the European Court of Human Rights—
 - (a) are not part of the law of any part of the United Kingdom, and
 - (b) cannot affect the right of Parliament to legislate or otherwise affect the constitutional principle of Parliamentary sovereignty.
- (2) If the European Court of Human Rights finds, in its final judgment in a case to which the United Kingdom is a party, that the United Kingdom has failed to comply with an obligation arising under the Convention (the 'adverse judgment'), the Secretary of State must lay notice of the adverse judgment before each House of Parliament during the notification period.
- (3) In order to facilitate debate in the House of Commons or House of Lords on an adverse judgment, a Minister of the Crown may exercise any power that he or she as a member of that House to table a motion in that House.
- (4) In this section "notification period" means the period of [30] days beginning with the day on which the adverse judgment—
 - (a) is given (if it is final when it is given), or
 - (b) becomes final in accordance with the provisions of Article 44, paragraph 2 of the Convention (in any other case);and for the purposes of calculating that period, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which either House is adjourned for more than four days.

Appendix 3 – Overview of potential impacts

1. At this stage, given the range of options we are putting forward and the need to gather further information, we have not carried out a full assessment of the impact of the proposals in this consultation document. In this section, we instead give our initial view of the potential high-level impacts, including equalities impacts, of our current proposals for a Bill of Rights, noting that the proposals and their impacts may ultimately change.
2. We will undertake a full impact assessment ahead of the introduction of the Bill of Rights. We would welcome any information and views on this overview which would help us improve that assessment.

Key monetised impacts for main affected groups

3. Given limited data, we have not been able to monetise the impacts of the current proposals for a Bill of Rights. However, since these proposals relate mainly to constitutional reform, we expect monetised impacts to be small. We are seeking evidence on the monetised costs of these proposals as part of this consultation, and we will continue to source data which we will consider when we prepare the final impact assessment. There is also likely to be persisting uncertainty in relation to the impacts as some proposals could lead to affected groups changing their behaviour.
4. We therefore describe only the main non-monetised impacts in this section.

Key non-monetised benefits for main affected groups

5. The potential benefits for justice and public authorities include the following:
 - There may be benefits to public authorities and the justice system from reduced litigation by foreign national offenders. Moreover, increased deportations would reduce the cost of holding foreign national offenders in prisons in the UK.
 - The potential reduction in compensation awards could lead some litigants to decide no longer to pursue their claims, resulting in cost savings for the courts.
 - A permission stage with a significant disadvantage requirement may mean that cases are dismissed at an earlier stage or that individuals choose not to pursue trivial claims. This could lead to savings for the courts and legal aid.

- The new factors in determining how damages are awarded may remove or reduce the awarded damages, leading to savings for government departments and other public bodies.
 - Restricting the scope of positive obligations may reduce litigation against public authorities and the associated administrative burden.
 - The procedural changes may reduce legal uncertainty over time and the expenditure by public authorities on mitigating legal risk. The procedural changes may also increase operational flexibility.
6. The potential benefits for wider society and individuals include the following:
- Changes to the way in which freedom of expression is taken into account by the courts may allow wider society to benefit from greater dissemination of information and debate. Individuals may feel more comfortable exercising their right to freedom of expression because of the legal protection provided. Journalists may also find it easier to source information should informants feel more protected.
 - The abolition or limitation of remedial orders will lead to incompatibilities of legislation with the Bill of Rights receiving greater scrutiny by both Houses of Parliament. That scrutiny would include consideration of how best the government should discharge its obligations in relation to human rights.
 - There may be greater democratic oversight of the way Strasbourg judgments are implemented in the UK.
 - The proposals would reinforce the supremacy of the UK Supreme Court, providing for human rights to be interpreted in a UK context.

Key non-monetised costs for main affected groups

7. There may be some transitional costs arising from the implementation of these proposals for a Bill of Rights for various justice and public authorities as well as businesses and the third sector, including systems change for the courts and tribunals' services, and updates to guidance and training courses upon implementation.
8. The potential costs for justice and public authorities include the following:
- Potential changes in deportation numbers, especially the potential increase in foreign national offender removals, may create additional transport costs for government departments.
 - There would likely be non-monetised costs to courts and tribunals from the permission stage proposals.
 - Additional costs to the justice system may result from a claimant pursuing an additional human rights claim in cases where the alternative cause of action has not provided a sufficient remedy. For example, litigants may have grounds to

make a claim in both tort and human rights, which currently can be decided together.

- In relation to the proposals concerning sections 3, 4 and 10, it is likely that using ordinary parliamentary procedures (primary legislation) to amend incompatible legislation would be more resource intensive and longer for government than using a remedial order (secondary legislation).

9. The potential costs for individuals include the following:

- The proposal that a court should be required to take account of a claimant's conduct may result in a removal or a reduction of awarded damages in some cases.
- There could be extra litigation costs for individuals in certain areas, such as where a permission stage is introduced.
- Certain litigants who are deemed not to have suffered a significant disadvantage, or where there is no other compelling reason for hearing the claim, would have their ability to pursue human rights proceedings constrained.
- Reforming the protection afforded to freedom of expression may reduce the availability of injunctions for some individuals, which may affect their privacy.
- There may be additional costs for those who would be subject to a stricter deportation approach than the present one. There may also be costs for the families of those who may face stricter deportation rules.

Equality impacts

10. This section sets out the initial impact of the proposals for a Bill of Rights in relation to the Ministry of Justice's duty under section 149 of the Equality Act 2010 to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Eliminating discrimination, harassment and victimisation.

Direct discrimination

11. The existing Human Rights Act offers protection to individuals in the UK. The proposals in this consultation will potentially have an impact on all individuals who are within the UK, regardless of their protected characteristics.
12. There are currently no centrally-collated statistics about those who bring human rights cases. Similarly, there are no statistics on how human rights legislation affects

people with characteristics protected under the Equality Act 2010. This therefore makes it difficult to assess exactly how individuals sharing different protected characteristics may be positively or adversely affected by any change in these arrangements.

13. The government does, however, hold data on the protected characteristics of applicants granted legal aid in freestanding claims categorised under the Human Rights Act in relation to race, sex, disability and age. It also holds data on the protected characteristics of UK offenders and foreign national offenders.
14. Although the exact nature of the proposed changes is still subject to consultation, the government's initial assessment, based on the available data, is that proposed changes are not likely to result in direct discrimination. These changes are unlikely to result in people being treated less favourably because of a protected characteristic.

Indirect discrimination

15. The definition of indirect discrimination under the Equality Act 2010 is where a provision, or practice, in relation to a relevant protected characteristic, is applied uniformly (to everyone), but has the effect of putting those with the protected characteristic at a particular disadvantage.
16. We have considered indirect discrimination and whether proposals would be likely to put those sharing a protected characteristic at a particular disadvantage when compared to those who do not share that characteristic. We have identified the broad groups that may potentially be disproportionately impacted by specific aspects of the proposed changes, such as ethnic minority individuals, children and men.
17. However, while this will require further analysis to determine the extent of any potential for disadvantage, it should be borne in mind that such impacts may nonetheless arise as a consequence of the proposed measures being a proportionate means of achieving the legitimate aim of balancing the rights of individuals with the wider public interest.

Advancing equality of opportunity

18. In relation to advancing equality of opportunity, all human rights reform proposals are designed to maintain proper rights protections and improve a number of areas including making sure our common law traditions are respected, strengthening the role of the UK Supreme Court, and providing a sharper focus on protecting fundamental human rights.

Fostering good relations

19. Effective human rights legislation provides a strong bedrock on which to foster good relations – by putting into law that everyone’s rights are to be respected and upheld.
20. Given current data limitations, we are keen to gather and use wider data and evidence of impacts, and have asked questions on equalities in the consultation aimed at better understanding the likely impacts (Question 29 on page 89).

Next steps

21. We will conduct a full impact assessment in due course, once the consultation closes and our policy proposals have been finalised. In line with the ongoing nature of the PSED, we will also consider any new evidence of equalities impact and update our equalities assessment as needed.
22. We will in due course provide a Welsh language version of this consultation.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

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

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

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

The position of the Supreme Court

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights.

How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

Trial by Jury

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

Freedom of Expression

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

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

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

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

II. Restoring a sharper focus on protecting fundamental rights

A permission stage for human rights claims

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

Question 9: Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

Judicial Remedies: section 8 of the Human Rights Act

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

Positive obligations

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

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

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

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

Option 1: Repeal section 3 and do not replace it.

Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.

We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

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

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

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

Declarations of incompatibility

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

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

Remedial orders

Question 17: Should the Bill of Rights contain a remedial order power? In particular, should it be:

- a. similar to that contained in section 10 of the Human Rights Act;
- b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;
- c. limited only to remedial orders made under the 'urgent' procedure; or
- d. abolished altogether?

Please provide reasons.

Statement of Compatibility – Section 19 of the Human Rights Act

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

Application to Wales, Scotland and Northern Ireland

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

Public authorities: section 6 of the Human Rights Act

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

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

Option 1: provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or

Option 2: retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

Extraterritorial jurisdiction

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

Qualified and limited rights

Question 23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act?

We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.

Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

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

Deportations in the public interest

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

Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment.

Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights.

Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.

Illegal and irregular migration

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

Remedies and the wider public interest

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

- a. the impact on the provision of public services;
- b. the extent to which the statutory obligation had been discharged;
- c. the extent of the breach; and
- d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

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

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

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

Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or

Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

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

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

Impacts

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

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

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Type of organisation or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	<ul style="list-style-type: none"> • Academics • Associations • Governmental Departments / Agencies • Member of the Public / as an Individual • Health and Disability Group • Devolved Administrations • Equalities Organisation • Human Rights Organisation • Law Firm / Legal Group • Unions • Political parties • Military, police or prisons • Voluntary organisations <ul style="list-style-type: none"> • If yes, how best describes your organisation [e.g. national, local, community, by and for]? • Other (please specify)
Date	
What region are you in?	<ul style="list-style-type: none"> • North East • North West • Yorkshire / Humberside • East Midlands • West Midlands • Wales • East Anglia • South East • South West • Greater London • Scotland • Northern Ireland • Other (please specify) • Don't want to say

Company name / organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details / How to respond

Please submit your response by 8 March 2022 by filling in the online response form which can be found here: <https://consult.justice.gov.uk/human-rights/human-rights-act-reform>
Alternatively, you can also send your response via post or email to:

Human Rights Team

Ministry of Justice
International, Rights and Constitutional Policy Directorate
102 Petty France
London SW1H 9AJ

Tel: 020 334 3555

Email: HRAreform@justice.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>.

Alternative format versions of this publication can be requested from HRAreform@justice.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published in due course. The response paper will be available on-line at <https://consult.justice.gov.uk/>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (UK GDPR) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018 that can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf

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