

Title: Draft Bill of Rights IA No: MOJ19/2021 RPC Reference No: N/A Lead department or agency: Ministry of Justice (MoJ) Other departments or agencies: N/A	Impact Assessment (IA)			
	Date: 19/06/2022			
	Stage: Draft Bill			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
Contact for enquiries: HRReform@justice.gov.uk				

Summary: Intervention and Options	RPC Opinion: N/A
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Cost of Preferred (or more likely) Option			
Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status Qualifying provision
N/A	N/A	N/A	

What is the problem under consideration? Why is government action or intervention necessary?

The government wishes to repeal the Human Rights Act 1998 (HRA) and to legislate for a UK Bill of Rights in line with its manifesto commitments. The HRA gives further effect to the European Convention on Human Rights in UK law, and was a major constitutional shift; however, reform is now required to ensure public confidence in the human rights system, to balance the rights of the individual with the diverse interests of society, to curb risk aversion for those delivering public services on the frontline, to address concerns with how the HRA operates in practice and to address democratic deficits caused by the HRA's framework. Government intervention is required as creating a UK Bill of Rights will require changes via primary legislation. Under the proposed reform, the broader human rights framework would remain in place including the UK's commitment to the European Convention on Human Rights. Individuals in the UK will remain protected against violations of their human rights in UK law and would have access to means of challenge when they feel that their rights have been violated.

What are the policy objectives of the action or intervention and the intended effects?

The key policy objectives of human rights reform are to create a UK Bill of Rights that:

- Respects our common law traditions and strengthens the role of the UK Supreme Court;
- Restores a sharper focus on protecting fundamental rights;
- Prevents the incremental expansion of rights without proper democratic oversight;
- Emphasises the role of responsibilities within the human rights framework; and
- Facilitates consideration and dialogue with Strasbourg, while guaranteeing Parliament its proper role.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

- **Option 0:** The UK continues to operate under the existing human rights framework as defined in the Human Rights Act.
- **Option 1:** Reform human rights in line with the policy proposals.

Option 1 is preferred as it best meets the government's policy objectives.

Will the policy be reviewed? If applicable, a review date will be set 3-5 years following Royal Assent.

Is this measure likely to impact on international trade and investment?				No			
Are any of these organisations in scope?				Micro No	Small No	Medium No	Large No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)				Traded : N/A		Non-traded: N/A	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: Date:

Summary: Analysis & Evidence

Policy Option 1

Description: Reform human rights in line with the policy proposals.

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
n/a	n/a	n/a	Low: n/a	High: n/a	Best Estimate: n/a

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Not monetised	Not monetised	Not monetised
High	Not monetised	Not monetised	Not monetised
Best Estimate	Not monetised	Not monetised	Not monetised

Description and scale of key monetised costs by 'main affected groups'

Due to data limitations, the highly varied nature of claims made under the HRA, and the uncertainties about how the changes will affect individual and public authority actions, it has not been possible to monetise the costs of these proposals. It is expected that the reforms may have monetary costs for public authorities which are within the remit of the HRA, and potential litigants, such as individuals or interest groups that may seek to make a challenge under the HRA.

Other key non-monetised costs by 'main affected groups'

There would be several non-monetised costs if the proposals were implemented:

- Some of the changes are expected to create legal uncertainty due to differences between the Bill of Rights and the HRA and are likely to create extra litigation until case law is settled.
- There may be transitional implementation costs to various justice and public authorities as well as businesses and the third sector, including systems change for the UK courts and tribunals' services, and updates to guidance and training courses upon implementation.
- The changes to the interpretation of rights include a provision for courts to potentially consider the preparatory work of the European Convention on Human Rights. We are considering how best to make this accessible for courts and tribunals.
- The reduced powers of courts to read legislation in a rights compatible manner, and increased powers to make declarations of incompatibility (DOIs), will likely lead to more DOIs being made. This is very likely to lead to government departments incurring costs and additional use of Parliamentary time.
- There will be costs to those who successfully claim that primary legislation is incompatible with the Bill of Rights. Previously, their claim might have been addressed with the immediate remedy of a section 3 interpretation, under the new system they and all people in a similar situation will have to wait for the issue to be resolved by Parliament. This could see more claimants taking cases to Strasbourg.
- A requirement by the courts to take account of a claimant's wider conduct may remove or reduce awarded damages in some cases.
- Should new deportation provisions around Article 8 appeals be introduced following the Bill of Rights, there may be clear additional costs for those subject to deportation to the extent that may 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.
- The implementation of a permission stage will generate some costs for the wider justice system, including when dealing with appeals.
- Strengthening the protection afforded to freedom of speech may reduce the availability of injunctions for some individuals, which may affect their enjoyment of their privacy.
- There could also be other impacts on individuals, for example, preventing the creation of future positive obligations may result in reduced protections for individuals where their rights may have otherwise been protected by such obligations.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Not monetised	Not monetised	Not monetised
High	Not monetised	Not monetised	Not monetised
Best Estimate	Not monetised	Not monetised	Not monetised

Description and scale of key monetised benefits by ‘main affected groups’

As with costs, due to data limitations, the highly varied nature of claims made under the HRA, and the uncertainties about how the changes will affect individual and public authority actions, it has not been possible to monetise the benefits of these proposals. It is expected that the reforms may have monetary benefits for public authorities which are within the remit of the HRA. We would note that the primary benefits to this option relate primarily to issues of constitutional governance.

Other key non-monetised benefits by ‘main affected groups’

There would be several non-monetised benefits if the proposals were implemented:

- Should new deportation provisions around Article 8 appeals be introduced following the Bill of Rights, there may be benefits to public authorities if there is an increase in the rate of deportations. For example, it may help avoiding costs associated with holding extra Foreign National Offenders (FNOs) in prisons in the UK, should more FNOs be deported, and resources which are used by FNOs such as housing and benefits could be used for other purposes.
- Changes to the way in which freedom of speech is taken into account by the courts may benefit wider society from greater dissemination of information and debate. Individuals may feel more comfortable exercising their right to freedom of speech because of the reduced threat of legal action.
- Journalists may also find it easier to source information should informants feel more protected under the journalists’ sources proposal.
- A permission stage may lead to savings for some public authorities through reduced litigation costs incurred when defending themselves against trivial claims, and litigants in person will know at an earlier point whether their human rights claim is sufficiently serious to be considered at a full court hearing with the resultant costs associated with this.
- The new factors in determining how damages are awarded may remove or reduce awarded damages, leading to savings for government departments and other public bodies. The potential reduction in damages could lead to some litigants deciding to no longer pursue their claims, leading to cost savings for the justice system.
- Prohibiting the creation of new positive obligations may reduce litigation against public authorities and the associated administrative burden which goes along with this, which could free up resource for use in other areas.
- Prohibiting the creation of new positive obligations and reforming section 6 to limit the exposure of public authorities implementing the clear will of Parliament may reduce legal uncertainty over time.
- The increased weight which courts will be required to give to public protection in their considerations may allow for the interpretation of rights in a manner more compatible with the reduction of risk to the public from persons sentenced to custody.
- Replacing a right of action for extraterritorial claims in the HRA, where damages are limited, with alternative remedies - for example in tort - may lead to an increase in damages for claimants.
- Repealing section 3 of the HRA will reinforce Parliamentary sovereignty.
- Reforming section 6 of the HRA will ensure that public authorities can be clear about how their duties will be interpreted by the courts and can focus on delivering the jobs entrusted to them.
- Repealing the requirement for section 19 statements of compatibility should encourage bold and innovative policy making.
- Reforming section 2 of the HRA will allow the courts to interpret the Convention rights in a UK context.

Key assumptions/sensitivities/risks

It has not been possible to monetise the costs and benefits of this option as cases have not been recorded consistently since the introduction of the HRA. However, there is a risk that the reforms may initially lead to more litigation in domestic courts, and potentially in the European Court of Human Rights. As for legal service providers, they are assumed to find alternative activities of equal or next best economic value.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m: n/a		Score for Business Impact Target (qualifying provisions only) £m:
Costs: n/a	Benefits: n/a	Net: n/a

Evidence Base

A. Background

The Human Rights Act 1998 (HRA)

1. The European Court of Human Rights in Strasbourg (also known here as the Strasbourg Court) has considered cases alleging breaches of the rights and freedoms contained in the European Convention on Human Rights (the Convention). Prior to the introduction of the HRA, there was a desire for the domestic courts in the UK to be able to consider alleged violations of rights, without cases needing to be taken to Strasbourg.
2. The HRA gives further effect to rights contained in the Convention in UK law. The Act made it possible for the first time for alleged infringements of the specific rights in the Convention to be brought directly before the UK courts. The right of individual petition to the Strasbourg Court remained.
3. The HRA has now been in force for over 21 years. Since the Act came into force, there has been increasing interest in reform which has arisen from how the Act has been implemented in practice.
4. As a result, various consultations have been conducted by other governments in the last 14 years. It is therefore appropriate that the government examines the human rights framework of the UK and makes appropriate adjustments, whilst acknowledging and upholding the rights contained in the Convention.
5. The government consulted on proposals to revise the HRA and replace it with a Bill of Rights. This consultation closed on 8 March 2022, with extensions granted for those who would be assisted by an Easy Read or audio version of the consultation until 19 April 2022.
6. This Impact Assessment (IA) aims to evaluate the impact of the proposals for human rights reform set out in the proposed Bill of Rights legislation.

Problem Under Consideration

7. The government wants to give effect to rights domestically in a way that ensures a focus on genuine human rights abuses and which respects the position of Parliament and of professionals who deliver public services. In doing so, the government wants to ensure that the human rights system commands the confidence of the public. The specific issues which the government wishes to address are set out below.
8. In addition to this aim, the government believes that there is a strong need for greater clarity on how the courts should balance the needs of the individual who has claimed that their rights have been infringed with the rights of others and the diverse interests of society as a whole.
9. A key area of concern for the government is perceived confusion for public services delivering on the frontline. Courts are not in the best position to make the key operational decisions affecting public authorities, particularly when resource allocation is an issue.
10. Operational matters, regarding public authorities, that touch upon human rights issues, may relate to matters of social or economic policy as well as national security. Where Parliament has decided where the balance should be struck between these competing interests, it is

important that the courts recognise Parliament's democratic mandate when reviewing such decisions. The need to adjust how the rights framework alters the constitutional balance, then, is a crucial rationale for change.

11. The government remains committed to the rights contained in the Convention and the protocols thereto which the UK has ratified. The specific detail is set out below.
12. Section 2 places an obligation on a court or tribunal to take into account relevant European Court of Human Rights or Strasbourg jurisprudence. The government believes that, in practice, UK courts continue to follow Strasbourg jurisprudence more closely than would be desirable. Therefore, reform is needed to enact a different framework for how courts should examine case law when ruling on cases that relate to human rights issues.
13. Section 3 of the HRA requires legislation to be read and given effect in a way that is compatible with the Convention rights, so far as it is possible to do so. This provision may be argued to have blurred the separation of powers between Parliament and the judiciary, by requiring the courts to interpret legislation in ways that may be contrary to both Parliament's intent and the ordinary meaning of the words used in the legislation.
14. Section 4 of the HRA enables the higher courts to make a declaration of incompatibility for primary legislation that is not compatible with the Convention rights i.e. declaring that the law is not compatible with the HRA. It can only be made in relation to secondary legislation (like Regulations and Orders) if the primary legislation under which the legislation is made prevents the removal of the incompatibility (except by revoking the secondary legislation). Currently a declaration of incompatibility cannot be made for other secondary legislation.
15. Section 10 of the HRA allows a Minister of the Crown to make a remedial order to remove an incompatibility in legislation following either a declaration of incompatibility from the higher courts or an adverse judgment from the European Court of Human Rights in Strasbourg. A remedial order is a special kind of secondary legislation which can only be used if there are 'compelling reasons' to do so. The government examined whether this remained the correct way for addressing incompatible legislation.
16. Section 19 of the HRA requires a Minister in charge of a Bill in either House of Parliament to express their view as to the compatibility of the legislation with the Convention rights, by making and publishing either of two statements before Second Reading of the Bill in each House. The government wished to examine whether there was a case for change.
17. Additionally, the government is concerned about the application of the Convention to overseas conflicts and the impact this has on the operational effectiveness of our armed forces. This is due to developments in case law of the domestic and Strasbourg courts on when the HRA and the Convention may apply abroad.
18. While the government is committed to the Convention rights, the government believes that the current 'living instrument' doctrine applied by the European Court of Human Rights, by which the Court has extended and expanded Convention rights, has expanded the human rights framework to complex areas of public policy where valid trade-offs should be decided by democratically elected representatives and expert decision-makers. The extension of human rights through interpretation of the text of the Convention appears to have enabled the courts to prescribe principles and rules in areas of policy with wide-ranging social and economic implications. Furthermore, concerns have been raised about the use of the right to respect for private and family life (Article 8) in cases involving deportations of foreign national offenders (FNOs).

19. The government believes that the expansion of how substantive rights are defined may risk displacing personal responsibility – for example, the responsibility of individuals not to break the law – and may be inducing a detrimental risk-averse approach from public authorities to the delivery of services.
20. For example, positive obligations have developed that lead to public authorities having to allocate resources to protecting individuals from factors outside of the state’s control¹, where the resources could have otherwise been used in a potentially more efficient or effective manner. Elected lawmakers and operational experts should decide upon such resource allocations.
21. On a separate matter concerning the human rights framework, the government believes that great weight should be given to the right to freedom of speech when the right is considered by the courts or other public authorities, unless one of a number of exceptions applies. The government believes that the right is currently restricted too frequently and given too little priority when balanced with other rights.
22. The government further believes all those interpreting and applying the Convention rights should have regard to the protection of the general public from those who have been sentenced to imprisonment for committing a criminal offence where considering their limited and qualified rights.
23. In relation to remedies, it is the view of the government that an element of responsibility is missing from the existing provisions relating to the payment of damages. The government considers that a claimant’s behaviour and the interests of wider society should be considered when a court is deciding whether to award damages and if so, how much.
24. In addition, the courts should have a responsibility to consider the impact of the award of damages on the public authority’s ability to provide services.
25. Finally, the government recognises that both the democratic responsibility and the power to legislate, lies ultimately with Parliament. The government therefore believes that Parliament should have a greater role in assessing the implications of adverse final judgments of the European Court of Human Rights.

B. Rationale & Policy Objectives

Rationale

26. The primary rationale for reform has been laid out in paragraphs 7-25 above.
27. The government believes that legal uncertainty for public authorities is creating inefficiencies. Reducing some of these uncertainties over time could lead to cost savings for the government. These changes will allow public authorities to reduce the time and cost spent interpreting the application of legislation on public authorities and evaluating the risk of legal challenge based on human rights grounds.

Policy Objectives

28. The associated policy objectives are to:
 - Respect our common law traditions and strengthen the role of the UK Supreme Court;

¹ See discussion on threat to life notifications and other positive obligations in the consultation document.

- Restore 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 consideration and dialogue with Strasbourg, while guaranteeing Parliament its proper role.

29. These objectives and the means of achieving them are detailed below.

C. Description of Options Considered

30. To meet the government’s policy objectives, this IA assesses the following options:

- **Option 0: The UK continues to operate under the existing human rights framework as defined in the Human Rights Act.**
- **Option 1: Reform human rights in line with the policy proposals.**

31. Option 1 is the preferred option as it best meets the government’s policy objectives.

Option 0

32. Under the “Do Nothing” option, the UK would continue to operate under the existing human rights framework as defined in the HRA. Under this option, the issues described in the previous sections would remain.

Option 1

33. Under this option, human rights reform would be carried out. The government’s proposals are set out under seven parts in the bill, which this document reflects:

- Part 1: the Convention rights;
- Part 2: legislation;
- Part 3: public authorities;
- Part 4: limits on the powers of the court;
- Part 5: remedial action;
- Part 6: derogations and reservations; and
- Part 7: UK judges at the European Court of Human Rights.

34. Additionally, administrative implementation, not part of the Bill of Rights, but an important issue to examine, is assessed as Part 8.

Part 1: The Convention rights

35. This section defines the Convention rights themselves and their interpretation. The main proposals compared to the Option 0 base case are to:

- Replace section 2 of the HRA with a provision to direct courts to have particular regard to the text of the Convention rights themselves, and provide that they may have regard

to the preparatory work of the Convention, the common law and the civil law of Scotland, in order to encourage courts not to focus exclusively on Strasbourg case law;

- Provide that domestic courts must not extend the protection of the Convention rights further than the European Court of Human Rights in Strasbourg would go, and affirm explicitly that they are not required to follow or apply Strasbourg case law (but may continue to have regard to it);
- Affirm explicitly that the UK Supreme Court is the ultimate judicial arbiter in interpreting our domestic rights;
- Prohibit domestic courts from adopting new interpretations of Convention rights that would require a public authority to comply with a positive obligation, and limit the circumstances in which existing obligations can be applied, in order to mitigate burdens on public authorities and enable operational experts to exercise greater discretion in the allocation of resources;
- Oblige all those who interpret Convention rights to have regard to the importance of reducing risk to the public from those who have been convicted of a criminal offence during the term of a custodial sentence. This is intended to support the government's proposed parole reforms and strengthen the government's hand in fighting Article 8 claims from prisoners opposing their placement in separation centres. It may also strengthen the government's ability to defend human rights claims brought regarding the deportation of FNOs;
- Provide guidance to courts, stating that where Parliament has expressed its view on competing rights and societal interests through primary legislation, courts should give deference to that view;
- Introduce a framework to guide the courts in how they consider legislative provisions (including primary and secondary legislation) in respect of the deportation of FNOs where Article 8 is relevant; and
- Provide that the right to a fair trial is capable of being secured by jury trial, insofar as this is prescribed by law in each jurisdiction.

Part 2: Legislation

36. This section establishes the interaction between the Bill of Rights and other legislation. The main proposals compared to the Option 0 base case are to:

- Repeal section 3 of the HRA without replacement, which will ensure that laws will be interpreted in a manner that is consistent with the will of Parliament;
- Institute a power to preserve the effect of judgments made under section 3 of the HRA by secondary legislation, where lead departments consider this necessary;
- Give courts a wider ability to declare secondary legislation incompatible, as an additional available remedy; and
- Not replicate the obligation under section 19 of the HRA to make a statement of compatibility, in order to move away from the simplistic binary options which it offers. This should encourage innovative and creative policy making which better achieves

government aims, without preventing human rights impacts from being considered during the passing of a bill.

Part 3: Public authorities

37. This section ensures that the Convention rights are properly balanced against the wider public interest and that public authorities are able to draw this balance appropriately in delivering their statutory duties. The main proposals compared to Option 0 are to:

- Replace section 6 of the HRA with a similar provision but with an amended scope to make clear that when public authorities are giving effect to the will of Parliament, they will not be acting unlawfully under the Bill of Rights. This should reduce the threat of having to defend against human rights claims;
- Prevent claims from being brought under the Bill of Rights in relation to military operations overseas in line with the intentions of the Convention's drafters. This will signal our commitment at domestic level to the principle that the Bill of Rights should not apply in the context of military operations overseas;
- Introduce a permission stage modelled on the Strasbourg Court's admissibility criteria, in Article 35 of the Convention. In particular, it will apply where Convention rights are relied on in Judicial Review (JR) and other civil claims, such as in private law proceedings. The permission stage will include a requirement that a claimant must have suffered a significant disadvantage in order to bring a human rights claim (subject to exceptional public interest);
- Enshrine a set of principles for awarding damages to allow UK courts to consider such awards in a UK context, and ensure that the UK courts do not award higher damages than they consider the Strasbourg Court would award. We will also introduce a provision for courts to take account of all the circumstances of the case when making an award, including the wider public interest, and to consider expressly certain factors such as the relevant conduct of the individual seeking damages, any other remedy they have been granted, and the impact on a public authority's ability to continue to provide services to society as a whole, including future awards of damages in similar cases; and
- Implement the Strasbourg Court judgment in *SW v United Kingdom*, which became final in September 2021. This case related to restrictions on the availability of damages for judicial acts done in good faith under the HRA (section 9). The Strasbourg Court found a violation of the right to private and family life (Article 8). We will therefore restate section 9 of the HRA, but include a further amendment allowing for damages to be available where an individual's rights under Article 8 are violated as a result of a judge following an unfair procedure.

Part 4: Limits on the power of the court

38. This section establishes statutory limits on relief courts can grant in relation to certain human rights cases and appeals against deportation by FNOs. The main proposals compared to the Option 0 base case are to:

- Strengthen protection for freedom of speech by introducing a provision that is stronger than section 12 of the HRA, to give additional weight to the right. We will ensure that the responsibility for attaching this greater weight is borne by all public authorities while recognising that freedom of speech must also be balanced against the need to protect

national security, keep people safe and take steps to protect against harm to individuals;

- Make specific provision for the protection of journalists' sources, to ensure that they are better protected; and
- Make it harder for foreign criminals to rely on Article 6 – the right to a fair trial – to frustrate deportation, save in very narrow circumstances, while maintaining the vital protection for the right to life and that no-one should be deported to face torture, or inhuman or degrading treatment or punishment abroad. Additionally, introduce a framework to guide the courts in how they consider legislative provisions (including primary and secondary legislation) in respect of appeals under Article 8 against the deportation of FNOs.

Part 5: Remedial action

39. This section covers the requirements on government in cases where the Strasbourg Court has found incompatibility, and the ability to use secondary legislation to address incompatibilities found by the courts. The main proposals compared to Option 0 are to:

- Introduce provisions to require that the Secretary of State in question lays any adverse Strasbourg judgments against the UK before Parliament; and
- Make clear that the Bill of Rights itself cannot be amended by a remedial order.

Part 6: Derogations and reservations

40. This section replicates provisions in the HRA on derogations and reservations. The only difference from the base case is the removal of the requirement for periodic review of reservations under section 17 of the HRA.

Part 7: UK judges at the European Court of Human Rights

41. Compared to Option 0 this allows all offices the right for a judge to retain their UK judicial office whilst serving at the Strasbourg Court, and changes judicial pension provisions. The HRA allowed this only for certain named judicial offices.

D. Affected Stakeholder Groups, Organisations and Sectors

42. The options assessed in this IA would have UK-wide effects, with particular impacts on the following:

- **individuals/potential litigants** who need to or wish to bring human rights claims. Litigants claiming rights may be wider than individuals, including businesses and the third sector.
- **the justice system**, including the judiciary, the courts and tribunals, prisons, and legal aid providers across the UK, as a means through which rights are enforced and disputes are resolved;
- **public authorities** as bodies having obligations under human rights legislation, including government departments, devolved administrations and local authorities;

- **wider society** as having interests in the proposals.

43. Human rights reform would also impact on those legal service providers who represent litigants bringing human rights claims. However as is standard practice in IAs, it has been assumed that any change in revenue would be offset by a change in the work conducted. Therefore, it has been assumed that legal service providers would be able to redirect their resources for productive uses elsewhere in the economy of equal or next best economic value, and thus they are not included in the options appraisal in section E below.
44. Whilst human rights reform would have a UK-wide impact, we do not expect the Scotland, Wales or Northern Ireland to be disproportionately impacted, though we will consider any particular sensitivities in the devolved nations. We are conscious of the importance of the HRA and the Convention with regards to the Belfast (Good Friday Agreement), and we continue to consider carefully the impact of any reforms to Northern Ireland.
45. Instead, the government's intention is to undertake human rights reform that respects the diverse legal traditions across the UK, but which is also founded on principles common to all. This IA has therefore sought to consider the impact of the reforms on the groups identified above for the UK as a whole.

E. Cost & Benefit Analysis

46. This IA follows the procedures and criteria set out in the Impact Assessment Guidance and is consistent with the Her Majesty's Treasury Green Book. Here follows an assessment of the reform proposals as to their costs, benefits, risks and sensitivities.
47. IAs place a strong focus on the monetisation of costs and benefits with the aim of understanding what the overall impact on society might be from the options under consideration. However, there are instances where important impacts cannot sensibly be monetised, for example, where individuals will seek to pursue claims through other remedies (e.g. in tort), and exhaustive data on human rights cases are limited, as is the case for this IA. It therefore has not been possible to monetise the impacts of these proposals. Where data are available, we have added in a more descriptive or qualitative analysis to outline what we believe the impacts of the policy could be, though uncertainty remains.
48. The assessment of the impacts of option 1 are based on a comparison between the changes introduced by this proposal against option 0, the counterfactual or "do nothing" scenario, where the current human rights framework remains unchanged. Where potential indirect effects of the proposals are uncertain, they are treated in this IA as a risk rather than a cost or benefit.

Base Case

49. As noted above, it is standard practice in IAs to assess the impacts of the options considered against a baseline where the existing arrangements remain in place. The current data available for option 0, the counterfactual or "do nothing" scenario, where the current human rights framework remains unchanged is summarised below.
50. It should be noted, however, that human rights data relating to the Strasbourg Court and domestic UK human right cases are limited, meaning that establishing the baseline for human rights reform is difficult. For example, it is challenging to isolate the number of cases which are successful on purely human rights grounds since the introduction of the HRA, as such cases are often brought together with other grounds for challenge. The data limitations and current uncertainty of proposals and their impacts makes it difficult to establish a clear

option 0 but given these data limitations we have presented below what we believe is the best representation of the baseline (option 0).

UK-wide

51. Since Protocol No.11 to the ECHR came into force in November 1998, creating the current structure of the European Court of Human Rights, 19,982 applications to the Strasbourg Court against the UK have been decided by a judicial formation of the Court.² This however does not include attempted applications that failed because, for example, they were incomplete. The Court has found at least one violation against the UK in respect of 271 applications since 1998.³ The approach of the Court has however evolved over the last 24 years, including through the implementation of further reforms under Protocols No.14 and 15 to the ECHR, and so it is not possible to identify clear trends in the Court's statistics resulting from external factors.
52. Domestically, most UK courts and tribunals do not systematically record data regarding the volume of human rights cases. Data are unavailable for the Crown Court, county courts, the High Court and the Court of Appeal but limited information is available for the Immigration and Asylum Tribunal.
53. Human rights cases represented 5% of the total caseload of the House of Lords (as the then final appellate court) in 1996. This proportion gradually increased following the introduction of the HRA, peaking at 41% in 2005.⁴ Since 2012/13 the Supreme Court (which replaced the appellate jurisdiction of the House of Lords) annual reports and accounts have included information on the number of human rights judgments. The Supreme Court gave judgments in 10 human rights cases in 2014/15, out of a total of 81 judgments that year, nine in 2015/16 out of 81, four in 2016/17 out of 74 and three in 2017/18 out of 78.⁵ Since 2018/19, the Supreme Court annual reports do not include judgments on human rights grounds in the same way anymore. Any judgments relating to JRs or other cases that have included human rights grounds are also not recorded.

Devolved administrations

54. Scotland and Northern Ireland publish statistics regarding their civil justice systems, but these make no reference to human rights cases.

Option 1: Reform human rights in line with the policy proposals

55. Due to the limitations in data available, monetised benefits and costs cannot be calculated and the net impact of introducing the proposals is uncertain. However, a number of non-monetised benefits and costs can be evaluated as the primary rationale for human rights reform is not based on financial (efficiency) arguments.

Assessment of Option 1

56. The following paragraphs set out the impacts of the proposals, under the seven parts set out above.

Part 1: The Convention rights

² Source: Combined total of 10 years of the "new" European Court of Human Rights 1998-2008 (coe.int) and European Court of Human Rights Annual Reports.

³ Ibid.

⁴ S Shah and T Poole, *The Impact of the Human Rights Act*, (2009). http://www.lse.ac.uk/collections/law/wps/WPS2009-08_Shah_Poole.pdf

⁵ The Supreme Court Annual Report and Accounts, Planning and governance - The Supreme Court

Reform to interpretation of the Convention rights

57. The government is, in the Bill of Rights, including a provision which is a replacement version of section 2 of the HRA, to direct courts to have particular regard to the text of the rights themselves, and providing that they may have regard to the common law and the preparatory work of the Convention. The bill will provide that domestic courts must not extend the protection of the Convention rights further than they are satisfied the European Court of Human Rights would go, and that they will no longer be required to take account of Strasbourg case law (but they may continue to have regard to it). It will make explicitly clear that the UK Supreme Court is the ultimate judicial arbiter in interpreting our domestic rights.
58. Section 2 is of significance in areas where potentially controversial legal issues are under consideration. In the context of the new provision regarding the interpretation of Convention rights, there may be changes of approach from the UK courts in areas where the jurisprudence of the European Court of Human Rights is argued not to appropriately reflect the UK context or its common law traditions, or where the Strasbourg Court has taken particularly expansive interpretations of rights.
59. This section refers to clause 3 of the draft bill.

Costs

60. The changes to section 2 include a provision stating that courts and tribunals may have regard to the preparatory work of the European Convention on Human Rights, when construing the text of the Convention. We are considering what steps need to be taken to make this preparatory work sufficiently accessible to litigants and the public. This work is ongoing, and it is not presently possible to estimate the cost accurately.
61. In the short term, reforming section 2 could lead to more litigation in domestic courts, as litigants seek to test the boundaries of the new framework and the extent to which the domestic courts in practice interpret the rights consistently with the previous Strasbourg and domestic HRA case law, or the ways in which they diverge. Over the medium to long term the reduced elasticity of the parameters of human rights law will create greater legal certainty and a clear separation of powers.

Benefits

Wider society

62. This reform would encourage human rights to be interpreted more distinctively in the UK context, and reinforce the UK Supreme Court as the ultimate judicial arbiter of the interpretation of the Convention rights in our domestic law.
63. The new framework will ensure that UK courts cannot interpret rights more expansively than they are confident the European Court would do if considering the same circumstances, and explicitly affirm that, within this limit, there is no requirement for courts to follow relevant Strasbourg jurisprudence.

Risks

64. To the extent that domestic courts choose to move away from European Court of Human Rights case law in more cases, this could also result in an increase in cases that are brought to the European Court of Human Rights against the UK, due to applicants wishing to bring cases to the European Court where they have been unable to obtain a remedy domestically.

Net impact

65. The overall impact of reforming section 2 of the HRA is uncertain as the impacts will be dependent upon the future development of domestic and Strasbourg jurisprudence.

Reform of positive obligations

66. The rights in the European Convention on Human Rights have been interpreted and incrementally expanded by the courts to require the state to discharge various 'positive obligations'. Positive obligations require the state to take preventative or protective actions to secure an individual's rights. For example, in some instances the state is required to take measures to protect individuals from infringements of their Convention rights by third parties. In other cases, the state may be obliged to investigate an arguable breach of a right. An example of a positive obligation is the issuing of threat to life notifications, which have arisen under preventive obligations under Article 2.

67. The expansion of such 'positive obligations' has involved extending the Convention by judicial implication, which is perceived as having created uncertainty as to the scope of the government 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.

68. The government intends to prohibit domestic courts from adopting new interpretations of Convention rights that would require a public authority to comply with a positive obligation. When considering whether or not to apply an existing interpretation of a requirement for positive action by the State, courts must give great weight to the need to avoid the positive obligation's potential impact on the ability of the public authority to deliver its services. Courts must also take into consideration whether or not the individual whose rights have allegedly been breached had been involved in criminal activity. This will allow public authorities (such as police forces) to assert greater discretion over the deployment of resources, and to argue against the imposition of a positive obligation where this would create a disproportionate burden.

69. This section refers to clause 5 of the draft bill.

Costs

Public Authorities

70. We cannot quantify the cost of limiting the application of existing positive obligations, nor in preventing the creation of new such obligations. There could be additional applications to the Strasbourg Court as a result, with additional litigation for government departments if individuals seek to challenge the services provided by public authorities as a result of any change.

71. Limiting the application of positive obligations in some cases could lead to legal action being brought under other non-human rights courses, such as negligence. Judgments brought under negligence grounds may also award higher financial compensation to claimants, potentially costing public authorities more.

Individuals

72. If individuals do not feel that a rights violation has been adequately addressed by a domestic court, and an application is made to the European Court of Human Rights, this would entail additional costs for the individual.

73. Furthermore, individuals who have been involved in criminal activity may be less likely to receive the protection which would otherwise have resulted from the police applying an interpretation of a Convention right.

Benefits

Justice system

74. The scale of these benefits depends on the behavioural response of public authorities to changes in positive obligations, including the extent to which they continue to maintain the level of service.

Public authorities

75. Enabling public authorities to feel more confident about how they exercise their discretion over operational decision-making could reduce the need to adopt a risk-averse approach to decision-making, allowing for greater flexibility in resource allocation by public service professionals and allowing them to focus their resources as they deem fit.

76. It is not possible to quantify the impact of this change, given that the policy is directed at addressing cases brought in the future. It is also not possible to quantify the extent to which it will drive behavioural change by public authorities.

77. However, we can use the preventive duties under Article 2 (such as the process around managing threat to life notifications, and mitigating the threat from start to finish) as an example of the potential scale of new court-imposed positive obligations. The data (see Table B5 in Annex B) show that police forces issued a considerable number of threat to life notifications between 2018-2020, totalling 2,190 across the four largest forces in England and Wales across these years.

78. Furthermore, and while noting that this will be due to several reasons which this analysis does not cover, including but not limited to the impacts of the COVID-19 pandemic on police forces, and not only related to positive obligations, Home Office crime outcomes data for England and Wales may show that the burden on police forces could be impacting their ability to process offences, and that reducing this through restricting the creation of future positive obligations may prevent future resource burdens from being imposed. Open data on crime outcomes shows that overall, 17.5% of offences between April - September 2021 did not have an outcome assigned to them, and only 4.8% of offences resulted in an outcome of a charge or summons.^{6, 7} Threat to life notifications will, of course, continue to be made in the appropriate circumstances, but this will be at the discretion of frontline operational staff.

Risks

79. Prohibiting the adoption of new positive obligations could create divergence from the European Court of Human Rights if, in the future, the Strasbourg Court finds additional positive obligations to exist (or expands the interpretation of existing ones), and Parliament chooses not to legislate to recognise the obligation. This is likely to result in an increase in cases that are brought to the Strasbourg Court, where applicants have been unable to obtain a remedy domestically. There may also be a risk for the government if work in this area is perceived to undermine other objectives.

Net impact

⁶ [Crime Outcomes open data April 2021 to September 2021](#)

⁷ The number of crimes 'not yet assigned an outcome' is derived by subtracting the total number of outcomes assigned to crimes recorded in the quarter from the number of crimes recorded in that quarter.

80. The net impact of these reforms is unclear at this stage. It is likely to reduce successful litigation against public authorities by prohibiting courts from interpreting rights as containing new obligations. However, there is likely to be litigation testing whether interpretations involve negative or positive obligations. There is likely to be some cost to the government as a result of an increase in European Court of Human Rights applications. Prohibiting the creation of new positive obligations, and limiting the application of existing ones, is intended to reduce costs on public bodies by limiting acts they are required to take.

Ensuring that public protection is given due regard in interpretation of rights

81. The government proposals include a provision that obliges courts, in interpreting those Convention rights which are qualified and limited, to have regard to the importance of reducing risk to the public from those who have been convicted of a criminal offence (during the period of any sentence of imprisonment they have been given). This is intended to influence consideration of parole reforms, as announced in the Root and Branch review. The government's position is that the parole reforms are fully compatible with the ECHR. Nonetheless, the Bill of Rights will reinforce this, providing that any court considering a challenge to a release decision on human rights grounds gives the greatest possible weight to the importance of reducing the risk to the public from those serving prison sentences.

82. This section refers to clause 6 of the draft bill.

Costs

Individuals

83. Those who face a change in their conditions of incarceration may find it more difficult to rely on their Convention rights (other than Articles 2, 3, 4(1) and 7) to challenge such a change. For some individuals, this may increase the time they spend in less favourable conditions, such as in a separation centre, compared to the base case.

Benefits

Public Authorities and Wider Society

84. The requirement for courts to consider public protection in considering human rights claims may have benefits to public authorities and wider society by reducing potential reoffending by the worst offenders who may have otherwise been granted parole or not been deported. Serious offences have a huge cost to society; using Home Office estimates from 2015/16, we calculate that homicide has an economic and social cost of around £3.9 million (2022/23 prices) per offence.⁸

85. The provision would require that in cases where human rights challenges arise regarding decisions to place prisoners in separation centres (on the basis of their extremist views), the requisite weight is given to a consideration of public protection.

86. The proposals may also complement proposals relating to the deportation of FNOs, as in considering a challenge to deportation under Article 8, for example, a court will be required to give the greatest possible weight to the importance of reducing risk to the public.

Risks

⁸ Source: [The economic and social costs of crime \(publishing.service.gov.uk\)](https://publishing.service.gov.uk). The figure was originally from 2015/16 but has been uplifted to the 2022/23 values.

87. The proposal does not remove the risk of domestic challenge to the parole reform proposals, or any other act of a public authority and an individual would still be able to bring a challenge to the European Court of Human Rights.

Net Impact

88. The overall impact is expected to be positive as it may reduce the risk to the public from those to whom this provision applies, who may otherwise have been released on human rights grounds.

Decisions that are properly made by Parliament

89. Our proposals will make clear that great weight should be given to the views of Parliament by the judiciary when determining a question of compatibility of Convention rights with a provision of an Act of Parliament, thereby ensuring the democratic will of Parliament is properly considered. It will provide guidance to courts in assessing the scope of a right or the proportionality of any interference and to give deference to Parliament's view of the public interest, as expressed in primary legislation.

90. This will protect Parliament's ability to exercise its judgment in balancing complex and diverse socio-economic policies with the wider interests of society.

91. This section refers to clause 7 of the draft bill.

Costs

92. No costs identified.

Benefits

Public Authorities

93. Giving great weight to Parliament's views, capturing the position which the UK Supreme Court currently takes, in situations where rights need to be balanced, may lead to less risk aversion and to a more flexible approach to the delivery of public services. Public authorities may also benefit from lower litigation costs if fewer cases are brought and/or fewer cases are successful.

94. It will also aim to ensure that the will of elected lawmakers is not thwarted where they have passed primary legislation which balances individual rights with due respect for the wider public. This would have involved careful decision-making between competing policies, considering broad questions of economic and social policy and issues involving the allocation of finite resources.

Risks

95. Reforming the legal framework carries the inherent risk of a response that would lead to more litigation in domestic courts if the reform is implemented, as litigants seek to test the boundaries of the new framework.

96. While there is a risk of diluted protection for individuals, it is the government's position that where Parliament has made law, it has taken into account its role in balancing the competing interests of society.

97. It is also arguable that if Parliament passes legislation which is perceived as violating rights, but which has been upheld by the domestic courts, that more applications may be made to the European Court of Human Rights.
98. Public authorities and other stakeholders may have reduced legal certainty if existing interpretations or rights are redefined.

Net Impact

99. The overall impact of giving 'great weight' to the views of Parliament is likely to be positive. This is due to increased legal certainty that reduces risk aversion. Public authorities are likely to benefit from reduced litigation and a more flexible approach, which may enable public authorities to deliver more effective public services.

Deportations in the public interest

100. The government will introduce a framework to guide the courts in how they consider legislative provisions (including primary and secondary legislation) in respect of appeals against deportation under Article 8 by FNOs.
101. The government will also provide that appeals against deportation of FNOs on the basis of Article 6 cannot prevent deportation, except under narrow circumstances.
102. Home Office data⁹ show 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 from 1 April 2016 to 8 November 2021, of 1,011 appeals against deportation by FNOs that were allowed on human rights grounds at First Tier Tribunal, an estimated 70% were allowed solely on Article 8 grounds.
103. This section refers to clauses 8 and 20 of the draft bill.

Costs

Public authorities

104. Any subsequent new deportation provisions, introduced after the Bill, that lead to an increase in the number of FNO deportations in the longer term may lead to increased costs to government departments in handling those deportations. The total costs would depend on the number of additional deportations, how quickly those deportations occur and the cost of processing each additional deportation.

Individuals (subject to deportation)

105. Should new deportation provisions be introduced following the Bill, or in cases where FNOs are relying on Article 6 as the basis of an appeal against deportation, FNOs may be more constrained in claiming the right to private and family life and the right to a fair trial in domestic courts, in order to avoid deportation. Therefore, there may be a cost on those individuals subject to deportation who would be subject to a stricter deportation approach than the present one. There would likely be some negative impacts on the deported individuals' families; this will of course vary in each case depending on the specific family circumstances.

⁹ Home Office, Foreign National Offenders appeals on human rights grounds: 2008 to 2021, 24 February 2022, <https://www.gov.uk/government/publications/foreign-national-offenders-appeals-on-human-rights-grounds-2008-to-2021>

106. FNOs affected by these changes and any future changes to the deportation framework allowed by them, who wish to challenge deportation domestically but have no domestic options (or who have exhausted all of them) may determine that their only option is to seek a remedy through the Strasbourg Court.

Benefits

Justice system

107. Should any future deportation provisions be introduced after the Bill, and in any case with regard to Article 6 appeals, there may be benefits to the justice system from the government being able, over time, to deport a greater number of FNOs, and to removing barriers to deportation. The scale of the additional benefits to the justice system (relative to the base case) from the removal of grounds of challenge against deportation would depend on the following:

- the extent of future limitations placed on the grounds on which FNOs can challenge deportation;
- the number of FNOs who can no longer challenge their deportation on certain human rights grounds; and
- the judicial resource freed up through reduced judicial and court times from a reduction in challenges.

108. Following this, there could also be benefits to prisons if the government is able to deport more FNOs. The average direct cost per prisoner per year in 2020-21 was around £33,000,^{10,11} and on 31 March 2022, there were 9,661 foreign nationals held in prisons in England and Wales, representing around 12% of the total prison population.¹² However, the exact extent of the benefits is highly dependent on the number of additional FNOs who would be deported and how quickly these deportations can occur. There could also be benefits from the reduction of the number of FNOs in Immigration Removal Centres.

109. Future estimates of the potential cost savings for the justice system are not possible. However, for all cases closed between 2016-2021, the cost to government of defending FNO deportation cases within the courts that were brought on human rights grounds, accounted for around 4% of total costs of defending human rights immigration cases (£553,240 out of a total cost of £13,038,830).¹³ They also accounted for around 3.6% of total immigration cases brought against government on human rights grounds (171 out of 4,710).¹⁴ In the same period, the average cost to government of defending criminal deportation cases was around £3,200 per case.¹⁵

110. While unquantified, other non-monetised benefits may exist, such as using prison space occupied presently by FNOs for domestic offenders to reduce prison capacity pressures or the need to invoke contingency capacity measures.

¹⁰ HM Prison & Probation Service Annual Report and Accounts 2020/21 [Prison performance data 2020 to 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/prison-performance-data-2020-to-2021)

¹¹ This is the latest figure available and there may be some impact on this figure due to effects of the COVID-19 pandemic.

¹² Ministry of Justice, Offender Management Statistics Quarterly, 28 April 2022, <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2021/offender-management-statistics-quarterly-october-to-december-2021-and-annual-2021>

¹³ Government Legal Department provided data (See table B4 in Annex B).

¹⁴ Ibid.

¹⁵ Ibid. Note that immigration and FNO deportation cases concluded in 2022 have been excluded from this analysis due to low case numbers. All figures are in Financial terms as cases extend over multiple years; without knowing the costs within each year of each respective case, we cannot accurately inflate the figures into Economic terms. Any attempt to do so would be heavily based on assumptions and would lack robustness. Costs recorded do not include damages or costs paid to the claimant (or costs received where the claimant's challenge is unsuccessful).

Public authorities

111. There may be benefits to public authorities from reduced litigation if FNOs would, following new deportation provisions, find it harder to rely on certain rights to challenge domestically or to delay their deportation. For instance, housing, healthcare and benefits available to foreign offenders with recourse to public funds could be used for other purposes.

Wider society

112. There may be benefits to wider society of deporting more FNOs over time. There is an inherent benefit to society and the victims of their crimes in removing FNOs who have committed serious offences in the UK and have therefore not fulfilled their societal responsibilities. The extent of these further benefits would depend on the cost to society of any offences that may have been committed in the future by FNOs currently living in the community, who may now be easier to deport. It is not possible to quantify these, but the potential reduction in crime which could arise from such deportations would be of great benefit.

Risks

113. There are two potential risks and uncertainties associated with the proposal and associated analysis. First, any increase in deportations that could rest of new deportation provisions following the Bill of Rights relies on Home Office operational policy and capacity. Secondly, it is possible that if claimants are unable to successfully challenge deportation under domestic law, this could result in an increase in cases brought at the European Court of Human Rights after individuals have exhausted all domestic remedies.

Net impact

114. It is not possible at this stage to quantify and monetise the benefits of earlier or additional deportations in the public interest. However, there are potential non-monetised impacts on individuals facing deportation and their families and clear benefits to wider society as described above. The evidence on impacts of deportation is mixed (see deportation in public interest equalities in Section F) and could have some benefits or drawbacks for the individual in prison and could possibly result in negative impacts on members of the deported individuals' immediate and extended families.

Right to jury trial

115. The HRA and the Convention do not specifically provide a right to trial by jury, but the Strasbourg Court has found that trial by jury is consistent with the right to a fair trial under Article 6.

116. However, trial by jury is an integral part of the UK's criminal justice system, albeit different provisions are made for it in the three UK legal jurisdictions, and the government intends to recognise it in the Bill of Rights. Recognising this in the Bill of Rights may also have the benefit of bolstering our position that trial by jury is part of our arrangements for ensuring a fair trial, should Strasbourg ever depart from their current acceptance of trial by jury as one mode of fair trial arrangements under Article 6.

117. Because the legislative recognition of trial by jury is not a change to the law as it stands, or to the role of the UK Parliament and devolved legislatures in Scotland and Northern Ireland in determining arrangements for trial by jury, we will not analyse the impacts.

Part 2: Legislation

Reform of sections 3 and 4 of the Human Rights Act

118. The government is proposing to repeal section 3 of the HRA without replacement, removing the additional interpretative power granted to courts by the HRA above and beyond standard judicial interpretation.
119. The government is also bringing in a delegated power to address the effect of previous case law under section 3. Government departments and devolved authorities responsible for legislation which has been interpreted under section 3 are likely to take action using this power to preserve many of the interpretations made under section 3, to ensure continued compatibility with the Convention rights.
120. The government is also proposing that the replacement for section 4 of the HRA within the Bill of Rights would extend the option of making a declaration of incompatibility to all secondary legislation. Under section 4, higher courts have the power to make a declaration of incompatibility if they consider that primary legislation cannot be interpreted compatibly with the Convention rights. A declaration of incompatibility can only be made in relation to secondary legislation where the Act under which the legislation is made prevents the incompatibility being removed, except by revocation. Where the courts consider other subordinate legislation to be incompatible with the Convention rights, they can, amongst other public law remedies available to them, disapply the provision in question. Courts will therefore have a range of options.
121. This section refers to clauses 10 and 39 of the draft bill.

Costs

Public authorities

122. The project to preserve section 3 interpretations using the delegated power will have a time and resource cost across government departments and devolved authorities. MoJ has, to date, identified approximately 60 cases subject to section 3 interpretations that have not been superseded by new legislation. Through consultation with lead policy teams, MoJ estimates that responsible UK government departments may seek to preserve the effect of around 40 of these interpretations using secondary legislation made under the power. In addition to this, the devolved administrations may wish to preserve several more.
123. The secondary legislation will require initial coordination from MoJ, but the development of the amendments will be the responsibility of policy owners in departments and the devolved administrations. The variability of possible amendments means that we cannot quantify the resource that will be required.
124. Removing the duty to interpret legislation compatibly with rights currently found in section 3 would likely lead courts to find more legislation incompatible with those rights, thereby resulting in more declarations of incompatibility. This would lead to greater government and Parliamentary time spent on fixing the incompatibility.

Benefits

Public authorities

125. The repeal of section 3 will shift power and responsibility away from the courts to Parliament and devolved legislatures. For primary legislation, we would expect to see that where under normal rules of statutory interpretation the legislation is incompatible, a declaration of incompatibility will be issued. This means that the role of finding a solution to

the incompatibility will be primarily in the hands of Parliament, at the initiative of the government. This is beneficial in the following ways:

- Given that the previous section 3 could require strained interpretation, “reading in” phrases that are not in the text, and going against Parliamentary intention, it is arguably more constitutionally proper for this quasi-legislative activity to be done by the legislature. It will also reduce the additional costs imposed on public authorities in elastic interpretation of the law.
- Parliament and the government have significantly more analytical and consultative resources. Where human rights incompatibility requires complex solutions, Parliament and the government will be better equipped to arrive at a solution.

126. In relation to secondary legislation, declarations of incompatibility will be an option, but our expectation is that in most cases courts will disapply incompatible secondary legislation rather than make a declaration of incompatibility. Repealing section 3 will in these cases therefore lead to greater disapplication of secondary legislation.

127. Repealing section 3 will reduce legal uncertainty for public authorities in discharging their statutory duties, as those duties will not be subject to section 3 judgments which amend their meaning.

Risks

128. Should Parliament not respond to a declaration of incompatibility, a human rights violation identified by the courts arising from legislation would go unremedied in our domestic system. However, in practice, between the commencement of the HRA and November 2021, the government has proposed or taken action to remove the incompatibility on 33 out of 34 occasions that a declaration has been made under the HRA and has not been overturned on appeal. The government is currently considering how to address the 34th and most recent of these declarations. However, again, this is a much slower process than when the courts have used section 3 to change their interpretation of legislation.

129. As the Acts establishing the devolved governance of Northern Ireland, Scotland, and Wales each provide for interpretative powers which overlap to some extent with section 3 of the HRA (though they are not directly equivalent), there will be instances where very similar (perhaps identical) legislation will be interpreted compatibly in devolved authorities, but declared incompatible as Westminster legislation. As the devolved legislatures would still be acting outside their competence, should they legislate incompatibly with the Convention, restricting the duty to interpret legislation compatibly with rights may lead courts to quash more devolved legislation.

130. Reform of section 3 and 4 of the HRA may increase legal uncertainty for the short term as courts settle on the principles to apply to the new system of interpretation and declarations of incompatibility.

Net impact

131. The overall impact of reforming sections 3 and 4 of the HRA is uncertain.

132. The reforms will empower Parliament and the government to resolve human rights issues. Following these reforms, it will be rare for courts to interpret away incompatibilities. Instead, deciding whether, how, and the extent to which incompatibilities in primary legislation are addressed will be the job of Parliament.

133. There may be costs resulting from reform, for example due to an increase in applications to the European Court of Human Rights. There may also be more declarations of incompatibility made which would bear additional cost to government, including work to prepare for remedying the incompatibility by government officials and the additional Parliamentary time used.

Repeal of the requirement for Statements of Compatibility (section 19 of the Human Rights Act)

134. Section 19 of the HRA currently requires a Minister in charge of a Bill in either House of Parliament to make and publish, before Second Reading, a statement regarding the compatibility of the Bill with the Convention rights. The Minister must either state that in his or her view the Bill is compatible with the Convention rights (section 19(1)(a)), or that, although he or she is unable to make such a statement, the government nevertheless wishes Parliament to proceed with the Bill (section 19(1)(b)). Legislation can still be found to be incompatible by the courts even if it was subject to a section 19(1)(a) statement, and can be held to be compatible even if subject to a statement under section 19(1)(b).

135. The government is proposing removing this requirement in order to move away from the simplistic binary choice offered by section 19, with the aim of encouraging bold and innovative policy making. The government would still intend to provide information to Parliament on the human rights implications of proposed legislation, and Parliament, including the Joint Committee on Human Rights (JCHR), will still be able to consider and debate this. However, the current dichotomous statement will no longer be required.

Costs

136. No costs identified.

Benefits

137. The removal of a binary statement on compatibility recognises the complexity of determining Convention compatibility, which is better reflected and more comprehensively set out in the analysis submitted to the JCHR.

Risks

138. While Parliament is able and welcome to consider human rights implications, the removal of the requirement for a statement of compatibility would mean there is no explicit duty for Ministers to share their views as to the compatibility of proposed legislation.

Net Impact

139. The net impact of repealing the requirement for section 19 statements of compatibility is expected to be positive as the removal of the binary declaration should encourage bold and innovative policy making.

Part 3: Public Authorities

Acts of public authorities (section 6 of the HRA)

140. The government proposes reforming the equivalent provision to section 6 of the HRA so that public authorities are not subject to litigation where they are acting to give effect to the direction and will of Parliament.

141. This section refers to clause 12 of the draft bill.

Costs

Public authorities

142. If there were to be an increased number of cases going to Strasbourg as a result of this proposal, there could be additional legal costs to the government to defend these cases.

Individuals

143. If individuals perceive that their rights have been violated and are unable to bring challenges against public authorities domestically, deciding to take their cases to Strasbourg, this may result in increased monetary and time costs to the individual.

Benefits

Public authorities

144. This proposal could create relative certainty for public authorities that they can conduct their duties without concern that implementing explicit mandates from Parliament will lead to cases being brought against them on the grounds of human rights claims. Additionally, it would allow public authorities to focus on frontline service rather than needing to spend time and resource seeking legal counsel on potential human rights concerns.

145. This reform could reduce cost burdens on public authorities, although we cannot quantify the saving at present. Data provided by the Government Legal Department for November 2016 – December 2021 show that approx. 97.1% (6,103 out of 6,285) of domestic human rights cases were brought against the Home Office, the Ministry of Justice, the Department for Work and Pensions (DWP) and the Department of Health and Social Care (DHSC), all heavily operational departments.¹⁶ In the same period, approx. 91.9% (around £21.2mn out of £23.0mn) of costs to government of defending these cases were accrued for cases brought against these departments.^{17, 18} Reducing these costs could result in public authorities being able to use their resource elsewhere.

Risks

146. As it follows, more individuals may take cases to Strasbourg if there is not the opportunity to challenge public authorities in the same way domestically.

Net Impact

147. As discussed, the net impact of these reforms is unclear at this stage. However, based on historic trends where most cases taken to the Strasbourg Court after judgment in the UK result in being struck out and where very few cases are judged in the favour of the individual, this reform could potentially result in reduced costs for public authorities, though this remains uncertain.

148. However, in those cases where incompatibilities are found it could mean that public bodies continue to act in accordance with incompatible primary legislation until amended rather than through direct remedy by the court.

¹⁶ Government Legal Department data (see Tables B1-B3 in Annex B)

¹⁷ Ibid.

¹⁸ Figures are in Financial terms as cases extend over multiple years; without knowing the costs within each year of each respective case, we cannot accurately inflate the figures into Economic terms. These costs do not include damages or costs paid to the claimant, or costs received where a claimant is unsuccessful. Any attempt to do so would be heavily based on assumptions and would lack robustness

Overseas military operations

149. Under Article 1 of the Convention, the States Parties are obliged to “secure to everyone within their jurisdiction the rights and freedoms” defined in the Convention. Jurisdiction in international law is classically defined on a territorial basis with certain exceptions such as diplomatic premises. While Strasbourg’s approach has been praised for ensuring protection for human rights, particularly where one Convention state has occupied the territory of another, it has been criticised for going beyond the intent of the Convention’s drafters, and for bringing international human rights law into conflict situations that are classically governed by the law of armed conflict.
150. The government is proposing that the Bill of Rights should apply extraterritorially to the extent of the UK’s extraterritorial obligations under the Convention, but with a carve out for military operations overseas. A restriction of extraterritoriality would be in line with the Convention’s original drafters’ intentions, we believe.
151. The government recognises that there is no unilateral domestic solution to extraterritorial jurisdiction. The government believes this provision signals our commitment to the principle that claims relating to overseas military operations should not be brought under human rights legislation. We are considering how to resolve this issue at an international level with our partners in the Council of Europe.
152. To maintain compatibility with the Convention, alternative remedies will be introduced through later legislation. The carve out for military operations overseas will not commence unless and until the alternative remedies are in place.
153. This section refers to clause 14 of the draft bill.

Costs

154. The full impact of these provisions will not be known until alternative remedies are developed, and until and unless our armed forces become involved in future overseas operations. As we do not know what future operations these might be, an accurate estimate of the future impact of these provisions is not possible.
155. However, it is anticipated that the boundaries of the carve out for military operations overseas may be tested by litigants. This could lead to an initial increase in the number of legal cases concerning extraterritorial jurisdiction.

Benefits

156. Extraterritorial jurisdiction has gone beyond the initial intention of those who drew up the Convention. This approach has been mirrored by domestic courts for the HRA. This provision will act as a signal that the government believes current HRA routes are not an effective vehicle for bringing claims relating to armed conflict.

Risks

157. There may be an initial increase in cases on extraterritorial jurisdiction as individuals seek to test a) the boundaries of the carve out and b) the alternative remedies provided to ensure compliance with the Convention. This includes an increased risk of litigation in Strasbourg.
158. There is a reputational risk if this change is perceived as an attempt to exclude the armed forces from accountability on military operations overseas. However, military personnel and

the MOD will continue to be held to account through, for example, international humanitarian law and the law of armed conflict.

159. Alternative remedies will need to be sufficiently comprehensive that national security safeguards can be implemented. This risk does not materialise unless and until alternative remedies, and thus this provision, commence. Mitigation of this risk will be considered through future policy development.

Net Impact

160. It is likely that there would be an initial increase in litigation (and associated costs) from lawyers looking to test the adequacy of the new routes. However, this is likely to reduce over time as the new routes become routine.

Introduction of a permission stage

161. The government proposals will introduce a permission stage for human rights claims. A permission stage is already required for launching JR claims. The new permission stage would require claimants to demonstrate that they have suffered a significant disadvantage before they can bring a human rights claim. It will also include a second 'public importance' limb for overwhelming and exceptional circumstances for claims which fail to demonstrate that the claimant has suffered a 'significant disadvantage'. 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.

162. It is intended that the permission stage will only filter out trivial claims. It will be broadly modelled on the European Court of Human Rights' admissibility criteria for dealing with individual applications under Article 35 of the Convention itself.

163. While this legislation will set the general parameters by which the permission stage will operate, full operationalisation will be covered in court rules.

164. This section refers to clauses 15 and 16 of the draft bill.

Costs

Justice system

165. There will be additional judicial resources and administrative costs to the justice system both to set up and run a permission stage. The additional 'hurdle' of the permission stage will create additional costs but could also weed out trivial cases earlier in the process. The exact cost will depend on how the permission stage is implemented. However, it is intended to be mainly a paper-based procedure for the courts which should reduce costs for the claimant on cases which would likely have failed at a full trial. Public authorities will have an option to respond, but this will be exceptional.

166. Costs would also arise from implementing operational changes for courts and tribunals. For example, UK courts services may need to invest in training for judicial and general staff and to adjust case management systems and standard forms. There will also need to be procedures for dealing with appeals.

Public authorities

167. Public authorities may incur some costs arising from responding to claims at the permission stage should they opt to do so as a result of the additional procedural step.

However, as the onus will be on the claimant to demonstrate the case is not trivial, these are expected to be minimal.

Individuals

168. The introduction of a permission stage is likely to lead to some claimants feeling that they are being denied a full hearing for their claim when they feel that they deserve one. However, the majority of claimants will discover at an earlier point whether their claim will proceed to a full hearing or not with the associated costs. Therefore, some claimants will see a reduction in legal costs.

Benefits

169. The volume of cases that will fail the permission stage test, but which would have progressed if this intervention had not been implemented, may be reduced slightly. For example, through reliance on disposal via other pre-existing court processes and procedures.

Justice system

170. The introduction of a permission stage with a significant disadvantage requirement may reduce the volume and duration of some domestic human rights claims. The scale of the benefit would depend on the following factors: the exact procedures involved in the permission stage as stipulated in court rules, the extent to which the court's existing case management powers, including the pre-existing JR permission stage, are already being used to strike out trivial claims early in proceedings, the frequency with which the public importance exemption is used and the extent to which the permission stage and significant disadvantage requirement act as an effective disincentive for individuals to bring trivial claims before the court.

171. There may be cost savings to the justice system and/or a reduction in the volume of claims reaching a substantive hearing would free up judges to work on other cases.

Public authorities

172. We are making the assumption that a general reduction in the number and duration of cases before the courts will lead to savings for public authorities (for example, government departments, police and NHS Trusts and Boards) due to reduced litigation costs from defending trivial cases.

173. The percentage of cases which pass the JR permission stage in England and Wales provides an approximate indication of how a previously introduced permission stage has affected case volumes. Civil Justice Statistics publications¹⁹ provide details of the proportion of cases lodged which are successful at the JR permission stage or renewal stage: in 2021, this was around 19% of cases, or just under one-fifth of all cases lodged.

174. There are not enough data that could be used to robustly estimate the effects of introducing a permission stage, including the significant disadvantage requirement (with a public importance exception), for human rights cases.

Individuals

175. The benefits for individuals would depend on the overall process and cost of using the new permission stage.

¹⁹ <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly>

176. Some claimants will save money with the introduction of a permission stage by knowing earlier in the process that their claim is trivial and before they have expended significant costs later in the process.

Risks

177. If a permission stage were to be introduced, there may be an increase in the number of cases and therefore a rise in transitional costs prior to implementation. Claimants may fear their claims will be filtered out once the new arrangements are in place and rush to put in claims before the changes come into force.

178. The extent to which the court's existing case management powers are being used to deal with trivial claims, including for JRs, and how this intervention can best interact with these will require careful consideration during implementation including in court rules.

179. If individuals feel that they have a legitimate case, but it does not pass the new permission stage at the domestic level, then their only remaining option would be to take their case to the Strasbourg Court which would take far longer than having their case heard domestically. However, given that the permission stage will be modelled on the Strasbourg Court's own admissibility criteria, the outcome for this group of claimants is unlikely to differ significantly.

Net impact

180. Overall, the impact of this proposal is uncertain. There could be some cost savings for government departments and public authorities due to the reduction in litigation costs in needing to defend themselves against trivial claims.

181. The analysis has identified some non-monetised impacts. Public authorities may be able to deliver more effective public services if litigation costs can be diverted into offering public services.

182. The non-monetised costs include initial start-up and running costs for the justice system attached to new processes to deal with the permission stage. There may also be costs to individuals such as additional costs associated with preparing for the permission stage or if they decide to take their case to Strasbourg.

Remedies and responsibilities

183. The Bill of Rights will re-focus how human rights remedies are decided by requiring courts expressly to consider a claimant's wider conduct, when considering whether to make an award of damages, and the quantum thereof, affirming in legislation the connection which exists between rights and responsibilities.

184. It will also contain a new provision for courts to take account of the public interest when making an award, including expressly considering certain factors such as the impact on a public authority's ability to continue to provide services to society as a whole.

185. This section refers to clauses 17 and 18 of the draft bill.

Costs

186. The proposed changes to compensation awards may make it less worthwhile to bring claims as there could be a reduction in damages as the claimant's wider conduct and the

effect on public authorities is expressly considered. This is likely to be a particular cost for litigants bringing claims against certain public-facing public authorities, such as the police.

187. The combination of the above factors is likely to lead to a reduction in potential damages to litigants from public authorities. In addition, any such reduction applied by the domestic courts may cause disappointed claimants to bring further claims to the European Court of Human Rights.

Benefits

Justice system

188. The potential reduction in awards of compensation could lead to some litigants deciding to no longer pursue their claims, depending on how expansively these provisions are interpreted by the courts. The resulting reduction in claims for damages may lead to reduced court costs (judicial and administrative), though this may be partially offset by a loss of associated court fees. It is not possible to monetise these costs.

189. There may also be a reduction in the cost of legal aid spending where discouraged cases may have previously been funded by legal aid.

Public authorities

190. The proposed changes to compensation awards may result in reduced costs to public authorities in three ways:

- a reduction in the number of cases brought by some litigants, as a reduction in the level of damages awarded may reduce the financial incentive to pursue their claims;
- a reduction in the level of damages being awarded, as a result of the need to consider relevant claimant and public authority conduct. This is likely to be a specific benefit for particular public-facing public authorities, such as the police; and
- a reduction in the level of damages as a result of the courts considering the impact of an award on the provision of the public services they provide.²⁰ This is likely to be of benefit to public authorities engaged in the delivery of services to the public.

191. The combination of the above factors may lead to a reduction in litigation and damages costs for public authorities.

192. If the previous and wider conduct of a claimant is taken into account in future human rights claims, then a useful comparison may be the Criminal Injuries Compensation Scheme. This contains provision to refuse or restrict damages to claimants as a result of their conduct before, during or after the incident.

193. The Criminal Injuries Compensation Authority (CICA) removed compensation awards due to the claimant's conduct before, during, or after the incident in 4% of cases, on average, between 2017/18 and 2019/20.²¹ These figures could give an indication of the impact of our new damages provisions for human rights claims in future in relation to England and Wales.

194. There are, however, several reasons why the CICA scheme is not a direct parallel with the new provisions on human rights damages. Firstly, the nature of claimant conduct considered

²⁰ This is potentially especially important for local authorities and government agencies where the level of damages awarded may be relatively higher compared to their operating budget than that of government departments and devolved administrations.

²¹ Criminal Injuries Compensation Authority Annual Reports. <https://www.gov.uk/government/publications/cica-annual-report-and-accounts-2019-20>.

to be relevant may differ in human rights cases compared to those involving criminal injury. Secondly, the CICA statistics referred to above also take no account of damages reduced, rather than removed, due to a lack of available data. Thirdly, in both human rights cases and those involving criminal injury, courts sometimes take account of the conduct of claimants when awarding damages, but not in a way which is sufficiently consistent as to provide a direct comparison.

Risks

195. There is a risk that claimants who have had damages reduced undertake satellite litigation in relation to the standard of proof to be applied to claimant conduct where there is no criminal conviction or finding by the court.

196. The test for whether damages are likely to prevent a public authority from delivering its public service obligations may be developed, by the courts, into a stage in proceedings requiring complex argument involving experts and administration costs. This may result in increased overall costs and delays.

197. While there may be reductions to the damages potentially available for rights claims, claimants may still recover damages on other grounds in some cases, such as tort, resulting in few, if any, cost savings.

198. The introduction of new tests for potential damages awards may lead to an initial spike in applications as individuals and interest groups test the boundaries of the new rules. There could also be a short-term swell in cases, resulting in transitional costs.

199. There is also a risk that some individuals who have meritorious claims may be discouraged from pursuing them through the introduction of these requirements.

Net impact

200. It is not possible at this stage to quantify and monetise the benefits of requiring courts to consider a claimant's wider conduct, however, some savings in awarded compensation, reduced legal aid costs, and court costs are expected. This could be offset by damages being paid to litigants taking an increasing number of claims to the European Court of Human Rights.

Judicial Acts

201. In September 2021, the European Court of Human Rights gave its final judgment in the case of *SW v United Kingdom*,²² ruling against the UK. The facts of the case are that a social worker (SW) lost her job following accusations of professional misconduct made by a judge in a hearing where SW appeared as a professional witness. SW appealed to the Court of Appeal, who found that there had been an infringement of her Article 8 rights. However, SW was unable to claim compensation from the domestic courts, due to restrictions on claiming damages for judicial acts done in good faith under the HRA, except in limited circumstances. The Strasbourg Court subsequently ruled that Article 13 of the Convention, read together with Article 8, had been violated. We propose to implement this judgment in this legislation in line with the UK's obligations under Article 46 of the Convention.

202. In order to meet our international obligations whilst at the same time safeguarding the principle of judicial immunity, the implementation of this judgment is tied closely to the facts of the case and the breach found by the Strasbourg Court. For completeness, we have also

²² *S.W. v United Kingdom* (Application No. 87/18), 2021

considered a 'do nothing' option, but this is not appropriate, given that we need to implement this judgment to meet our international obligations.

203. The Bill of Rights will restate section 9 of the HRA, but include an amendment allowing for damages to be available where an individual's rights under Article 8 are infringed as a result of a judge following an unfair procedure.

204. This section refers to clause 19 of the draft bill.

Benefits

205. We do not see a significant impact on the justice system (including the payment of damages under this provision). However, in 2019, the government implemented the *Hammerton* judgment,²³ which allows for damages to compensate a person for a judicial act which was incompatible with Article 6 and which has resulted in a person being wrongly detained. It has not been possible to quantify if any damages have been paid under the *Hammerton* judgment's implementation provision to date.

206. If similar circumstances arose in future to those of the *SW v United Kingdom* judgment, damages would be available to the claimant in question in the domestic courts instead of needing to take their case to the Strasbourg Court. The total economic cost of this is not quantifiable.

Net impact

207. The net impact of implementation is difficult to quantify as we are unable to quantify damages paid through previous amendments to the HRA, or how likely it is for a similar case to occur in future. The government's proposals seek to strike a balance between meeting our international obligations through implementing this judgment, whilst safeguarding judicial immunity.

Part 4: Limits on powers of court

Reform of protection for freedom of expression

Freedom of speech

208. Freedom of expression underpins our democracy, ensures greater transparency and accountability, and preserves the space for wide and vigorous public debate.

209. The Bill of Rights will focus specifically on strengthening the protection of freedom of speech, instead of that of Article 10 of the Convention and freedom of expression in all its facets. 'Speech' will mean the imparting of ideas, opinions and information by means of speech, writing or images. 'Speech' will not extend to the freedom to receive information.

210. Under the Bill of Rights, great weight should be given to the importance of protecting freedom of speech. Whenever courts and tribunals are considering an issue of free speech, they should give great weight to the importance of protecting the right. Our proposals do not make freedom of speech an absolute right and it will continue to be subject to competing interests. Whilst there is a public interest in the protection of free speech, there is also a public interest in balancing freedom of speech with other rights and protections. Section 12 of the HRA is to be restated in the Bill of Rights, save for subsection (4).

²³ *Hammerton v United Kingdom* (Application No. 6287/10), 2016

211. There will be exceptions where the requirement to give great weight to the importance of free speech will not apply. The exceptions include: the determination of any question of whether a criminal offence has been committed; decisions in the interests of national security; where persons receive confidential information in the course of their profession (e.g. where information would be subject to legal professional privilege); and immigration decisions based on an assessment that stay/entry is not conducive to the public good. When an exception applies, the requirement to give greater weight to the importance of freedom of speech will not apply. The right will continue to be subject to the limitations set out in Article 10 of the Convention.

Protection for journalists' sources

212. Protection for journalists' sources is an important component of a free and vibrant media which supports wide-ranging public debate.

213. In addition to the freedom of speech proposals, the Bill of Rights will include a strengthened equivalent of what is currently in section 10 of the Contempt of Court Act 1981, by making additional provisions applicable only to journalists and the protection of their sources.

214. We will strengthen the protection of journalist's sources by including a statement recognising the public interest which exists in the protection of journalistic sources, and by requiring a compelling reason for the courts to override that interest in favour of disclosure.

215. This section refers to clauses 4, 21 and 22 of the draft bill.

Costs

Public authorities

216. The provision on freedom of speech will not place a new responsibility on public authorities, given their existing responsibility to ensure that any restrictions placed on Article 10 are appropriate and proportionate. The Bill of Rights will instead require them to increase the weight they award to the importance of freedom of speech within their decision-making.

217. Providing stronger protection for journalists' sources may result in additional work by the police and other agencies to demonstrate that the need for disclosure outweighs the public interest that exists in the protection of journalistic sources. It could therefore result in prolonged investigations of cases.

Individuals/wider society

218. Strengthening the protection afforded to freedom of speech may reduce the number of successful applications for injunctions, which may affect an individual's enjoyment of their right to privacy under Article 8.

Benefits

Justice system

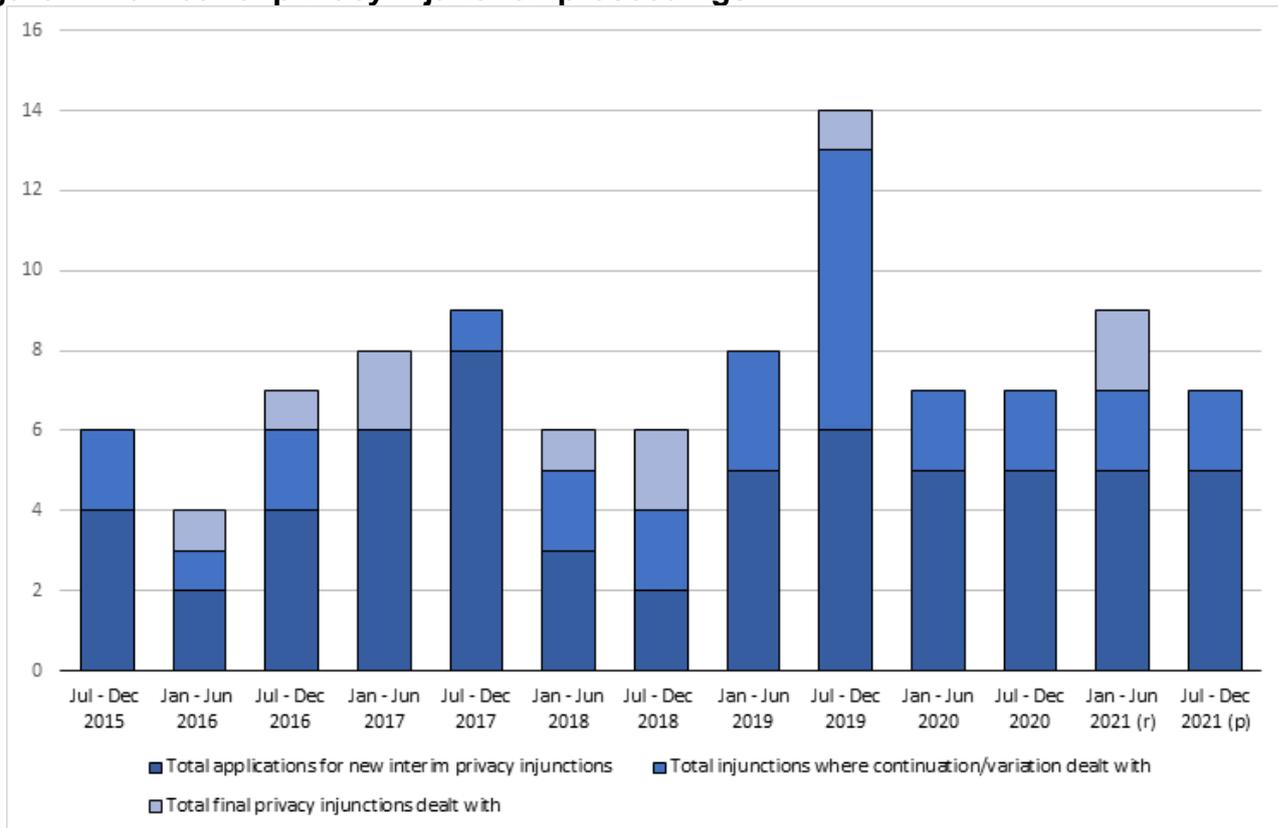
219. The right balance between freedom of expression and its limitations is essential in a democracy. Any exercise in balancing competing rights and interests can be time-consuming and challenging, both for courts and public authorities.

220. There are potential benefits for the justice system associated with the provision that the courts should attach great weight to freedom of speech when balanced against other rights. By placing great weight on the importance of freedom of speech, some cases may be

capable of being resolved more quickly, particularly where the balance has previously been difficult to ascertain, and where the great weight proves decisive earlier in a court's decision-making. However, this could be offset, perhaps immediately following the introduction of the Bill of Rights into law, from the courts spending more time working through how to balance the new weight to be given to freedom of speech.

221. Together with the retained provisions of section 12 of the HRA, the strengthened emphasis which courts should place on freedom of speech may also have the effect of reducing, over time, the number of applications for injunctions against publication. Figure 1 below shows Ministry of Justice published statistics on applications for injunctions to protect a person's privacy ("privacy injunctions"), dealt with at hearings in the High Court or the Court of Appeal at the Royal Courts of Justice (RCJ).²⁴

Figure 1: Number of privacy injunction proceedings



Source: Civil Justice Statistics Quarterly – July 2015 to Dec 2021

222. It is reasonable to assume that some of these cases are very complex and can have significant impact on the exercise of the freedom of expression, including Strategic Lawsuits Against Public Participation (SLAPPs), which involve the courts, and respondents, in time-consuming and costly legal processes.

223. A higher threshold for granting an injunction, as a result of the increased weight to be attached to the importance of free speech, may reduce the length of court time that these complex cases take. There may also be an impact on the number of cases in other areas of law which rely on the relationship between Article 10 and another right, such as damages for breach of confidence which has been extended by the courts under the HRA to breaches of privacy, even where there is no relationship giving rise to a duty of confidence.²⁵

²⁴ The statistics do not cover injunctions arising from proceedings dealing with family issues, immigration or asylum issues, those which raise issues of national security, or most proceedings dealing with intellectual property and employment issues. The statistics also relate only to those injunctions dealt with at the RCJ in London. They exclude, for example, cases dealt with at District Registries of the High Court. In practice, however, the vast majority, if not all applications for such injunctions will be dealt with at the RCJ.

²⁵ *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 QB

224. This may result in small savings for the justice system. At this stage, it has not been possible to estimate the volume or cost impact of the proposed changes to freedom of speech.

Individuals / wider society

225. The potential reduction in the possibility of legal sanctions may reduce the so-called 'chilling effect', whereby individuals are discouraged from exercising their right to freedom of speech because of the threat of legal action. Journalists may also find it easier to source information should informants feel more protected under the reform. This may lead to greater public awareness of issues that might otherwise not have been brought to light, thereby enhancing and promoting the benefits of free speech in society.

226. Increasing the protection afforded to freedom of speech also interlinks with the Ministry of Justice's work on SLAPPs. The Ministry of Justice has consulted on proposals to limit the use of SLAPPs. While detailed proposals and any legislation specifically on SLAPPS is still being finalised, this is separate to the proposals in the Bill of Rights and this Impact Assessment. However, by restating the importance of free speech in the Bill of Rights, individuals or organisations may be further discouraged from pursuing SLAPPs. Defendants may feel less intimidated by the threat of SLAPPs due to the primacy of free speech. As a result, the misuse of SLAPPs as an intimidation tool to prevent the publishing of information in the public interest may reduce over time.

Risks

227. There is potential for increased litigation in the short-term after changes take effect. Strengthening the protection for journalists' sources may require additional court time to consider whether sources can be disclosed.

Net impact

228. Strengthening freedom of speech will present benefits to individuals and wider society. There are also potential benefits to the justice system, public bodies, and individuals due to cases being resolved more quickly. However, the scale of the benefit is uncertain.

229. There will also be specific impacts for journalists and their sources due to the strengthened protection for journalists' sources. Sources may be more likely to engage with journalists due to the increased protection.

Part 5: Remedial action

A role for Parliament in assessing adverse judgments from Strasbourg

230. The bill includes provision for a new a requirement for the government to lay before Parliament both adverse rulings from Strasbourg and unilateral declarations made by the UK acknowledging a failure to comply with the Convention. This will formalise the process by which Parliament can be is made aware of instances where the UK has been found in breach of the Convention.

231. This section refers to clause 25 of the draft bill.

Costs

232. None identified.

Benefits

Public Authorities

233. We expect that requiring Ministers to notify Parliament of adverse Strasbourg Court judgments would have a positive impact in encouraging greater democratic oversight of policy areas where adverse judgments have been received and the manner in which Strasbourg Court judgments are implemented.

Net Impact

234. We expect the net effect of a requirement to notify Parliament of adverse judgments by the Strasbourg Court to be positive for the reasons set out above.

Reform of Remedial Orders (section 10 of the Human Rights Act)

235. Section 10 of the HRA currently allows Ministers to use secondary legislation, known as a remedial order, to 'make such amendments to the legislation as [they] consider necessary to remove the incompatibility' with the Convention rights. This power can only be used when a declaration of incompatibility with the Convention rights has been made by a UK court or when an adverse judgment has been received from the European Court of Human Rights. The government is proposing replacing section 10 with a similar provision that includes stating that remedial orders cannot be used to amend the Bill of Rights itself.

236. This section refers to clause 26 of the draft bill.

Costs

237. It is likely that using ordinary parliamentary procedures (primary legislation) to amend the Bill of Rights will be more resource intensive for government than using a remedial order (which is secondary legislation). Individuals affected by the incompatibility may also have to wait longer for the incompatibility to be removed. However, to date there have only been two cases requiring amendment of the HRA itself to remove an incompatibility.²⁶

Benefits

238. If amendments to the Bill of Rights are made using primary legislation, these issues will receive greater scrutiny by being debated on the floor of both Houses of Parliament. That scrutiny will include consideration of how best the government should meet its obligations in relation to human rights.

Risks

239. Given the time required to take primary legislation through Parliament, this approach carries the risk that other Bills may be deprioritised and not given time to move ahead in a session of Parliament, particularly given the already tight Parliamentary timetable. Additionally, this could create instances where an incompatible provision in the Bill of Rights remains in effect longer, given that the parliamentary procedure for primary legislation is likely to take longer than the remedial order procedure. This therefore increases the risk of people making applications to Strasbourg.

Net Impact

²⁶ Following the cases of *Hammerton v United Kingdom* (Application No. 6287/10), 2016 and *S.W. v United Kingdom* (Application No. 87/18), 2021

240. The overall impact is likely to be positive. Legal issues with the Bill of Rights, an important constitutional document, will receive greater scrutiny by being debated on the floor of both Houses of Parliament. That scrutiny will include consideration of how best the government should meet its obligations in relation to human rights. This outweighs the cost of using primary legislation to amend the Bill of Rights which will be more resource intensive than using a remedial order (secondary legislation).

Part 6: Derogations and reservations

241. The Bill of Rights will replicate almost exactly the provisions in the HRA on designating reservations and derogations.

242. Both reservations and derogations need to be designated under the HRA, which is the process by which they are given effect for the purposes of the HRA. The Bill of Rights will not include the obligation for periodic review of reservations as per the current section 17 of the HRA. The impact of this is expected to be limited and there is currently only one partial reservation. Ministers and Departments will still be responsible for keeping up to date with any changes necessary to reservations.

243. This section refers to clauses 27, 28 and 29 of the draft bill.

Part 7: UK judges at the European Court of Human Rights

244. The current right to retain UK judicial office while serving at the Strasbourg Court will be extended to further judicial offices not listed in the HRA, thereby benefiting judicial officeholders in that position.

245. Under the HRA, a Minister is required to make an order to the effect that the UK judge at the Strasbourg Court, if they were a member of a domestic judicial pension scheme immediately prior to their appointment to the Strasbourg Court, is entitled to remain a member of the that scheme whilst serving at the Strasbourg Court. The Bill will replace this order-making duty with an order-making power, so that this entitlement would cease if no order is made. An order made under this provision would also determine the terms of the entitlement.

246. This section refers to clause 30 and schedule 4 of the draft bill.

Benefits

247. The measures outlined above will not have a significant impact as they mostly just replicate HRA provisions in the Bill of Rights. However, the extension of the office-retention provisions to any domestic judge appointed to the Strasbourg Court could incentivise the most senior judges (such as Justices of the Supreme Court) to apply for the Strasbourg Court. This would also be beneficial to our judicial system's reputation and to society as a whole if this allows the government to put forward candidates of an even higher level of qualification to become a judge at the Strasbourg Court.

248. When the HRA was enacted, the Strasbourg Court did not have its own pension scheme. The changes to the pensions provisions account for the current situation where there are now two available pension schemes (Strasbourg and domestic, currently the Judicial Pension Scheme 2022). By replacing the order-making duty with an order-making power, the Minister therefore will be able to determine if it is beneficial for the UK judge at the

Strasbourg Court to be able to retain active membership of the domestic pension, whilst taking into account wider considerations with regards to propriety, and any impacts on the domestic scheme.

Risks

249. If a Minister decides not to make an order allowing a judge serving at the Strasbourg Court to use the domestic scheme, this may negatively affect a UK judge at the Strasbourg Court who would have preferred to remain a member of the domestic scheme. However, the impact would be extremely limited as the judge can now sign up to the Strasbourg Court scheme instead, or any private scheme of their choice.

Net Impact

250. The office-retention measures are likely to have an overall positive impact on all judicial-office holders appointed to sit on the Strasbourg Court, as they will be able to retain their UK judicial office whilst serving at the Strasbourg Court. The measures may also incentivise more senior judges to apply for nomination to the Strasbourg Court.

251. The net impact of implementing the order-making power for judges' pensions is difficult to quantify as we do not know the likelihood of it being used. However, whether or not it is used, the impact would be extremely limited as the judge could still decide (in either case) to sign up to the Strasbourg scheme.

Part 8: Administrative implementation

252. Part 4 assesses the administrative and operational impact of implementing option 1 on the affected stakeholders.

Costs

Individuals

253. Those businesses and organisations in the third sector which work with human rights are likely to have to update guidance and some may need to run additional training courses to inform staff of any relevant changes brought about by reform.

Justice system

254. There would be the following implementation costs incurred by the justice system:

- **training for the judiciary and magistrates** – exact training costs are unknown and would depend on the final version of the reform. However to give a broad indication, analysis carried out in 2016 estimated training for the judiciary and magistrates to be a one-off cost of between £4m (based on half a day training) and £8m (based on 1 day of training.)²⁷ The overall number of the judiciary has increased since then and efforts are also being made to increase the size of the judiciary, so we would expect these costs to increase (including with inflation for venues). Judicial training costs include: half a day's/full day's training fee for every single fee paid judge; plus back fill²⁸ costs for every salaried judge; and back fill costs for course directors to plan the training and to go out and deliver it and venue costs. These figures only apply to England and Wales. It is also expected that further money will be needed to train

²⁷ The £8m estimate assumes no more than one day of training is needed. The £4m estimate assumes half a day training, which is in line with other legislative reform and the training offered in relation to them. An optimism bias adjustment of 41% is applied to the cost estimates in line with HMT Green Book supplementary guidance for projects within the "outsourcing" category.

²⁸ Back fill costs relate to the opportunity cost of judges, course directors and magistrates. Other members of the judiciary, magistrates or court directors will have to be paid to undertake the duties of those individuals who are engaged in the proposed training.

judges in NI and Scotland, but this amount should be far smaller. As these figures are based on 2016 data, we will continue to work with the Judicial Office to update these estimates based on latest data and in line with the final version of the reforms to feed into future IAs related to this reform.

- **the UK courts services** – as part of implementing the proposal, the UK courts services may incur costs related to updating forms and systems (for example, updates to electronic case management systems) to handle new cases.
- **Other justice system agencies** – there may be implementation and operational costs incurred by other justice agencies, including legal aid providers and the prison services. Prosecuting authorities are also likely to incur some additional training costs.

Public authorities

255. Public authorities are likely to have to update guidance and some may need to run additional training courses to inform staff of any relevant changes.

Benefits

256. The benefits of implementing these reforms are set out above.

Risks

257. No risks identified.

Net impact

258. There will be a one-off training cost to the justice system as a result of additional judicial and magistrates training. Exact training costs are unknown and would depend on the final version of the reform and the size of the judiciary requiring the training.

259. This IA has identified other implementation costs which cannot be monetised until the proposals are finalised. These include administrative costs to various justice agencies, including UK courts and prison services and legal aid agencies. There may also be costs to public authorities to update guidance, amend forms, and run additional training courses.

Summary of Impacts for Option 1

Costs of Option 1

Non-monetised costs

260. There would be a number of potential non-monetised costs of implementing option 1, including:

Transitional

- Transitional implementation costs to various justice and public authorities as well as to businesses and the third sector, including systems change for the UK courts and tribunals' services, from updating guidance and training courses upon implementation.

Public authorities

- Should there be new deportation provisions introduced after the Bill, potential changes in deportation numbers may create additional costs for government departments due to increased numbers of FNO deportations.
- Initial uncertainty caused by the reforms will likely create an increase in litigation against public authorities.
- In relation to several proposals, government departments and other public authorities are likely to incur costs if additional cases go to the European Court of Human Rights.

Justice system

- There would also be non-monetised costs to the justice system as a result of the permission stage proposals.
- The reforms may increase litigation, which will increase costs for the justice system.

Wider society

- It is likely that using ordinary parliamentary procedures (primary legislation or secondary legislation) to amend incompatible legislation will be more resource-intensive and will take longer to address an incompatibility than a section 3 interpretation made by the courts.

Individuals

- The proposal that a court should be required to take account of a claimant's relevant conduct may remove or reduce awarded damages in some cases, negatively affecting those who, otherwise, might have been awarded these damages.
- There may be additional costs for those subject to deportation who would be subject to a stricter deportation approach than the present one. There would likely also be costs for the families of those who may face stricter deportation rules.
- Certain litigants whose claims are deemed trivial may have their ability to pursue human rights proceedings constrained.
- Reforming the protection afforded to freedom of speech may reduce the availability of injunctions for some individuals, which may affect their enjoyment of their privacy.
- Prohibiting the creation of future positive obligations, and limiting the application of existing ones, could result in fewer protections for individuals where potential future positive obligations may have afforded additional protections to the human rights of affected populations.
- As the new framework settles down, the legal uncertainty created by the new regime may make it more difficult and more expensive for potential litigants to enforce their rights.

Benefits of Option 1

Non-monetised

261. There would be a number of non-monetised benefits of implementing option 1, as follows:

Public authorities

- Should new deportation provisions be introduced following the Bill, there may be benefits to public authorities and the justice system. Increased deportations would reduce the cost of holding FNOs in prisons in the UK and for use by domestic offenders to reduce prison capacity pressures or the need to invoke contingency capacity measures.
- Changes to the way in which freedom of speech is taken into account by the courts may benefit wider society from greater dissemination of information and debate. Individuals may feel more comfortable exercising their right to freedom of speech because of the reduced threat of legal action; journalists may also find it easier to source information should informants feel more protected.
- Prohibiting the creation of positive obligations, and limiting the application of existing ones, may reduce litigation against public authorities such as the police.
- A permission stage with a significant disadvantage requirement may lead to savings for the courts if trivial cases are dismissed at an earlier stage or if individuals choose not to pursue claims.
- The new factors in determining how damages are awarded may remove or reduce damages awarded, leading to savings for government departments and other public bodies.
- The reforms may reduce expenditure by public authorities on mitigating legal risk while increasing operational flexibility.
- The removal of a binary declaration of compatibility will enable bolder and more innovative policy making.
- The repeal of section 3 of the HRA will enable the elected Parliament and the government to consider and resolve human rights incompatibilities, allowing greater democratic oversight of, and input into, the development of human rights law.

Wider society

- Allow human rights to be interpreted in a UK context.
- Greater democratic oversight of the way Strasbourg judgments are implemented.
- There may be societal benefits to deporting FNOs in the form of reduced crime, especially if those who have committed serious crimes are deported.
- Public protection provisions aim to ensure that fewer dangerous criminals are released from prison and that terrorist offenders who radicalise others can be more easily segregated in prison.

Individuals

- A permission stage with a significant disadvantage requirement may lead to savings for litigants, if cases are dismissed at an earlier stage, or if individuals choose not to pursue claims due to the permission stage.
- Claimants whose causes of action arise extraterritorially may, if they now pursue the alternative remedy of a tort claim, receive higher damages.

Summary of Option 1

262. The impact of proposals for the meaning of rights and their relationship with other legislation (Part 1) is judged to be largely positive as they would balance rights appropriately, and may have a positive impact on public confidence in the human rights framework, as set out above.
263. For reform of obligations on public authorities (Part 2), it is judged that at this stage, although there are some costs of implementing these reforms, some proposals are likely to have a positive net impact over time, such as reforming the way in which public authorities discharge their duties. However, in some areas, such as the reform of future positive obligations, the impact is not clear at this stage as no precedent reform of these obligations exists, and thus no historical data or analyses are available to determine any potential impacts.
264. We are unable to assess the impact of the proceedings and remedies proposals (Part 3) at this stage. Introducing a permission stage could bring net benefits as courts can focus on those serious breaches of human rights. Any reform will result in implementation costs.
265. It should be noted that the broader human rights framework beyond the proposals would remain in place, ensuring that individuals in the UK would be protected against violations of their human rights in UK law, and would have access to means of challenge when they feel that their rights have been violated.
266. Overall, due to the limitations in data available, the net impact of introducing the proposals is uncertain at this stage, but we consider that the benefits of a refined and overhauled human rights framework will outweigh any of the potential negative effects.

F. Wider impacts

Equality Impacts

267. This section sets out the potential impact of the reform proposals 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.
268. We will first consider the human rights reform proposals under each of these headings, then consider equality impacts for each proposal in further detail, updated in line with the consultation responses.
269. The HRA guarantees protection for all individuals in the UK and ensures their rights are respected and upheld. The HRA can be used as a tool for all individuals to assert their rights. Article 14 of the Convention guarantees non-discrimination in relation to the Convention rights. This has enabled many individuals with protected characteristics to assert their rights to equality, such as a bereaved partner to a home.

270. The Bill of Rights will contain these same rights, which are an important guarantor of equality of opportunity, along with the Equality Act 2010.

Eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Equality Act 2010

A. Direct discrimination

271. The existing HRA offers protection to individuals in the UK (as well as, in limited circumstances, individuals overseas). Any proposed changes to the HRA or rights therein will potentially have a direct impact on all individuals who are within the UK or, potentially, under UK jurisdiction regardless of their protected characteristics.

272. 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: age, disability, race, sex and gender reassignment, marriage/civil partnership status, religion and beliefs, sexual orientation; pregnancy and maternity, and caring responsibilities. This, therefore, makes it hard to assess exactly how individuals sharing different protected characteristics may be positively or adversely affected by any change in these arrangements. The government does, however, hold data on the protected characteristics of applicants granted legal aid in freestanding claims categorised under the HRA in relation to certain protected characteristics. It also holds data on the protected characteristics of UK offenders and FNOs. Our consultation sought views on the equalities impacts of these proposals, which have been integrated into both the consultation response and this updated Impact Assessment.

273. The government's assessment, based on the available data and the policy analysis conducted, 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.

B. Indirect discrimination

274. The definition of indirect discrimination under the Equality Act 2010 is where a provision or practice is applied uniformly (to everyone) in the same way but has the effect of putting a group of people who share a protected characteristic at a particular disadvantage compared to those who do not share the protected characteristic.

275. 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 protected characteristic. We have identified the broad groups that may potentially be disproportionately impacted by specific aspects of the proposed changes, such as individuals from an ethnic minority background, children and men.²⁹

276. Overall, where we have identified a risk of an impact that might indicate a particular disadvantage, we consider that this constitutes a proportionate means of achieving the legitimate aim of balancing the rights of individuals with the wider public interest, including ensuring the proper balance of responsibilities between the courts and elected law-makers, and not placing excessive financial or operational burdens on the delivery of public services.

277. A more detailed assessment of these findings follows from paragraph 281.

²⁹ Assuming that the makeup of individual claimants under any amended or introduced human rights legislation would resemble current claimant characteristics.

C. Advancing equality of opportunity

278. In relation to advancing equality of opportunity, our human rights reform proposals are designed to maintain and improve a number of areas including making sure our common law traditions are respected, strengthening the role of the Supreme Court, protecting freedom of speech, enshrining jury trial as an aspect of the right to a fair trial, and providing a sharper focus on protecting fundamental human rights. We therefore consider that these aspects of the policy measures will be likely to advance equality of opportunity for everyone with protected characteristics.

D. Fostering good relations

279. While the human rights reforms described may not necessarily expand the fostering of good relations between groups, the Bill of Rights maintains a strong bedrock on which to foster good relations by restating that everyone's rights are to be respected and upheld.

280. Crucially, the Belfast (Good Friday) Agreement included a commitment that the Convention would be embedded in the law of Northern Ireland. The Convention is regarded as a useful tool to agree rights of all residents of Northern Ireland and thus fosters good relations between those of differing religious and other backgrounds. The human rights reforms will keep the Convention rights enshrined in UK law.

Detailed examination of equality impacts

281. As a proportion of domestic human rights cases brought against UK Government, immigration cases accounted for the vast majority of these at around 75.1% of these cases, while public law cases constituted 14.4% of total human rights cases, damages cases constituted 10.3%, and planning cases constituted 0.3% (See table B8 in Annex B for breakdowns). While there is no data on the ethnic makeup or nationality of claimants, it is reasonable to assume that most claimants bringing forward immigration cases on human rights grounds would be from non-UK nationalities.

282. The best data available to evaluate the protected characteristics of those making claims under the HRA is applicants for legal aid in freestanding civil claims categorised under the HRA (suggesting that these cases could not be made under other non-HRA routes). This may provide some indication of the groups who may be particularly affected by the changes introduced between the HRA 1998 and the Bill of Rights, including but not limited to; the reformed replacements of sections 3, 4 and 6 of the prior Act, the introduction of a permission stage and reforms to damages awards.

283. As most cases involving human rights are classified according to the subject matter of the case or type of challenge, these figures represent an incomplete picture of the number and characteristics of legal aid claimants on matters involving human rights elements. These figures also refer exclusively to claimants in receipt of civil legal aid so the protected characteristics are only representative of this group and the characteristics of other legal aid claimants or private claimants may differ.

284. Using the indicative data mentioned above, this data suggests there could be differences in the make-up of claimants versus the general population (see the breakdown below and Annex A). However, it is not clear that this disproportionality would constitute a particular disadvantage from the planned human rights proposals. These indicative figures show the following:

- Comparing men and women within this sample, men are slightly over-represented as claimants compared to the general population (56% and 49% respectively). (Annex A Table A1);
- 45% of claimants are children, while they only represent 20% of the general population. (Annex A Table A4);
- Individuals from an ethnic minority background are overrepresented among claimants who declare their ethnicity – 36 per cent of claimants who declare their ethnicity identify as individuals from an ethnic minority background compared to 14 percent of the general population (Annex A Table A3);
- Only 54% of claimants declared their disability status, and the breakdown among the remaining 46% may differ from those that declared. Out of those claimants that declared their disability status, 32% cited a disability compared to 18% of the general population at large.

285. This data, with the caveats included in paragraphs 282 – 283, indicate there could be a disproportionate impact for those who are individuals from an ethnic minority background, male, a child or have a disability.

286. However, these disproportionalities are not considered likely to result in a particular disadvantage for legal aid users, or more generally for human rights claimants overall. In the unlikely event of a particular disadvantage being suffered, the government considers this would likely be justifiable on the basis of achieving the benefits set out in Section E.

287. Additionally, some of the proposals are likely to impact on those individuals who have been convicted of offenses or those whose conduct has infringed upon the rights of others. This includes proposals for a greater requirement for courts to consider public protection, and for the courts to take a broad view of claimant conduct in the award of damages. Recent data on the characteristics of persons sentenced in magistrates' courts and the Crown Court in England and Wales in 2014, for example, suggest that men, individuals aged between 18 and 49 years, and individuals from an ethnic minority background are more prevalent in this group than in the general population. This indicates there may be a disproportionate impact for these groups from the above reforms. However, as stated above, we do not consider that this disproportionality would constitute a particular disadvantage.

288. Below we will examine the equalities impacts of individual proposals, where there are further particular considerations, or where the impact may be different from the above.

Part 1: The Convention rights

Reform of positive obligations

289. A significant, although non-quantified, number of threat to life notifications (see Table B5 for total volumes) are made to individuals who are involved in criminal activity who could be affected by subclause 5(2)(c). This is likely to result in negative impacts on those with the protected characteristics covered in paragraph 287. However, it is not possible to assess the extent to which this change in the law will affect the operational practices of the police.

Ensuring that public protection is given due regard in interpretation of rights

290. In addition to the general impact upon those serving custodial sentences covered in Paragraph 287, the proposals would also be applicable in cases where prisoners appeal

against detention in a separation centre on the basis of their Article 8 rights. In relation to separation centres in particular, there is a risk of the measures disproportionately affecting Muslims, on the basis that every prisoner currently held in a separation centre is Muslim.³⁰ For those affected, the impact of this proposal is likely to be negative.

Decisions that are properly made by Parliament

291. This proposal involves the courts being required to give great weight to Parliament's view of the public interest. The government considers that such impacts would be justifiable on the basis of ensuring that where Parliament has passed legislation, it should be recognised that it has had to balance complex and diverse issues relating to the public interest, and in a parliamentary democracy its view should be respected. It is not possible to identify the protected characteristics of individuals who would seek redress under the Convention rights across the gamut of all legislation and therefore whether there would be any disproportionate impact on persons with protected characteristics as a result of this proposal. However, it is expected that Parliament, as now, will consider and debate potential human rights impacts through the course of the legislative process.

Deportations in the public interest

292. Looking at the characteristics of FNOs provides some indication of which groups are more likely to be affected by any future legislative changes in this area. At 31 March 2022, there were 9,661 foreign nationals held in prisons in England and Wales, representing 12% of the total prison population.³¹ The most common nationalities after British Nationals in prisons are Albanian (14% of the FNO prison population), Polish (9%), Romanian (8%), Irish (6%), Lithuanian (5%), and Jamaican (4%); FNOs are more likely to be male.³²

293. Under the Equality Act 2010, there are specific exemptions from the prohibition on discrimination, including in relation to certain acts which discriminate against individuals on the grounds of nationality or ethnic or national origins³³ in the immigration context.³⁴ In addition, the government considers that any indirect discrimination is justified in the light of the aims of the policy, to ensure that the wider public interest is protected when considering deportation.

294. It is expected that those appealing deportation are more likely to be male, thus those FNOs would be impacted by any legislative changes to deportation in the public interest.

295. Studies on general deportations and FNO deportations have shown negative impacts. Some research has outlined negative impacts on family life for the individual and British and European citizens close to them, including on finances, physical and mental health, and an impact on British children's feelings of 'Britishness and belonging'³⁵ indicating a possible negative effect on fostering good relations. During the processes of Immigration and Asylum Chamber cases, the same study showed that there was inadequate legal advice and representation, and fatherhood and family ties were undervalued by Home Office Presenting Officers who mostly focused on proving the bad character of appellants, and, sometimes, their witnesses³⁶. Another study has shown there could be adverse impacts for not only the

³⁰ Internal HMPPS Data.

³¹ Ministry of Justice, Offender Management Statistics Quarterly, 28 April 2022, <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2021/offender-management-statistics-quarterly-october-to-december-2021-and-annual-2021>

³² Ministry of Justice, Offender Management Statistics Quarterly, 28 April 2022, <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2021>, Prison Population, 31 March 2022, Table 1.7

³³ As part of the protected characteristic of race.

³⁴ See, in particular, paragraph 17 Schedule 3 to the Equality Act 2010.

³⁵ <https://www.birmingham.ac.uk/documents/college-les/gees/research/deportability-families-report-2021.pdf>

³⁶ Ibid.

immediate family, but also the extended family.³⁷ Furthermore, a literature review of studies from the US has shown that children impacted by deportation can be at risk of long-term mental health issues and stress, and suffer emotional costs, housing instability, academic withdrawal and family dissolution.³⁸ Deportation could possibly result in negative impacts on members of the deported individuals' immediate and extended families, however this assumes that the family of deported individuals are in the UK and/or have meaningful relations with them and would be adversely impacted by deportation of the individual. In situations where this is not the case, there could be benefits to children and families arising from such deportations.

Part 2: Legislation

Reform of sections 3 and 4 of the Human Rights Act

296. It is difficult to ascertain reliably how many cases have drawn on section 3. The department has analysed around 80 section 3 cases. A small number of these involve rights for people with particular protected characteristics.³⁹ In these cases the reforms will likely delay solution to the discrimination. Where previously the issue may be solved immediately and directly at the resolution of the case under the proposals, it is much more likely that a declaration of incompatibility will be issued and resolution – through Parliament – will take much longer.

297. Regarding the section 4 reforms, only 34 declarations of incompatibility have been made and not overturned on appeal (or may still be appealed) between 2000, when the HRA came into force, and November 2021.⁴⁰ These low numbers present difficulties in obtaining robust evidence on the impact on protected characteristics.

298. The reforms of sections 3 and 4 would not change the fact that individuals will be able to bring proceedings domestically in order to challenge the compatibility of primary and secondary legislation. Our initial assessment is that the proposals relating to section 3 or 4 will not be directly discriminatory against those with protected characteristics, despite these cohorts of people with protected characteristics relying on the Act more than the general population and that their cases may take longer to resolve under these reforms. However, it is also our assessment that the proposals will help maintain equality of opportunity for those individuals bringing such challenges.

Repeal of the requirement for Statements of Compatibility (section 19 of the Human Rights Act)

299. Given that section 19 statements do not have a direct impact on individuals, it is difficult to ascertain the impacts for those with protected characteristics. When deciding whether a statement should be made under section 19(1)(a) or (b), Ministers often consider the compatibility of proposals with Article 14 of the Convention. The removal of the section 19 requirement may therefore result in less consideration being given by the government to possible discrimination in proposed legislation.

300. However, it is expected that these issues will still be considered including through, for example, equality impact assessments.

Part 3: Public Authorities

³⁷ <https://www.amacad.org/publication/financial-emotional-burdens-deportation-incarceration>. Note that the sample size for this study was small, with 57 individuals who have had a family member being deported interviewed.

³⁸ [Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families: A Review of the Literature \(migrationpolicy.org\)](#)

³⁹ As an example, see *Ghaidan v Godin-Mendoza* [2004] UKHL 30

⁴⁰ Ministry of Justice, [Responding to human rights judgments - Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2020–2021](#) (publishing.service.gov.uk)

301. In addition to the legal aid data covered above, 97.1% (6,103 out of 6,285) of domestic human rights cases were brought against the Home Office, the Ministry of Justice, the Department for Work and Pensions (DWP) and the Department of Health and Social Care (DHSC).⁴¹ The users of the public services provided by these Departments may have a disproportionate likelihood of possessing a protected characteristic, such as being disabled, and therefore be more affected by the proposed changes to what was previously section 6 of the HRA, than the general population.

Extraterritorial Jurisdiction

302. The Bill of Rights will apply extraterritorially to the extent of the UK's extraterritorial obligations under the Convention, but with a carve out for military operations overseas.

303. Analysis produced by the MOD for the Overseas Operations (Service Personnel and Veterans) Act 2021 suggests it is likely that the bulk of claims arising from overseas operations are likely to arise from local populations, rather than from the UK armed forces.⁴²

304. Local populations are therefore most likely to be affected by this measure. As we do not know what involvement the armed forces may have in future conflicts, it is not possible to assess the impact on protected groups within local populations, but the carve out would apply in the same way for everyone with protected characteristics, no matter where any future overseas operation may occur.

305. Members of the UK armed forces will be included within the scope of the carve out, meaning that they will be unable to bring claims under the Bill of Rights in relation to events taking place on military operations overseas. Protected characteristics which may be impacted are:

- sex: only 11.2% of UK regular forces are female;⁴³ and
- disability: the policy may have a low indirect negative discriminatory impact on grounds of disability for individuals whose disability arises from injuries sustained as a result of overseas operations.⁴⁴

306. Therefore, the policy may be indirectly discriminatory towards men and those with disabilities. The government considers that such impacts are justifiable on the basis that alternative remedies will be created to ensure that Convention rights can continue to be enforced domestically and the carve-out for military operations overseas will not commence unless and until these alternative remedies are in place.

Remedies and responsibilities

307. In addition to the impacts on those convicted of criminal offenses (during the term of their imprisonment), as covered in paragraph 287, individuals making claims against public authorities (see paragraph 302) may also be negatively affected if the contemplated award of damages is reduced, having been deemed to be capable of impairing the effective delivery of public services.

Part 4: Limits on the power of court

Reform of protection of freedom of speech

⁴¹ Government Legal Department data, see Table B3

⁴² Equality Analysis Impact Assessment template (Initial Assessment) (longstops) (accessible version) - GOV.UK (www.gov.uk)

⁴³ <https://www.gov.uk/government/statistics/uk-armed-forces-biannual-diversity-statistics-october-2021/uk-armed-forces-biannual-diversity-statistics-1-october-2021#gender-1>

⁴⁴ Equality Analysis Impact Assessment template (Initial Assessment) (longstops) (accessible version) - GOV.UK (www.gov.uk)

308. The proposed changes may result in fewer privacy injunctions being granted. Whilst we have statistics on the number of privacy injunction proceedings, we do not have a breakdown of the characteristics of those who seek these injunctions. We therefore cannot fully assess whether the proposals will disproportionately affect any groups with protected characteristics.

309. There is potential for some groups such as those with protected characteristics to be disproportionately affected by the greater weight afforded to freedom of speech when balanced with privacy. However, freedom of speech will remain a qualified right and courts will retain discretion to take these factors into account in cases involving the right to freedom of speech.

Part 5: Remedial action

A role for Parliament in assessing adverse judgments from Strasbourg

310. These proposals may lead to greater Parliamentary debate on adverse judgments from the European Court. In turn, this may result in greater opportunity to identify and mitigate the potential impacts of the proposed approach (or approaches) to implementing such a judgment on groups with a protected characteristic. Whilst it is challenging to assess the exact effect these provisions would have on these groups, we expect it would overall be positive, and give rise to further debate on such impacts.

Reform of Remedial Orders (section 10 of the Human Rights Act)

311. Reforming the remedial order procedure to ensure that the Bill of Rights itself cannot be amended by remedial order is intended to allow greater scrutiny and democratic oversight by Parliament. This may lead to amendments that better address any incompatibility identified in the Bill of Rights, but it may take longer for the incompatibility to be removed. However, there have only been two cases that led to the identification of an incompatibility in the HRA, so it is difficult to assess the possible impact of this provision on people with protected characteristics.

Summary of equalities impacts

312. Our assessment is that the proposals for reform are not directly discriminatory within the meaning of the Equality Act 2010. The potential for indirect discrimination has also been considered, as have the potential for human rights reforms to enable equality of opportunity.

313. In the event that the proposals might result in a particular disadvantage for people with protected characteristics, which initial research indicates could be possible for the reformed equivalents to sections 3 and 4 of the HRA, reform of positive obligations, the permission stage, as a result of deportations in the public interest, the changes to the extraterritorial jurisdiction of the Bill of Rights and reform to the award of claimant damages. The government considers these impacts would be justifiable for the reasons set out above.

314. As previously stated, there are currently no centrally collated statistics about how current human rights legislation affects people with protected characteristics. There are considerable uncertainties surrounding the future behavioural responses of Parliament, the judiciary, and individual litigants to the finalised arrangements. All of these factors present challenges in robustly assessing exactly how different groups may be positively, neutrally, or adversely affected by any change in these arrangements.

315. Using the limited data that are currently available does, however, allow us to identify some individuals with protected characteristics that are over-represented in the populations described in this high-level assessment of equality impacts, who may be more likely to be affected by the proposed changes. These include men, those aged 18-49, individuals from an ethnic minority background.

Better Regulation

316. This measure is not classed as a regulatory provision under the Small Business Enterprise and Employment Act 2015 and so does not score against the department's business impact target.

Trade Impacts

317. These proposals do not have a direct impact on international trade, although changes to human rights regulations could impact lead to changes in trade patterns dependent on trade agreements.

318. The impact is considered proportionate to achieving the aims of the policy.

Environmental Impact Assessment

319. We expect there to be no environmental impacts as a result of Option 1.

Families

320. Direct and indirect impacts on families as a result of the reforms are possible, such as the impacts upon the families of FNOs set out above, that the increased weight given to freedom of speech may in some cases impact upon a family's right to privacy, or that limiting the court's discretion in interpreting legislation to fit familial relationships not explicitly stated in original legislation. For example, a line of case law has used section 3 to interpret provision around surrogate and adopted families.⁴⁵ In future, addressing this through court interpretation will likely not be possible. However, such cases will instead likely result in a declaration of incompatibility, and these issues will be for Parliament to resolve.

321. However, this potential impact is considered proportionate to achieving the aims of the policy.

G. Monitoring and Evaluation

322. The legislation will be reviewed in line with post-legislative scrutiny procedures.

323. The Ministry of Justice will continue to monitor declarations of incompatibility made by the domestic courts and adverse judgments of the Convention against the UK. These will continue to be set out, together with the government's response, in the annual report to Parliament, *Responding to human rights judgments*.

324. Additionally, the new requirement that Parliament is notified of any adverse Strasbourg judgments against the UK will also enhance monitoring and opportunity for debate where such cases occur.

⁴⁵ *Re JC Druce Settlement* [2019] EWHC 3701 (Ch); *Re X (Parental Order: Death of Intended Parent Prior to Birth)* [2020] EWFC 39; *Ms A v Ms B* [2021] EWFC 45; *Re A (Surrogacy: s.54 Criteria)* [2020] EWHC 1426 (Fam)

Annex A

Table A1: Human Rights Act civil certificates issued, 2018-19 to 2020-21, by gender

Gender	2018-2019	2019-2020	2020-2021	Grand Total	Percentage of known gender	Percentage of known gender general population ⁴⁶
Female	320	384	370	1074	44%	51%
Male	417	456	484	1357	56%	49%
Unknown	4	4	8	16	N/A	N/A
Grand Total	741	844	862	2447	100%	100%

Source: Legal Aid Agency, Standalone Human Rights Act Legal Aid Proceedings further breakdown of tables 6.2 in Legal Aid stats quarterly published on 30 September 2021:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021430/legal-aid-statistics-tables-apr-jun-2021.ods

Table A2: Human Rights Act civil certificates issued, 2018-19 to 2020-21, by disability

Disability	2018-2019	2019-2020	2020-2021	Grand Total	Percentage of known disability status	Percentage of known disability status general population ⁴⁷
Disabled	136	149	132	417	32%	18%
Not Disabled	283	330	291	904	68%	82%
Unknown	322	365	439	1126	N/A	N/A
Grand Total	741	844	862	2447	100%	100%

Source: Legal Aid Agency, Standalone Human Rights Act Legal Aid Proceedings further breakdown of tables 6.2 in Legal Aid stats quarterly published on 30 September 2021:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021430/legal-aid-statistics-tables-apr-jun-2021.ods

⁴⁶ Source: Census 2011 Table KS101EW: Usual resident population, local authorities in England and Wales.

⁴⁷ Source: Census 2011 Table QS303EW: Long-term health problem or disability, local authorities in England and Wales.

Table A3: Human Rights Act civil certificates issued, 2018-19 to 2020-21, by ethnicity

Ethnicity	2018-2019	2019-2020	2020-2021	Grand Total	Percentage of known ethnicity	Percentage of known ethnicity in general population⁴⁸
White British, Irish and any other White background	266	340	309	915	64%	86%
Black/ African/ Caribbean/ Black British	52	84	106	242	17%	3%
Asian /Asian British	41	23	33	97	7%	7%
Mixed / multiple ethnic groups	15	18	18	51	4%	2%
Chinese and any other ethnic group	48	42	34	124	9%	2%
Not stated/ Prefer not to say	319	337	362	1018	N/A	N/A
Grand Total	741	844	862	2447	100%	100%

Source: Legal Aid Agency, Standalone Human Rights Act Legal Aid Proceedings further breakdown of tables 6.2 in Legal Aid stats quarterly published on 30 September 2021:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021430/legal-aid-statistics-tables-apr-jun-2021.ods

⁴⁸ Source: Census 2011 Table KS201EW: Ethnic group, local authorities in England and Wales.

Table A4: Human Rights Act civil certificates issued, 2018-19 to 2020-21, by age

Age	2018-2019	2019-2020	2020-2021	Grand Total	Percentage of known age	Percentage of known age in general population ⁴⁹
0-16	336	390	382	1108	45%	20%
17-24	92	97	100	289	12%	11%
25-34	111	115	159	385	16%	13%
35-49	111	138	147	396	16%	21%
50-64	74	73	60	207	8%	18%
65+	17	31	12	60	2%	16%
Unknown			2	2	N/A	N/A
Grand Total	741	844	862	2447	100%	100%

Source: Legal Aid Agency, Standalone Human Rights Act Legal Aid Proceedings further breakdown of tables 6.2 in Legal Aid stats quarterly published on 30 September 2021:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021430/legal-aid-statistics-tables-apr-jun-2021.ods

⁴⁹ Source: Census 2011 Table PP01UK: Usual resident population by single year of age, unrounded estimates, local authorities in England and Wales.

Annex B: Supporting data tables^{50,51}

Table B1: Outcomes⁵² of domestic human rights cases vs Home Office (HO), Ministry of Justice (MoJ), Department for Work and Pensions (DWP) and Department of Health and Social Care (DHSC), 2016-2022

Outcomes of cases	Total outcomes of cases	% of cases vs HO, MoJ, DWP and DHSC	% of total cases vs UK Government
Won	3,273	53.6%	52.1%
Lost	108	1.8%	1.7%
Settled	1,681	27.5%	26.7%
Withdrawn or not pursued	1,017	16.7%	16.2%
Other outcome	24	0.0%	0.0%
Total	6,103	100.0%	97.1%

Source: Government Legal Department

Table B2: Cost⁵³ of domestic human rights cases vs HO, MoJ, DWP and DHSC, 2016-2022

Case Type Description	Total costs of cases	% of total cost of cases vs HO, MoJ, DWP and DHSC	% of total cost of cases vs UK Government
Damages	£2,414,498	11.41%	10.48%
Immigration - Judicial Review	£12,396,555	58.57%	53.82%
Immigration - Statutory Appeal	£701,630	3.32%	3.05%
Public Law - JR	£5,621,128	26.56%	24.41%
Other	£31,124	0.15%	0.14%
Total cases	£21,164,935	100.00%	91.89%

Source: Government Legal Department

⁵⁰ Figures are in Financial terms as cases extend over multiple years; without knowing the costs within each year of each respective case, we cannot accurately inflate the figures into Economic terms. Any attempt to do so would be heavily based on assumptions and would lack robustness.

⁵¹ Note that all tables in Annex B are previously unpublished data. Where data has been previously published, this is referenced in footnotes under specific figures

⁵² Outcome is the overall outcome of the case, where other grounds of challenge are brought where the case may be lost or settled this does not indicate whether it was lost or settled in respect of HRA grounds, other grounds, or both.

⁵³ Data on fees and legal costs to government and does not include damages or costs paid to the claimant, or costs received from unsuccessful claimants.

Table B3: Breakdowns of all domestic human rights cases brought vs government and by select departments, 2016-2022

Cases vs UK Government	Total number of cases	Total cost of cases
Total cases	6,285	£23,031,878
Cases vs Home Office	4,804	£13,803,334
Cases vs Ministry of Justice	1,212	£6,137,890
Cases vs DWP	50	£788,504
Cases vs DHSC	37	£435,206

Source: Government Legal Department

Table B4: Breakdowns of Immigration cases and FNO deportation cases brought on human rights grounds, 2016-2021

Case type	Total number of cases	Total cost of cases	Avg. cost of cases	Avg. days of a case ⁵⁴	Cases won	Cases settled	Cases lost	Cases withdrawn or not pursued
All immigration cases	4,710	£13,038,830	£2,768	339	2,970	1,427	73	240
All Judicial Review cases	4,643	£12,337,200	£2,657	335	*	*	*	*
All Statutory Appeal cases	67	£701,630	£10,472	588	*	*	*	*
All FNO deportation cases	171	£553,240	£3,235	341	*	*	*	*

1. Note that FNO deportation cases are a subset of immigration cases

2. Cells with * have been suppressed to ensure no risk of individual case disclosure

3. Note that immigration and FNO deportation cases concluded in 2022 have been excluded due to low case numbers.

Source: Government Legal Department

⁵⁴ Duration from case opening to case closing on Case Management System.

Table B5: Combined number of threat to life notifications (TTLNs) issued by the four largest police forces in England and Wales⁵⁵, 2018-2020

Year	Volume of TTLNs issued			
	2018	2019	2020	Total
TTLNs issued	831	770	589	2190

Source: Home Office Statistics

Table B6: case numbers by outcome and financial year⁵⁶, from the perspective of the government

Outcome	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22
Won	*	539	1,171	915	420	275
Settled	*	93	356	472	531	263
Lost	*	*	19	39	22	27
Withdrawn or Not Pursued	*	112	222	183	338	246
Other	*	*	*	*	*	*

Source: Government Legal Department

Cells with * have been suppressed to ensure no risk of individual case disclosure

Table B7: Average duration⁵⁷ of domestic human rights cases 2018-2021

Year	Average duration of cases (days)	Average duration of cases (years)
2018	302	0.83
2019	346	0.95
2020	446	1.22
2021	494	1.35

Source: Government Legal Department

Table B8: Total domestic human rights cases brought against government between 2016-2022⁵⁸

Case type	Total number of cases	% of total cases
Total cases	6,285	100.00%
Damages	646	10.28%
Immigration	4,720	75.10%
Planning	17	0.27%
Public Law	902	14.35%

Source: Government Legal Department

⁵⁵ The Metropolitan Police, Greater Manchester Police, West Midlands Police, West Yorkshire Police

⁵⁶ Financial year in which the case was closed. Outcome is the overall outcome of the case, where other grounds of challenge are brought where the case may be lost or settled this does not indicate whether it was lost or settled in respect of HRA grounds, other grounds, or both.

⁵⁷ Duration from case opening to case closing on Case Management System.

⁵⁸ Data covers cases which were opened with at least one HRA ground of challenge by from 1 November 2016 and were closed by 6 January 2022.