1) Amend the Human Rights Act 1998 (the HRA) to make clear that a majority vote of *both* Houses of Parliament would be required to pass any further changes to the Act

In most Western democracies, human rights protections are entrenched in such a way that only a **super-majority** of the legislature and/or a **confirmatory nationwide referendum** can amend or repeal them. These safeguards exist to prevent the government of the day and/or our elected representatives from violating fundamental rights, in particular the rights of vulnerable minority communities. In the United Kingdom, such safeguards would be difficult - if not impossible - to enact owing to the principle of Parliamentary sovereignty and the common law maxim that 'no Parliament may bind its successor'. What *would* be in-keeping with both of these principles, however, is an amendment to the HRA to make clear that the approval of *both* Houses of Parliament would be necessary in order to modify its wording in future. That is to say, the Commons would be barred from invoking the Parliament Act 1911 (the PA 1911) to override the concerns / objections of the Lords in such circumstances. In 2008, the Joint Committee on Human Rights was sympathetic to this idea whilst scrutinising proposals for a 'British Bill of Rights':

"239. Consideration could also be given to requiring the consent of both Houses to any measure amending the Bill of Rights."[1]

There are already precedents for such an approach in UK law. Take, for instance, derogations under the HRA. A Derogation Order, issued by the Secretary of State, is designed to limit the applicability of one or more Convention rights during a time of national emergency - for a maximum 5 year period. Under Section 16 (3) of the HRA, any such Order would have to be approved by a resolution of *both* Houses of Parliament within 40 days, or it would cease to have legal effect. Is it not rather anomalous, therefore, that the HRA can be **totally rewritten or repealed** by the Commons, **without ever securing the agreement of the Lords**, via the PA 1911? A repeal or rewrite may last in perpetuity, in stark contrast to a 'mere' 5-year derogation – if a two-Houses safeguard is deemed necessary to trigger *temporary* changes, it is surely vital in the context of *permanent* change.

At present, any Bill designed to extend the life of a Parliament must also be approved by both the Lords and Commons according to Section 2 (1) of the PA 1911. What I am proposing is not, therefore, particularly innovative – I am simply asking that we apply a rule that already exists in certain circumstances to the process of amending the HRA in future. As one of our most important constitutional documents, this would be a perfectly natural and sensible thing to do.

2) Provide the Joint Committee on Human Rights (the JCHR) with the power to amend Government bills

In order to give Parliament a greater say over human rights issues than it has had, in practice, since the passage of the HRA, would you consider providing the JCHR with its own power to amend Government bills? In recent years, this little committee has shown itself to be a studious critic of Government policy, particularly with regards to the Justice and Security Bill (secret courts)[2] and the Investigatory Powers Bill (wiretapping)[3]. In light of its accumulated knowledge and expertise, it strikes me as a rather wasted opportunity that the JCHR is currently unable to table its *own* amendments to Government Bills. Such a change would bring with it two notable benefits, in my view. Firstly, whereas our existing judicial model of rights protection is chiefly concerned with what

1 JCHR's recommendations for a 'British Bill of Rights': https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16510.htm
2 JCHR's scrutiny of the Justice and Security Bill (2012): https://publications.parliament.uk/pa/jt201213/jtselect/jtrights/59/59.pdf
3 JCHR's scrutiny of the Investigatory Powers Bill (2016): https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/104/104.pdf

restrictions / infringements the Government can 'get away with', a JCHR-led fine-tuning of primary legislation would empower Parliament to strike the *best possible balance* between an individual's human rights and the legitimate interests of Government. Secondly, in contrast to the judicial model of rights protection, there is a significant elected component to the JCHR (six out of its twelve members are sitting MPs) thereby giving its interventions - particularly on matters of public policy - *far greater legitimacy* in the eyes of the electorate.

Any such power of amendment would have to be 'checked', of course. For instance, if the Government felt that one of the Committee's amendments would violate a manifesto commitment (or, as the case may be, "the Coalition Agreement") the relevant Minister should be able to make an official declaration to that effect to the whole House and thereby whip his / her colleagues to vote against the amendment concerned. For the sake of clarity, we might call this declaration "Manifesto Privilege" (or "Coalition Agreement Privilege") - a very important safeguard without which the Government's legislative agenda could be placed at risk. If, on the other hand, the Government felt that it could not make such a declaration without straining credulity, its Ministers and MPs should – by default – enjoy a *free vote* on the JCHR's proposals. Free votes are already widely used for 'issues of conscience' in Parliament (see, for instance, votes pertaining to capital punishment and abortion law). Extending this approach to broadly similar 'human rights questions' would be a perfectly logical and sensible evolution of the principle. Moreover, by requiring an official declaration to the whole House in order for a free vote to be replaced by a whipped vote, it is far more likely that the Government will respect the voting autonomy of its MPs. Ministers would be only too aware of the political costs of officially invoking Privilege (read: "taking away the voting rights of close colleagues") if there was *no genuine policy basis* in their latest party manifesto for doing so.

With respect to the opposition, the exact same voting rights should apply. That is to say, if an opposition party leader felt that his / her *own* party's manifesto was threatened by the JCHR's amendments, he / she should be able to make an official declaration to that effect to the whole House and thereby whip his / her colleagues to vote against the Committee's proposals. In the absence of such a declaration, the decision whether or not to accept the JCHR's amendments would be taken by that party's MPs on the basis of a *free vote*.

In terms of the wider logistics of my proposal, we might wish to make clear in the HRA that the JCHR's newly-enshrined 'power of amendment' did not extend to finance bills (for instance, the budget) or to any bill seeking authorisation for the use of military force. We could also specify the timing of the JCHR's involvement - which I believe should commence *after* the relevant bill had completed its ordinary passage through both Houses of Parliament (including the so-called "ping pong" stage between both chambers). The JCHR would communicate to the Speaker of the Commons its intention to 'call in' the relevant bill for further scrutiny and would be given a set amount of time in which to carry out its work (I offer no firm opinion on *how much* time it should be granted for this purpose, but I would suggest 'days' rather than 'weeks'). If the Committee were to agree on the need for further amendments to the bill, these would then be transferred to the House of Commons, where one of the Committee's six elected members would give a brief speech to the whole House outlining and justifying the new proposals. The Minister responsible for the bill would then be invited to make a counter-speech and declaration of Manifesto Privilege, if he / she so wished. Finally, opposition party leaders would be able to make their own speeches / Privilege declarations to the House (such declarations would likely prove rarer, given that opposition MPs would have an almost natural interest in seeing the Government's decisions challenged by the JCHR. Still, there may well be circumstances in which the Committee's amendments fundamentally threatened an opposing party's policy platform, such that its leader wished, quite legitimately, to invoke Privilege). Each of the JCHR's amendments would then be put to a final and binding vote of *all MPs* - 'free' by default though 'whipped' in the case of Privilege declarations - after which the

bill would be sent for Royal Assent.

In order to keep the number of Parliamentary stages after the JCHR's intervention to a minimum, and mindful of the Committee's impressive scrutiny record to date, I do not envisage the further involvement of the House of Lords after "ping pong" has run its course. Save for truly exceptional circumstances (for instance, amendments to the HRA itself), the decision whether or not to accept the Committee's amendments should rest with the House of Commons *alone*.

Furthermore, in order to reassure the Government that only a select few amendments would be drawn up during this 'super-added' Parliamentary stage, I would suggest requiring a *unanimous* vote of the JCHR's 12 members for its amendments to be transferred to the Commons. That way, if the Committee member who represented the governing party felt that his / her 11 colleagues had overreached themselves, he / she would be able to *veto* the Committee's proposals.

Moreover, in the event of any dispute between the JCHR and the Government, I would propose making the Speaker of the Commons the final arbiter.

With the above-mentioned reforms in place, and thinking more broadly, we could even hand over the responsibility of responding to a 'Declaration of Incompatibility' (see Section 4 of the HRA) to the JCHR. This would surely be a natural fit for its newly-enhanced oversight role in such matters.

To conclude, there is a lot that can be done with a JCHR-led human rights framework. In many respects, this approach would confer all the benefits of a judicial strike down power, but without the negative aspects of that power in the form of an unaccountable and potentially 'out of touch' judge. Whilst there will doubtless be further exemptions and/or qualifications that need to be added to my framework, I hope I have illustrated that the protection of human rights in the UK and a strict belief in Parliamentary sovereignty can go hand in hand. To date, these concepts have often been regarded as conflicting – even irreconcilable.

Please feel free to develop the above-mentioned framework in whatever manner you see fit.

Thank you for taking the time to read my submission.
Kind regards,
Ben Boult.

Addenda

1) Ordinary MPs who felt strongly about the JCHR's proposals should also be allowed to give brief speeches during my 'super-added' Commons stage. In order to guard against the possibility of a protracted debate at the 11th hour, however, stringent time limits should apply – perhaps no more than one minute per speaker.

2) If the Minister responsible for the bill's passage disagreed with the JCHR's amendments for logistical reasons, rather than manifesto-based reasons, he / she would not be able to invoke Manifesto Privilege as a means of *whipping the vote* against those amendments. The Minister would, however, be able to use his / her speaking time in the Commons to *ask* or *persuade* colleagues to use their free votes to reject the Committee's proposals.

3) If the level of detail outlined above is thought to be 'too much' for a revised HRA in its own right, we could outline the general principles of the JCHR's enhanced role in the new HRA, with the Act leaving the detail to a revised Erskine May.