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Joint Committee on Human Rights

Legislative Scrutiny: Bill of Rights Bill

Ninth Report of Session 2022–23

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Summary

The Bill of Rights Bill repeals and replaces the Human Rights Act 1998 (HRA). It is a major reform of our human rights framework. The Secretary of State for Justice and Lord Chancellor, Rt Hon Dominic Raab MP, has described the Bill as "the next chapter in the evolution and strengthening of our human rights framework".

Whilst there might be a case for some small changes to be made to the Human Rights Act, those alone do not make for a new Bill of Rights. It seems to us that the Bill is likely to reduce the protections currently provided by the HRA, which some argue is the Government's intention; to place restrictions on the interpretation and application of the rights set out in the European Convention on Human Rights (ECHR) in our domestic system; to limit the powers of the courts accordingly; and to divorce ourselves from the European Court of Human Rights in Strasbourg (ECtHR) as far as possible. Moreover, the Bill will likely see more cases going to the European Court of Human Rights, and result in more adverse judgments against the UK.

The Bill's desirability is highly contested. We believe that some of its provisions are simply unnecessary, whilst others are positively damaging to the enforcement and protection of human rights in the UK. We also cannot see how the Bill will achieve its own stated aims of strengthening rights protection, the role of Parliament, or increasing legal certainty. We are not alone in our view. The evidence we received, and the responses the Government received to its consultation on a "modern Bill of Rights", were overwhelmingly against these proposals.

We call on the Government not to make further progress with the current Bill's passage through Parliament. We propose amendments to the Bill if the Government presses on with the legislation, but we recognise that some of these would change the nature of the Bill currently before Parliament, almost entirely.

A Bill of Rights should be for everyone

Human rights are, by their nature, universal. They apply to everyone equally. The state's legal obligation reflects this fundamental principle. Under the European Convention on Human Rights, the UK State is obliged to secure everyone within its jurisdiction the rights and freedoms defined within the Convention. The Bill of Rights risks carving out groups of people who will have less ability to enforce their rights than others. It also risks making enforcing rights both inside and outside of court more difficult for all. By undermining universality and hindering enforcement, the Bill will result in the UK shirking its responsibility and leaving effective enforcement to the European Court of Human Rights in Strasbourg, which many will not have the time or the money to access.

Bringing rights home, then sending them back

The Bill of Rights Bill will weaken rights enforcement in the UK. It will prevent the courts from enforcing positive obligations under the ECHR. Positive obligations go beyond a duty not to interfere with Convention rights, and require that, in some circumstances, the State must take active steps to protect people's rights against interference by others.

The Bill will encourage the courts to interpret Convention rights as they would have been read in the 1950s, not the twenty-first century. There will be many who will no longer be able to rely on public authorities acting compatibly with the Convention. Some will no longer be able to enforce their rights in the domestic courts. Groups who contacted us with these concerns included those who represent victims of violence against women and girls, care home residents, and those whose family members have lost their life due to the actions of the police or other state actors.

Clause 3 would focus domestic courts on the original text of the Convention, as adopted in 1950, rather than on the case law of the European Court of Human Rights (ECtHR) that reflects the many social changes that have taken place over the past 70 years. It would encourage divergence between UK courts and the ECtHR, putting at risk the positive judicial dialogue between them and the respect that the Strasbourg court pays to UK decisions. Clause 3 also prohibits the courts from interpreting the Convention any more generously than the ECtHR. We see no reason to fetter the decision-making of the UK courts in this way. We consider it crucial that the ECHR can continue to be respected as a "living instrument". The Government should replace clause 3 with a clause mirroring section 2 HRA.

The doctrine of positive obligations is a central principle of the Convention. The legal basis for the imposition of positive obligations arises from the Convention rights. Clause 5 of the Bill would prohibit the domestic courts from applying any new positive obligations adopted by the ECtHR following enactment of the Bill ("post-commencement interpretations"). It would also require the courts, in deciding whether to apply an existing positive obligation ("pre-commencement interpretations"), to give "great weight to the need to avoid" adopting an interpretation of Convention rights that would result in certain consequences for local authorities that the Government sees as too onerous. The suggestion that positive obligations can be severed from negative obligations and either ignored or applied in a restricted manner is simply untenable given they are core to the protection of Convention rights. It is also clear that positive obligations have resulted in large gains for rights protection that we would not wish to turn our backs on—from protecting victims of domestic violence to inquests into deaths in custody and events such as Hillsborough. The legislation, if passed, would create a variance between rights enforceable in domestic courts and the ECtHR, almost certainly resulting in more adverse judgments from the ECtHR. We are therefore extremely concerned by the restrictive approach to positive obligations contained in clause 5 and believe the Government should give serious consideration to changing its approach.

Removing the obligation to read legislation compatibly with the Convention that currently applies under section 3 of the HRA risks undermining years of settled case law by restoring incompatible legislation. Courts should continue to be required to interpret domestic legislation so far as possible to ensure it is compatible with the Convention, to reduce the number of declarations of incompatibility made so as to provide speedier remedy and resolution for those who seek to enforce their rights. This will also result in fewer applications being taken to the ECtHR and fewer adverse judgments against the UK. Other public bodies should also continue to be required to read legislation in a way that is compatible with the ECHR in order to protect peoples' rights. On a practical basis, it is not always clear which judgments relied on the ability to "read down" legislation as

set out in the HRA. The Bill gives the Secretary of State a power for up to two years to preserve such judgments, by making regulations. We do not see how it will be possible to identify all such judgments made in reliance on section 3 HRA, and in any case, such a wide regulation-making power is inappropriate as it gives to wide a power to the Secretary of State. A clause equivalent to section 3 HRA should be added to the Bill, ensuring that legislation continues to be read compatibly with the Convention and that previous compatible readings of legislation remain in effect.

A rockier road to remedies

Several clauses of the Bill will delay access to effective resolution of incompatibilities and to remedies for claimants. Under the Human Rights Act, where primary legislation is found to be incompatible with Convention Rights the courts cannot strike down the legislation; they issue a "declaration of incompatibility" which the Government is then free to decide whether and how to remedy the incompatibility. Whilst declarations of incompatibility work well for addressing incompatible primary legislation as they preserve parliamentary sovereignty, we believe that their expanded use for secondary legislation serves no purpose and will simply leave incompatibilities in place until the time is found by Government to legislate or introduce a remedial order. In the meantime, the injustice will persist.

The proposal to introduce a new permission stage, which would not permit human rights claims to be brought unless a claimant has suffered "significant disadvantage", will prevent meritorious claims being heard. This is inconsistent with the UK's obligations under the ECHR and undermines the primary role that domestic courts play in enforcing Convention rights. The Government should reconsider whether introducing the permission stage will achieve its aims, and whether it would leave the UK in breach of its international obligations.

The ability of the domestic courts to award damages will also be restricted by the Bill. Not only will the amount that can be awarded be strictly limited to that which would be awarded by the ECtHR, but the courts will be obliged to take into account relevant conduct of the claimant (even if it is unrelated to the claim in question) when considering whether to award damages and how much to award. The provision of the Bill which requires "great weight" to be given to the importance of minimising the impact of damages on public authorities, including those that have violated someone's rights, wrongly shifts attention away from victims and their right to an effective remedy. Clause 18 (judicial remedies: damages) should be amended to remove these provisions from the Bill.

Disregard for existing international legal obligations

The Bill seeks to potentially carve out the State's liability for human rights violations in the context of overseas military operations. Clause 14, in conjunction with clause 39, paves the way for future legislation to limit the extraterritorial application of the Convention, by excluding certain acts done in the course of overseas military operations. Whilst this clause would not be commenced unless and until the Secretary of State is satisfied that to do so is consistent with the UK's obligations under the Convention,

we believe that this decision should be for Parliament, not a Minister, to make. If the Government wants to change the law relating to the application of Convention rights to overseas military operations and are confident that doing so would comply with our international obligations, it should introduce a new Bill to Parliament; this would allow for proper Parliamentary scrutiny. Clause 14 (overseas military operations) and clause 39(3) (commencement) must be reconsidered.

The Bill, at clause 24, seeks to depart from our international legal obligations by prohibiting a court from having any regard to any interim measure issued by the ECtHR when it is considering whether to grant relief that might affect Convention rights. Given the recent interim decision of the ECtHR concerning the UK-Rwanda Memorandum of Understanding providing for the relocation of asylum seekers, it is hard not to see clause 24 as a reaction to this decision. Interim decisions of the Court are legally binding under the Convention. Ignoring interim measures will undermine human rights enforcement and breach our obligations under the Convention. Clause 24 (interim measures) must be reconsidered.

The role of Parliament

The Government has been clear that it seeks to "rebalance" the constitution—placing a premium on the role of Parliament. We are therefore surprised that the Bill of Rights Bill might make the job of Parliament more difficult. The Bill does not include the requirement which exists under section 19 HRA for a Minister to make a statement on the compatibility of all government Bills with Convention Rights. The Government argues that the section 19 statements constrain innovative policy making. We see no evidence of this. Statements of compatibility should continue to be accompanied by a statement of reasons to be published upon introduction of a Bill. This is important to ensure that Government engages in human rights analysis whilst legislating, and to assist Parliament, and this Committee, with its scrutiny. The Bill should be amended to include a provision to reinstate statements of compatibility upon introduction of a Bill, and to make the provision of a human rights analysis a statutory requirement.

The Courts cannot strike down Acts of Parliament, but they do play a crucial role in identifying when legislation is incompatible with Convention rights. In so doing, they show great respect for the democratic will of Parliament. Clause 7 would require the Courts to go yet further. They would need to treat Parliament in every case as having concluded it has struck the right balance between competing rights or policy aims–even if those haven't been considered, and then to give "the greatest possible weight" to the principle that it is for Parliament (not the courts) to strike that balance. No Parliament is capable of foreseeing all potential human rights implications in perpetuity. Clause 7 risks inhibiting the Courts' ability to protect rights in accordance with the ECHR. This may result in more claimants taking their claims to the ECtHR, and more adverse judgments against the UK. The Government should reconsider Clause 7.

The Bill, at clause 25, requires the Secretary of State to lay before Parliament notice of an adverse ECtHR judgment against the UK, or a voluntary UK declaration that it has failed to comply with the Convention. There is nothing inherently problematic in this clause; increased provision of information to Parliament is to be welcomed. However, this notice should be accompanied by an explanation of what the Government intends

to do about this incompatibility, and the timescale for doing so. We also recommend that notice should be given to Parliament when declarations of incompatibility are made in the UK courts. We remind the Government that the Convention requires the UK to comply with adverse judgments of the ECtHR; the way in which we comply is for the state to decide and it is right that Parliament might debate any such action. We also sound a warning that there is likely to be a large increase in numbers of declarations of incompatibility as a result of the provisions of the Bill and therefore the remedial regulation processes are likely to be used increasingly frequently. The remedial regulation provisions could be reformed to streamline the process, but we are nevertheless concerned about the volume of regulations that are likely to have to be made.

Tipping the balance and future reforms

Unusually for a Bill of Rights, the Bill also seems to be a vehicle for addressing a small number of specific issues, which, whilst important, we would not expect to see in a statute about fundamental rights. Several of these tip the balance in favour of one right over another, and point to future intentions of the Government, rather than dealing with the mischief they are intended to address directly. For example:

- Clause 4 requires courts to "give great weight" to the importance of protecting freedom of speech whenever the courts are determining a question which has arisen in connection with that right. It is unclear whether this clause will have any practical effect as is, although the Secretary of State appeared to indicate in evidence to the Justice Committee that the Bill could be amended to tackle concerns around Strategic Lawsuits Against Public Participation (SLAPPs). In our view, the Government has not made the case to separate freedom of speech from the other elements of the right under Article 10 ECHR to freedom of expression, nor is it right to elevate it above other Convention rights without a balancing exercise being undertaken. The Government should reconsider whether clause 4 (freedom of speech) is necessary or appropriate.

- Clause 6 of the Bill would introduce a new obligation on the courts to "give the greatest possible weight to the importance of reducing the risk to the public" from persons who have been given custodial sentences when they are considering claims that the human rights of a person subject to a custodial sentence (in respect of a criminal offence they have committed) have been breached. The Explanatory Notes to the Bill make clear that these changes will "strengthen the Government's forthcoming parole reforms" along with strengthening the Government's hand in contesting human rights claims from prisoners opposing their placement in a separation centre. The courts should and will already give great weight to the importance of protecting the public from dangerous prisoners. However, a clause that seeks to bind the hands of the courts when assessing whether an individual's rights have been violated is inherently problematic. The Government should reconsider whether clause 6 (public protection) is necessary or appropriate.

- Clause 8 seeks to insulate future deportation laws from successful human rights challenges by introducing an extremely high threshold for the application of

the right to private and family life under Article 8 ECHR. Although States are given a wide margin of appreciation in relation to deportation laws and the balance between the public interest and individual rights to private and family life, the extreme restrictions placed on the courts by clause 8 would almost extinguish Article 8 ECHR rights entirely in such cases. We are concerned that clause 8 may breach the ECHR, and we therefore believe the Government should give serious consideration to changing its approach.

- Clause 20 seeks to prohibit the courts from properly assessing the deportations under the 'deportation with assurances' (DWA) policy. The objective of DWA is to obtain assurances from the Government of the receiving state which are sufficiently credible to allow deportation to take place without infringing the human rights of the deportee or the obligations of the state under international law.

- Whilst the practical effect of clause 20(3) is likely to be limited, there may be cases where failure to adequately assess the sufficiency of deportation assurances may amount to a violation of Article 6 ECHR (right to a fair trial) and Article 13 ECHR (right to an effective remedy), as the deportee is effectively stripped of the right of effective access to a court and the right to a remedy that a court would otherwise be able to provide. The removal of this judicial safeguard may also lead to an enhanced risk of breaches of Article 6 ECHR rights of persons deported to face trial upon return. We therefore recommend that clause 20 be amended to restore judicial safeguards.

No case for this Bill

The Bill of Rights Bill not only lacks support, but has caused overwhelming and widespread concern. Those who support the Bill in its current form appear to us to be limited in number: they certainly represented a tiny minority of those who responded to the IHRAR review, the Government consultation, our call for evidence, or those who chose to respond to the survey we posted on Twitter, which had over 40,000 responses. The outcomes of the Government's consultation, independent review, and our own inquiries on the Bill of Rights Bill have not been incorporated into the Government's proposals. The Scottish and Welsh Governments have expressed concerns about the Bill, and the Northern Ireland Human Rights Commission has pointed out the potential impact on the Good Friday Agreement. There has been no national conversation about our rights framework.

The Bill will introduce large scale uncertainty as the courts grapple with a new, complex, regime. Far from increasing understanding, matters will end up being litigated in order to gain clarity. This does not bode well. Human rights instruments, such as the HRA, are constitutional statutes, which should provide stability to citizens and the courts. They should be easily understood and accessible to all in order to endure. Indeed, we do not think this is a Bill of Rights at all, and recommend that the title of the Bill is changed accordingly. In any case, the Government should not proceed with this Bill: it weakens rights protections, it undermines the universality of rights, it shows disregard

for our international legal obligations; it creates legal uncertainty and hinders effective enforcement; it will lead to an increased caseload in Strasbourg; and will damage our international reputation as guardians of human rights.

1 "Ships that pass in the night"—the story so far

1. The Bill of Rights Bill (the Bill) was introduced to the House of Commons in June 2022. The Bill, if enacted, would repeal and replace the Human Rights Act 1998 (the HRA).[1] The Secretary of State for Justice and Lord Chancellor, Rt Hon Dominic Raab MP, has described the Bill as "the next chapter in the evolution and strengthening of our human rights framework".[2] This view of the Bill is, however, highly contested, with many arguing that its provisions will have the opposite effect.

2. At various points since its introduction, the future of the Bill has been uncertain. Following the first meeting of the Rt Hon Liz Truss MP's Cabinet on 7 September 2022, it was widely reported that the Bill would be "shelved" and would not "come back in anything like its current form".[3] In a letter dated 17 October 2022 the then Secretary of State for Justice, Rt Hon Brandon Lewis MP, told us:

> I can confirm that the Government stands by its manifesto commitment to update the Human Rights Act, but that we are looking again at the Bill of Rights Bill to ensure that we deliver on the Government's objectives in this area in the best way possible. The Bill's progress through parliamentary processes has therefore been paused.[4]

3. In a Westminster Hall Debate on 24 October 2022, the then Parliamentary Under-Secretary of State for Justice, Gareth Johnson MP, reiterated the then Government intended to deliver its 2019 manifesto commitment to update the Human Rights Act. He went on to state that the 2019 manifesto "does not say that we wish to repeal and scrap the Human Rights Act".[5] The Bill, however, does just that: it repeals and replaces the Human Rights Act. Following the change of administration with Rt Hon Rishi Sunak MP becoming the Prime Minister, the Bill appears to be back on course. On 14 December the current Secretary of State, Dominic Raab, told us the "Bill of Rights is ready to go and we look forward to bringing it to Second Reading".[6]

Background to the Bill

The Independent Human Rights Act Review

4. To fulfil its manifesto commitment to "review" the HRA, the Government launched an Independent Human Rights Act Review (IHRAR) in December 2020. The Panel was chaired by Sir Peter Gross (a retired Court of Appeal judge).

1 Bill of Rights Bill (Bill 117 2022–23). All references to clause numbers in this report are to this version of the Bill, the Bill as introduced to the House of Commons
2 HC Deb, 22 June 2022, col 845
3 Harry Cole on Twitter: "EXC: Cabinet agreed to shelve Raab's British Bill of Rights designed to protect against meddling ECHR in Strasbourg, The Sun can reveal. It was due back in Commons next week." , Twitter
4 Letter to the Chair from the Lord Chancellor regarding the Bill of Rights, 17 October 2022
5 HC Deb, 24 October 2022, col 275WH
6 Q18

5. The Panel's Terms of Reference set out three areas for them to consider:

- The relationship between the domestic courts and the European Court of Human Rights (ECtHR). This included how the duty to 'take into account' ECtHR case law (in section 2 HRA) has been applied in practice, and whether dialogue between the UK's domestic courts and the ECtHR works effectively and if there is room for improvement.
- The impact of the HRA on the relationship between the judiciary, executive and Parliament, and whether domestic courts are being unduly drawn into areas of policy.
- The implications of the way in which the HRA applies outside the territory of the UK and whether there is a case for change.

6. In his evidence to us, Sir Peter Gross explained that the Panel was independent, comprised of eight members of varied backgrounds, and that their conclusions were informed by a wide-ranging and transparent evidence-gathering exercise. The Panel received over 150 written responses, held 13 online round table events with interested groups and seven online roadshows facilitated by universities around the United Kingdom. The Panel also met judges from the Irish Supreme Court, the German Constitutional Court, and the European Court of Human Rights.[7] Sir Peter Gross told us there was an "overwhelming body of support for retaining the HRA". He went on:

> IHRAR was not provided with evidence showing any depth of support for a Bill of Rights, nor were any detailed arguments put forward in favour of repeal of the HRA and its replacement by a Bill of Rights.[8]

7. The Panel presented the results of their review to the Government in Autumn 2021.[9] Whilst the review did not recommend large scale reform of the Act, in Sir Peter's words, the Panel did, however, conclude that:

> [T]here was clear room for a coherent package of practical reforms designed to improve its operation, with benefits both domestically and to the UK's relationship with Strasbourg. These recommendations included, among others, amending Section 2 of the Act [duty to have regard to Strasbourg case law] to give greater prominence to the common law, putting it centre stage; targeted proposals addressing concerns as to Section 3 of the Act [duty to interpret legislation compatibly with Convention Rights so far as possible], designed to generate light rather than heat; and recognition of an extraterritorial jurisdiction problem resulting from the course taken by the Strasbourg jurisprudence, while emphasising in the UK national interest the need for a multilateral rather than a unilateral solution.[10]

7 Q1
8 Q1
9 The Government published the review on 14th December 2021.
10 Q1

The Government consultation

8. On the same day the IHRAR report was published, the Government launched its consultation *Human Rights Act Reform: A Modern Bill of Rights*.[11] In the consultation the Government sought views on its proposals to "revise and replace the Human Rights Act 1998 with a Bill of Rights."[12]

9. The consultation stated that a new Bill of Rights would address the Government's concerns about the separation of powers between the UK courts and Parliament; the authority of the UK courts; and the balance between rights and responsibilities.[13] The consultation's proposals also touched on specific Convention rights. It included proposals to address what the Government perceives to be a longstanding difficulty of deporting foreign national offenders and to give greater weight to what were described as "quintessentially UK rights" such as freedom of speech and trial by jury.[14] Some of the consultation proposals were then replicated in the Bill of Rights Bill, others were included with significant modifications or fleshed out in greater detail. We discuss the provisions of the Bill in greater detail in the following chapters of this report.

10. The Government told us it had "engaged extensively" on the proposals within the consultation paper and claimed it had been informed by both the IHRAR report and the 12,873 consultation responses it received.[15] However, Lord Carnwath, a former Supreme Court Judge, described the IHRAR report and the Government consultation as "almost like ships that pass in the night."[16] Moreover, Sir Peter Gross told us:

> [T]he Government have not to date responded in a reasoned or iterative fashion to the IHRAR report. To the contrary, in important respects, the then [Lord Chancellor, Rt Hon Dominic Raab MP] simply went against it.[17]

11. Based on the Government's consultation analysis it appears the content of the Bill as introduced also "went against" the majority of the 12,000 consultation responses, most of which were in favour of maintaining the status quo. In a letter to the Secretary of State dated 30 June 2022, we noted two examples of where the Government had decided to go ahead with reform despite a lack of support:

- 79% of respondents to the Government's consultation did not want any change to section 3 HRA, which requires legislation to be interpreted in a manner compatible with Convention rights, so far as it is possible to do so, (something that was also advised against by both the IHRAR and by us). The Bill of Rights will repeal this provision nonetheless.

- Less than 2% of respondents thought any changes should be made to the requirement that the Minister introducing a Bill to Parliament should make a statement as to whether the Bill was compatible with human rights (what is now

11 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021
12 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021, para 1
13 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021, paras 8 and 9
14 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021, page 3
15 Joint Committee on Human Rights, Thirteenth Report of Session 2021–22, Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22, HC 1033, para 2.
16 Constitutional Law Matters, 'Lord Carnwath lecture on Human Rights Act reform – is it time for a new British Bill of Rights?', accessed 14 December 2022.
17 Q1

> section 19 of the HRA). Neither IHRAR nor this Committee thought any such changes should be made. However, the Government's Bill repeals this useful provision that helps Parliament undertake its scrutiny.

We continued:

> The Government's consultation analysis provides scant to no reasoning to explain why it has decided to disregard the views of a significant number of consultees.[18]

12. In evidence to us the Secretary of State appeared to question the results of the consultation, suggesting that the consultation responses were not reflective of wider public opinion. He said:

> Of course, when you do a consultation like that, mostly you hear back from the sector, NGOs, those who support the very elastic interpretation of human rights, which, as I said, I think is constitutionally wrong as well as creates the practical problems that we have made, but that is natural; that normally happens with consultations in those sectors. If you look at the broader public response, when people hear what we want to try to do … I think it has widespread public support.[19]

This appears, to us, to be dismissive of a large volume of evidence from experts and citizens alike who engaged in good faith with the Government's consultation process.

Our work

Previous work

The Government's Independent review of the Human Rights Act Report

13. We launched an inquiry into the *Government's Independent Human Rights Act Review* in January 2021. We wanted to know more about how the Act was operating for those delivering public services. We published our report on 8 July 2021.[20] Our overarching conclusion was that there was no case for reform of the HRA. In our report we also highlighted that the HRA:

- enables individuals to argue for our rights in domestic courts,
- has had an enormously positive impact on the enforcement of human rights in the UK, and
- makes human rights real and accessible to those that use public services without recourse to the courts by requiring public authorities to act compatibly human rights.

18 Letter from the Acting Chair to the Lord Chancellor relating to the Bill of Rights, dated 30 June 2022
19 Q20
20 Joint Committee on Human Rights, Third Report of Session 2021–22, The Government's Independent Review of the Human Rights Act, HC 89/HL Paper 31.

Human Rights Act Reform Report

14. We launched a further inquiry following the publication of the Government's consultation paper. During our inquiry, we considered in comprehensive detail the proposals in the consultation. In our report, which was published on 13 April 2022, we concluded that "a case has not been made for replacing the Human Rights Act with the British Bill of Rights in the form proposed".[21] We also recommended that given the constitutional importance of the Bill, any forthcoming legislation should be published as a draft Bill to enable pre-legislative scrutiny. In a joint letter to the Secretary of State for Justice dated 27 May 2022, the Chairs of this Committee, the Public Administration and Constitutional Affairs Committee, the Justice Committee and the House of Lords Constitution Committee, urged the Government to reconsider its decision not to put forward the Bill of Rights Bill for pre-legislative scrutiny. The Government did not, however, produce the Bill in draft form.[22]

15. We also expressed concern that unlike other Bills of Rights, which generally enhance the protection of human rights, the proposed Bill of Rights would weaken existing human rights protection in the UK. We asked the Government to think carefully about whether significant reform was necessary and made several proposals that we believed would strengthen the human rights framework in the UK. This included recommending that it should: look at ways to spread best practice in human rights compliance across the public sector; develop an effective programme of civic and constitutional education; and show more political leadership in championing respect for human rights as a core part of our constitution and values.

Letters to the Secretary of State setting out preliminary views on the Bill

16. Following the introduction of the Bill on 22 June 2022, our Chair wrote to the Secretary of State for Justice setting out our preliminary views on the Bill. Again, we reiterated our view that the Government had failed to make the case for repealing and replacing the HRA with a Bill of Rights.[23] We also noted our "overarching and predominant concern" that the Bill would weaken the protection of human rights in the UK.

17. On the same day, the Chair also wrote to the Secretary of State setting out our dissatisfaction with the Human Rights Memorandum that accompanied the Bill. In the letter, we stated that the Memorandum "contained very little analysis to back-up the Government's assertions or to enable Parliament to understand the reasoning that supported the Government's position." We asked a series of detailed questions on the Government's human rights analysis of the Bill.[24] The Secretary of State responded to our letter on 14 July. He reiterated his view that the Bill is compliant with the Convention rights and provided some further analysis of its human rights implications. He also stated

21 Joint Committee on Human Rights, Thirteenth Report of Session 2021–22, Human Rights Act Reform, HC 1033 HL Paper 191

22 Letter to the Lord Chancellor from the Chairs of the Public Administration and Constitutional Affairs Committee, the Justice Committee, the Joint Committee on Human Rights, and the House of Lords Constitution Committee regarding pre-legislative scrutiny of a "bill of rights", dated 27 May 2022

23 Letter from the Acting Chair to the Lord Chancellor relating to the Bill of Rights, dated 30 June 2022

24 Letter from the Acting Chair to the Lord Chancellor relating to the Bill of Rights human rights memorandum, dated 30 June 2022

"were every member State of the Council of Europe to adopt and implement the approach of the Bill of Rights, the standard of human rights protection across Europe would rise markedly".[25]

This inquiry

18. We launched this inquiry, *Legislative Scrutiny: Bill of Rights Bill*, along with a call for written evidence on 12 July 2022.[26] We launched an online survey on the same day, which contained seven multiple choice questions. We received 78 submissions to our call for evidence and 41,786 survey responses. We also heard oral evidence, supplementing that we had already taken on the IHRAR consultation in 2021 and the Government's own proposals earlier this year. We are grateful to everyone who took time to share their views with us.

Views on the Bill

19. The overwhelming majority of written responses we received were critical of the provisions in the Bill. Many appeared to disagree with the underlying policies reflected in the Bill, thought repealing the HRA would be an unnecessary step and, in the words of the former Secretary of State for Justice, Robert Buckland MP, believed the Bill is a "cure in search of a problem."[27] The various criticisms made of the Bill were summarised well by the Law Society:

> We believe the Bill of Rights Bill will diminish rights protections domestically and damage our reputation internationally. The Bill will remove the ability to enforce human rights from swathes of the population, including any British citizen who has suffered a breach of a right which falls below the Government's definition of "significant disadvantage". It will dramatically limit accountability for public bodies that breach rights, enabling routine rights violations by state authorities to go unremedied. And it will increase legal complexity, costs and delays, while putting the UK at greater risk of being found in breach of the European Convention of Human Rights [ECHR].[28]

20. We received a large number of responses from organisations working in specific sectors who raised concerns that the Bill would make it more difficult for individuals to enforce their rights out of court and would weaken legal protections for their service users. We have previously expressed similar concerns.[29] The organisations we received responses from included charities that support and advocate for: women and girls who have been victims of violence,[30] victims of trafficking and modern slavery,[31] asylum seekers

25 Letter to the Chair from the Lord Chancellor regarding the Bill of Rights, dated 14 July 2022 to the Chair from the Lord Chancellor regarding the Bill of Rights, dated 14 July 2022
26 Call for Evidence - Committees - UK Parliament
27 Joshua Rozenberg, 'A cure in search of a problem', 1 July 2022
28 The Law Society (BOR0046)
29 Joint Committee on Human Rights, Thirteenth Report of Session 2021–22, Human Rights Act Reform, HC 1033 HL Paper 191
30 Centre for Women's Justice (BOR0055)
31 Helen Bamber Foundation, Asylum Aid (BOR0017)

in immigration detention,[32] children living in poverty,[33] people in care settings,[34] those with learning disabilities,[35] and people in prison.[36] This demonstrates both the potential wide-reaching impact of the Bill and the significant concerns that it would negatively affect some of the most vulnerable individuals in society.

21. The critical tenor of the written responses we received was mirrored by the witnesses who gave oral evidence. Lord Sumption, a former Supreme Court Judge who since his retirement has been critical of the HRA, told us the Bill was "a singularly badly drafted Bill".[37] On the substance of the Bill, when asked whether there were any sections of the Bill that concerned him, Lord Pannick KC, Barrister at Blackstone Chambers and Crossbench Member of the House of Lords, responded "how long do you have?"[38]

22. Although the strength of feeling from those who engaged with our inquiry was clear, we note that, whilst they are in a minority, there are some that support plans to repeal the HRA. For example, Professor Richard Ekins, Head of the Judicial Power Project at Policy Exchange, has recently published a report stating the Government should enact "a Bill that simply repeals but does not replace the Human Rights Act" and "should be willing to withdraw from the ECHR and should give serious and ongoing consideration to whether—and how or when—to withdraw."[39] Moreover, Lord Sumption, in his evidence to us, appeared to broadly support the underlying objectives of the Bill.[40]

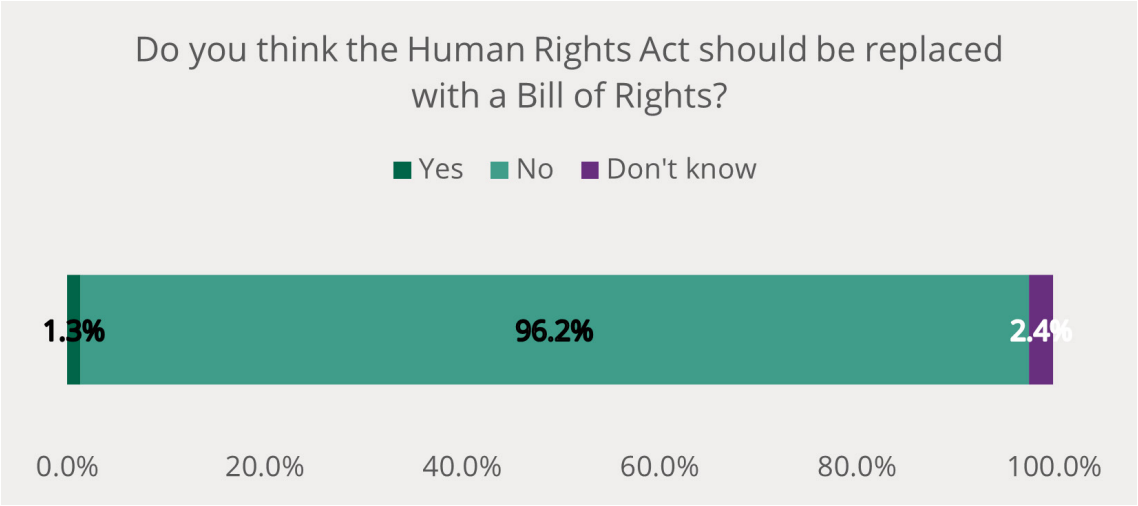
23. A limited number of the provisions in the Bill did have some support from stakeholders. Several of our witnesses supported clause 25, which would require the Secretary of State to notify Parliament of adverse ECtHR judgments. Moreover, the News Media Association, Reach and the Free Speech Union supported the underlying purpose of clause 4 to strengthen freedom of speech (although they made some specific criticisms of clause 4 which are considered in chapter 7 below).[41]

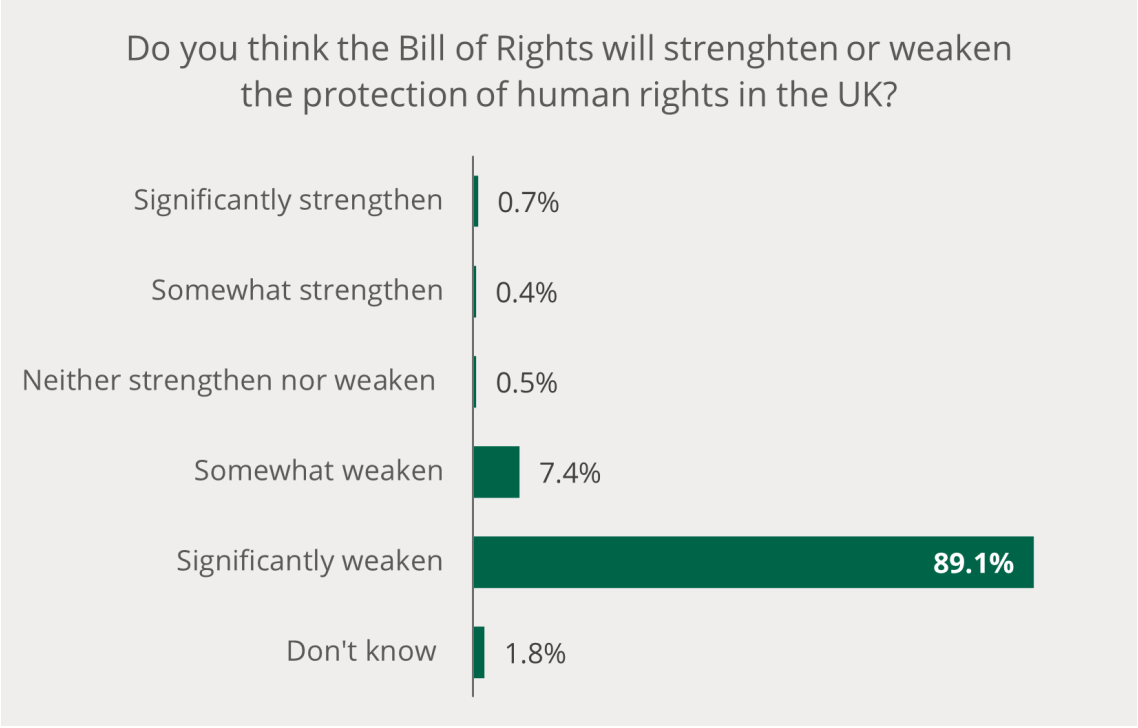
Survey results

24. As noted above, we conducted an online survey alongside our written call for evidence. We publicised our survey on Twitter and received 41,678 responses. To assist us in understanding our audience, we asked people to tell us how much they knew about the HRA and the Bill. The vast majority of respondents said they had some knowledge of the HRA and the Bill.[42] Only 1.8% of respondents said they had no knowledge of the HRA and only 6.8% said they were unfamiliar with the Bill.

32 Bail for Immigration Detainees (BOR0031)
33 Child Poverty Action Group (BOR0012)
34 British Institute of Human Rights: The RITES Committee (BOR0027), Relatives and Residents Association (BOR0025)
35 Mencap, Challenging Behaviour Foundation (BOR0034), Learning Disability Wales (BOR0038)
36 Prison Reform Trust (BOR0056)
37 Q10
38 Q20
39 Richard Ekins, The Limits of Judicial Power, 2022
40 Q9
41 News Media Association (BOR0036), Reach plc (BOR0044) and Free Speech Union (BOR0043)
42 For the HRA: 9.5% said they used it in their area of work/research, 19.6% said they had read it, 43.6% said they were familiar with some sections in it and 25.4% said they knew about it from what they had seen in the news and media. For the Bill: 7.0% said It would have an impact on their work, 18.4% said they had read it, 36.3% said they were familiar with some clauses in it and 31.2% said they knew about it from what they had seen in the news and media.

25. We asked people for their views on issues such as whether they thought: human rights protections should be strengthened; the HRA should be replaced with a Bill of Rights, and the proposed Bill of Rights would strengthen or weaken the protection of human rights in the UK. The charts below show a breakdown of the responses to two of the questions in the survey. Whilst clearly this was a self-selecting group, the results were clear: 96% of those who responded answered the question "do you think the Human Rights Act should be replaced with a Bill of Rights?" "no". Over 90% thought the proposed Bill of Rights would weaken the protection of human rights in the UK.





26. People were more likely to think that the HRA should be replaced by the Bill of Rights, and that the Bill of Rights would strengthen the human rights of people in the UK if they were unfamiliar with the HRA or the Bill.[43]

Reception in the devolved nations

27. There has been a negative response to the Bill from key stakeholders and office holders in Scotland, Wales, and Northern Ireland. On 1 March 2022, the Scottish and the Welsh Governments wrote to the Secretary of State for Justice describing the UK Government's plans to replace the HRA with a Bill of Rights as an "ideologically motivated attack on freedoms and liberties".[44] The Scottish Human Rights Commission told us, "the Bill will deliver primarily negative outcomes for the people and institutions of the UK, including Scotland."[45]

28. There have also been specific concerns expressed about the impact of the Bill in Northern Ireland. The Belfast/Good Friday Agreement (the GFA) and the principle of respect for human rights guaranteed therein is at the heart of the peace settlement in Northern Ireland. In its report, the IHRAR Panel stated that repealing the HRA and introducing a British Bill of Rights could have a "significant impact" on the GFA.[46] The Northern Ireland Human Rights Commission expressed their concerns in stronger terms. They told us:

> [T]he present Bill does not adequately consider the Belfast (Good Friday) Agreement, and the integral role of both the Human Rights Act and ECHR in the complex fabric of the NI Peace Process and devolution. The NIHRC is particularly concerned that the present Bill appears to be incompatible with obligations under the Belfast (Good Friday) Agreement to incorporate the ECHR and provide direct access to the courts.[47]

The Secretary of State maintains that the Bill is consistent with the GFA.[48]

29. **We have hardly heard any support for the Bill of Rights Bill. The Government-commissioned Independent Review did not support repeal or reform of the Human Rights Act 1998; the Government's consultation analysis showed very little support for a Bill of Rights; the evidence we have received in this inquiry is overwhelmingly against the Bill; and there is significant opposition to the Bill from the Governments**

43 5.9% of those who answered they were unfamiliar with the HRA thought it should be replaced with a Bill of Rights compared with 1.3% of those who used the HRA in their work, 0.9% of those who said they had read the Human Rights Act and 1.1% who said they were familiar with some sections of the HRA. Meanwhile, 4% of people who answered they were unfamiliar with the HRA thought the Bill would strengthen the protection of human rights in the UK compared with 1% of those who used the HRA in their work, 0.9% of those who said they had read the Human Rights Act and 1% who said they were familiar with some sections of the HRA. 3.3% of those who answered they were unfamiliar with the Bill of Rights Bill thought the HRA should be replaced with a Bill of Rights compared with 1.2% of those said the Bill would have an impact on their work, 1.1% of those who said they had read the Bill and 1% who said they were familiar with some of the provisions in the Bill. Meanwhile, 3.1% of those who answered they were unfamiliar with the Bill thought it would strengthen the protection of human rights in the UK compared to 0.9% of those said the Bill would have an impact on their work, 1.0% of those who said they had read the Bill and 1% who said they were familiar with some of the provisions in the Bill.

44 Scottish Government and Welsh Government, Joint letter to the Lord Chancellor, dated 1 March 2022

45 Scottish Human Rights Commission (BOR0074)

46 Ministry of Justice, The Independent Human Rights Act Review Report, 2021, CP 586, chapter 2, para 23

47 Northern Ireland Human Rights Commission (BOR0075)

48 Q30.

of Scotland, Wales, and in relation to its potential impact in Northern Ireland. The previous administration also took the decision to halt and reconsider the Bill. *Given the significant opposition, we urge the Government to reconsider its decision to proceed with the Bill.*

The Government's commitment to remain party to the ECHR

30. At a statement given on the day of the First Reading of the Bill, the Secretary of State for Justice confirmed that the Government intends to remain a state party to the ECHR.[49] He reiterated that commitment in a letter to us dated 14 July 2022.[50] When asked about withdrawal from the ECHR by the Justice Committee on 22 November 2022, the Secretary of State said he was "not entirely clear what the upsides would be."[51] We were also pleased when the Secretary of State, in evidence to us, reiterated that the Government "want to stay within the Convention". However, we were concerned that he refused to rule out potential future withdrawal and said "Nothing is off the table for the future."[52] We think the Government's commitment to the ECHR is crucial at a time when Russia has already shown contempt for the principles of the Council of Europe by invading Ukraine, resulting in its expulsion from the organisation.[53]

31. Some stakeholders raised concerns that certain provisions of the Bill would risk the UK being in breach of its international obligations under the ECHR. In their evidence to us, Professor Conor Gearty and Dr Giulia Gentile of the London School of Economics described the Government's approach as "cake-ism", whereby they are "seeking to retain membership of the Council of Europe while resiling from what its obligations entail."[54] We address this issue in greater detail in Chapter 6 below.

32. **We welcome the various statements made by the Government that affirm its commitment to remaining party to the ECHR. However, the Secretary of State cast doubt over those commitments when he refused to rule out the possibility of the UK leaving the Convention in the future. Leaving the Convention would be a deplorable and regressive step, which would see the UK become an outlier in Europe alongside Russia and Belarus. The Government must be unequivocal in its commitment to the Convention and must continue to comply with its obligations under it.**

49 HC Deb 22 June 2022 c849
50 Letter from the Lord Chancellor to the Chair regarding the Bill of Rights, 14 July 2022
51 Oral evidence taken before the Justice Select Committee on 22 November 2022, HC (2022–23) 883, Q102.
52 Q21
53 Letter from the Acting Chair to the Lord Chancellor relating to the Bill of Rights, dated 30 June 2022
54 Professor Conor Gearty (Professor of Human Rights Law at London School of Economics); Dr Giulia Gentile (Fellow in Law at London School of Economics) (BOR0009)

2 Approach to interpretation: Convention rights

Interpreting the Convention rights - Clause 3 of the Bill

The European Convention on Human Rights

33. The ECHR is the key instrument which underpins the recognition and protection of human rights in the UK. The UK was involved in the drafting of the Convention in the aftermath of the Second World War, was one of the first states to ratify it in 1951, has been bound by it since it came into force in 1953 and has recognised the right of individuals to take their claims against the UK to the ECtHR since 1965. The HRA gave effect in domestic law to the rights set out in the Convention; the Bill of Rights Bill proposes to do the same. As with any law, however, how the Convention is interpreted by the domestic courts is crucial in determining the precise extent to which the rights it contains can be relied upon and enforced in the UK.

34. Clause 3 of the Bill of Rights Bill would dictate how the UK courts are to approach the interpretation and application of the ECHR rights contained in Schedule 1. It would effectively replace section 2 of the HRA, which requires domestic courts to "take into account" relevant Strasbourg case law when determining a question related to a Convention right. Clause 3 is intended to "encourage the courts to take a more restrained approach to interpreting Convention rights",[55] but will also add a new layer of complexity.

35. The Government explains why it is seeking to repeal and replace section 2 HRA in its consultation on HRA reform, which states that section 2 has:

> led the UK courts to conclude that Parliament had instructed them to keep up with, and match, the Strasbourg Court's case law, rather than apply the Convention rights in a UK context, and within the margin of appreciation that the Convention allows. Whilst the courts have retreated a little from this maximalist position, the ambiguity of section 2 continues to give rise to legal uncertainty and promote an over-reliance on the Strasbourg case law, at the expense of promoting a home-grown jurisprudence tailored to the UK tradition of liberty and rights.[56]

36. The effect of section 2 HRA as it stands is expressly *not* to require the domestic courts to follow the decisions of the ECtHR. The UK courts are free to depart from ECtHR case law wherever appropriate. As we have made clear in previous reports, we do not accept the Government's suggestion that the UK courts are inappropriately reliant on ECtHR jurisprudence as a result of section 2 HRA.[57]

55 Explanatory Notes to the Bill of Rights Bill [Bill 117 (2022–23) - EN], para 6

56 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021, para 114

57 See further: Joint Committee on Human Rights, Third Report of Session 2021–2022, The Government's Independent Review of the Human Rights Act, HC 89/HL 31, chapter 3; and Thirteenth Report of Session 2021–2022, Human Rights Act Reform, HC 1033/HL 191, chapter 3

The Supreme Court & Clause 3(1)

37. Clause 3 begins by providing that the Supreme Court is the ultimate judicial authority on questions arising under domestic law in connection with the Convention rights. This is simply a restatement of the current legal position in domestic law. As Professor Gavin Phillipson, Professor of Law at the University of Bristol, set out in evidence to the Justice Committee, clause 3(1) "is the case already. Once the Supreme Court has adopted an interpretation of a Convention right that may be in reliance on a Strasbourg reading, all the other courts are bound to follow that, even if there is other Strasbourg case law that comes along afterwards that is inconsistent with it."[58]

38. As a matter of international law, however, the body responsible for authoritatively interpreting the Convention rights is the ECtHR.[59] Furthermore, in accordance with Article 46(1) ECHR, its judgments are binding on the UK where the UK is a party to a judgment. Nothing in the Bill of Rights Bill can change either of these facts: they reflect the terms of the ECHR, which the UK has ratified. To the extent that clause 3(1) fails to acknowledge the important role of the ECtHR, it risks neglecting international law, causing confusion for those interpreting, applying, and relying on the Bill of Rights Bill and the ECHR.

The importance of the living instrument doctrine

39. Instead of the current requirement for the UK courts to take relevant Strasbourg case law into account, clause 3 does not specify any general approach that should be taken to that case law. It would, therefore, leave it open to the UK courts to determine for themselves the extent to which they have regard to the ECtHR's case law in applying the Convention rights in cases before them. One might expect material that is relevant to the case they are considering—including relevant ECtHR case law—still to be taken into account. There is every possibility that the UK courts would ultimately adopt a similar approach to that currently taken under section 2 HRA. This might, however, follow lengthy litigation and significant legal uncertainty.

40. In contrast to the approach taken to ECtHR case law, clause 3(2) does require UK courts, when interpreting any Convention right, to have particular regard to the text of that Convention right. The term "particular regard" (in the absence of an equivalent reference to the development of the rights through case law) may be seen as an attempt to encourage a more originalist reading of the Convention. By "originalist" we mean a focus on the text itself as a reflection of the intentions of the original drafters rather than on how the instrument in question has been applied since its origins as a result of societal

58 Q9, Professor Phillipson. Evidence to the Justice Select Committee on 5 July 2022.

59 See, for example, the speech of Lord Bingham in R (on the application of Ullah) v Special Adjudicator [2004] 2 AC 323 at para 20: "the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court."

changes. This view is supported by the fact that clause 3(2) also specifies that the Courts may have regard to the preparatory work of the Convention (i.e. documentary evidence of the negotiation, discussions and drafting of the Convention).[60]

41. The emphasis in clause 3(2) on the text of the Convention was welcomed by a small number of those who submitted evidence. The Free Speech Union consider it to be "necessary and justified as the judgments issued by the European Court of Human Rights (ECtHR) have often departed radically from the agreed text of the Convention".[61] Lord Sumption similarly suggested that the ECtHR has gone further than interpreting a text "so as to make it relevant to the current day … as applicable in current situations" to "creating analogous and supplementary rights" which "undoubtedly is a process that undermines the sovereignty of the United Kingdom's own decision-making organs."[62]

42. Nevertheless, many more witnesses expressed concern that overemphasis on the text of the Convention could prevent the UK courts protecting Convention rights as they have developed since the 1950s. For example, Amnesty International UK warned that:

> it will reduce rights protections for women, people of colour, LGBT+ people and other groups who were socially and politically marginalised, sometimes to the point of criminalisation, when the Convention's drafters were doing their work. In turn, it will cause increasing divergence between the rights protected by the Bill of Rights domestically and the Convention rights protected at Strasbourg. As with multiple other clauses in the [Bill of Rights Bill], this will inevitably lead to the UK having more cases taken against it, and the UK losing more of those cases.[63]

43. In particular, witnesses noted the inconsistency between this focus on the text of the Convention and its negotiation and the ECtHR's treatment of the Convention as a "living instrument", i.e. a set of rules that are interpreted so as to keep pace with changes in society.[64] The Government's consultation on reform of the HRA referred to the living instrument doctrine as "the Strasbourg Court's concerted attempt to pioneer, expand, and innovate human rights law beyond the rights set out in the Convention."[65] The British Institute of Human Rights stated that "human rights are only effective if they reflect the world we live in. This is why the ECHR is a 'living instrument' that is intended to be interpreted to match the modern day."[66] The 'living instrument' approach is not unfamiliar to UK law. The common law has always recognized the need to evolve and

60 We also note a practical concern raised by JUSTICE (BOR0071) about the emphasis given to the travaux preparatoires in clause 3(2):
"Looking back at the preparatory text of the Convention will provide little or no indication of what the drafters would have contemplated the result of the application of the Convention to the particular facts of a case many years later. It will however encourage additional arguments and disputes over the meaning and relevance or not of these documents, when the court's time could be more efficiently spent addressing the facts of the case before it."

61 Free Speech Union (BOR0043)

62 Q9

63 Amnesty International UK (BOR0033)

64 Tyrer v United Kingdom, App. No. 5856/72: "the Convention is a living instrument which . . . must be interpreted in the light of present day conditions"

65 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021, para 99

66 The British Institute of Human Rights (BOR0039)

adapt to modern conditions.[67] Similarly, statutes are said to be 'always speaking' and must be interpreted so they can apply to situations which were not contemplated at the time they were first passed.[68]

44. The Scottish Government noted an obvious example of how important the living instrument doctrine is to the protection of human rights in the 21st century:

> To take the most obvious example, Article 14 of the Convention makes no reference to prohibiting discrimination on the grounds of sexual orientation. This is because homosexuality was criminalised in most jurisdictions at the time the Convention was drafted. The "living instrument" doctrine has subsequently enabled that injustice to be corrected.[69]

45. The risk of focusing too greatly on the text of the Convention at the expense of the way it has been interpreted by the ECtHR over the past 70 years is, therefore, twofold. Firstly, it risks unravelling the hugely important and largely uncontroversial developments in human rights recognition that have taken place since the 1950s. Secondly, it risks putting the UK out of step with past and future developments recognised by the ECtHR, leaving human rights victims in the UK who want to enforce their rights with no option but to take their claims to Strasbourg. As Dr Alan Greene of Birmingham Law School summed up:

> As the Convention meaning evolves over time, there is a risk that greater divergences and tensions may emerge between domestic courts and the ECtHR.[70]

46. **Any suggestion of an 'originalist' approach to the interpretation of Convention rights would be damaging to human rights in the UK. The living instrument doctrine ensures protection for the human rights we recognise now, rather than those accepted in 1950. It is central to the operation of the Convention.**

Restricting expansive or innovative interpretation

47. The focus of clause 3(2) of the Bill appears to be on freeing the UK courts from the influence of the ECtHR. It is perhaps surprising, then, that clause 3(3) of the Bill would appear to do the opposite.

48. Clause 3(3) would provide that UK courts may adopt an interpretation of a Convention right that diverges from the case law of the ECtHR, but may not adopt an interpretation of the Convention right that "expands the protection conferred by the right unless the court has no reasonable doubt" that the ECtHR would adopt that interpretation if the case were before it. This part of clause 3 therefore permits UK courts to give *less* protection to human rights than that provided under the ECtHR's case law, but prohibits them from being

67 Baroness Hale has described the common law judge as "seeking to identify and apply the underlying principles of the law, extending and adapting them to meet new situations but not turning them on their head", Dialogue between judges, European Court of Human Rights, Council of Europe, 2011

68 See McFarland's Application for Judicial Review, Re [2004] UKHL 17; [2004] 1 W.L.R. 1289 at 25: "It is now settled that legislation, primary or secondary, must be accorded an always speaking construction unless the language and structure of statute reveals an intention to impress on the statute a historic meaning. Exceptions to the general principle are a rarity."

69 The Scottish Government (BOR0052)

70 Dr Alan Greene (Reader in Constitutional Law and Human Rights at Birmingham Law School) (BOR0006)

more generous in human rights protection, unless there is no reasonable doubt that the ECtHR would give that interpretation.[71] The Secretary of State suggested in evidence to us that clause 3(3) would "encourage the UK courts to adopt a more autonomous approach to the interpretation of case law"—but that the provision means this can only possibly be in one direction, lowering the protections Strasbourg offers and widening the gap between domestic law and our international commitments.[72] The Secretary of State also said that clause 3 would provide a "clearer framework".[73] We note and concur with the opposite view expressed by Professor Conor Gearty and Dr Giulia Gentile of the London School of Economics: "Clause 3(3)(a) and (b) overall unnecessarily complicate the UK courts' task of applying ECHR rights in UK domestic law."[74]

49. By preventing the UK courts interpreting Convention rights "more expansively than the ECtHR has or would", clause 3(3) expressly imposes a ceiling on rights while maintaining that "there is no 'floor' in relation to the Strasbourg jurisprudence."[75] As the Scottish Government told us, this appears "to overturn the principle that Convention rights provide a "floor" and not a "ceiling".[76]

50. The likely consequences of clause 3(3) appear inconsistent with the Government's apparent intention to create a more distinctly British system of rights protection, instead elevating the ECtHR and reducing the relative power of domestic courts. As Professor Jacques Hartmann, Professor of International Law at University of Dundee, and Dr Samuel White, Lecturer in Law at University of the West of Scotland, explain:

> [S]trictly limiting the domestic courts' ability to interpret the extent of ECHR rights in perpetuity harms, rather than enhances, the development of a uniquely British approach to the Convention rights… The proposed Clause 3 flies in the face of the traditional principle of subsidiarity. It limits the UK courts' ability to develop human rights standards within the framework of the ECHR in a way that accommodated particular aspects of the UK's constitutional position.[77]

51. The requirement that there be "no reasonable doubt" before the Courts are permitted to adopt an interpretation of a Convention right beyond that already established by the ECtHR involves a particularly high threshold.[78] It would prevent the courts adopting obviously innovative interpretations, but could also stop them adopting a more limited and sensible (even obvious) approach to interpretation because there was some doubt that the ECtHR might take a somewhat different interpretative approach. This will leave

71 Clause 3(3) does also demonstrate that domestic courts will still be under an obligation to take into account ECtHR case law, in some way, despite the absence of any reference to it in clause 3(2).

72 Q26

73 Q25

74 Professor Conor Gearty (Professor of Human Rights Law at London School of Economics); Dr Giulia Gentile (Fellow in Law at London School of Economics) (BOR0009)

75 Explanatory Notes to the Bill of Rights Bill [Bill 117 (2022–23) - EN], para 51

76 The Scottish Government (BOR0052)

77 Professor Jacques Hartmann (Professor of International Law at University of Dundee); Dr Samuel White (Lecturer in Law at University of the West of Scotland) (BOR0015)

78 Professor Guglielmo Verdirame QC, Barrister, Twenty Essex Chambers, and Professor of International Law, King's College London noted to the Justice Select Committee: "Reasonable doubt is a bit strange in this context. If you apply it in the way in which it is normally understood—99% to 100% certainty—there is always reasonable doubt in this context and this kind of adjudication." Oral evidence taken before the Justice Committee on 5 July 2022, HC 562, Q11.

victims having to turn to Strasbourg to obtain a progressive interpretation of their rights. Overall, as the Law Society concludes, "domestic courts would have the final say on fewer, not more, human rights cases, contradicting the very rationale for Clause 3."[79]

Clause 3(3) and domestic case law

52. The Secretary of State for Justice defended clause 3(3)(a) in correspondence with our Chair, arguing that it was consistent with the approach currently taken by domestic courts. He noted that it "reflects the position set out recently in the Supreme Court judgment in *R(AB) v Secretary of State for Justice* that domestic courts should not take the protection of the Convention rights further than they can be fully confident the ECtHR would go".[80] However, *AB* makes it clear that what it is discouraging is "a major departure from the principles currently laid down in the Convention jurisprudence".[81] Lord Reed explained in *AB* that the court was not saying domestic courts "are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European court, they [UK Courts] can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law."[82] This is a long way from requiring there be no reasonable doubt as to Strasbourg's interpretation.

53. The Secretary of State also noted that clause 3(3)(a) would not "prevent Parliament from legislating to provide greater protection in certain areas or prevent domestic courts from continuing to develop the common law." This is true, to an extent, but does not assist those seeking to enforce their Convention rights. Furthermore, it is very rare for the common law to provide rights that go beyond those provided by the Convention (hence the need for the HRA). It is also surprising that the Government should turn to judge-made common law as an answer to criticism of reforms designed, at least in part, to reign in apparent judicial overreach.

Judicial dialogue

54. By taking the UK courts' focus away from Strasbourg case law and encouraging a disconnect between interpretation of the Convention in the UK and interpretation in Strasbourg, as well as by tying their hands in respect of more expansive interpretations, the Bill, and clause 3 specifically, would reduce the scope for valuable "dialogue" between national courts and the ECtHR. This dialogue arises in particular where there are complex issues of domestic law or context to consider when the ECtHR applies human rights standards to a given scenario. The UK courts apply the ECHR, putting their own stamp on the principles established by the ECtHR. The Strasbourg court then refers to the decisions of the domestic courts when it comes to consider such cases. As Lord Mance, former Justice of the Supreme Court, has recently noted, this dialogue has seen UK courts influence the approach taken by the ECtHR, to the UK's benefit:

79 The Law Society (BOR0046)
80 Letter from the Lord Chancellor to the Chair regarding the Bill of Rights, 14 July 2022, para 14
81 R (on the application of AB) v Secretary of state for Justice [2021] UKSC 29, para 53
82 Ibid, para 59

> United Kingdom jurisprudence has over time proved outstandingly influential in Strasbourg, in assisting mutual understanding, in helping shape the development of Convention law and in avoiding situations where the UK is at risk of being found in breach of the Convention.[83]

55. We have previously stated that section 2 of the HRA, which would be replaced by clause 3 of the Bill, has been of central importance to that dialogue by enabling the courts to 'speak the same language'.[84] Section 2 ensures that UK courts effectively engage with the reasoning of the relevant ECtHR caselaw in domestic proceedings. As a result, the ECtHR has faith in the analysis carried out by those courts.

56. The healthy state of the current dialogue between the UK courts and the ECtHR was commented on in IHRAR's report and in our own report made in response to the IHRAR consultation.[85] A consequence of this respect between our courts is a greater 'margin of appreciation' being afforded to the UK. The 'margin of appreciation' is a recognition that in certain contexts national authorities have available to them a degree of discretion in their choice of policy when regulating the exercise of a Convention right. This stems from the doctrine of 'subsidiarity', or acknowledgement that the "the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court [ECtHR]. The Court can and should intervene only where the domestic authorities fail in that task."[86]

57. Where the Strasbourg court accepts that a state is acting within its margin of appreciation, it will not further scrutinise the merits of the particular decision in question. The ECtHR is more likely to grant a wide margin of appreciation to the State where the ECtHR has confidence in the way in which the national courts address human rights issues arising before them.[87] It is hard to understand why the Government would want to damage judicial dialogue and risk undermining the margin of appreciation the UK is currently granted.[88] As President Robert Spano and Judge Tim Eicke told us in evidence for our inquiry into IHRAR:

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83 Lord Mance, The Thomas More Lecture, "The Protection of Rights – this way, that way, forwards, backwards …", 26 October 2022. Lord Mance noted in particular that the judicial dialogue includes examples of the Supreme Court declining to adopt Strasbourg case law, and ultimately persuading Strasbourg to modify its jurisprudence: see e.g. R v Horncastle [2009] UKSC 14 and R (Hicks) v Commissioner of Police [2017] UKSC 9, leading to ECtHR Grand Chamber decisions in Al-Khawaja and Tahery v UK, App. No. 26766/05 and S, V and A v Denmark, App. No. 35553/12.

84 Joint Committee on Human Rights, Thirteenth Report of Session 2021–22, Human Rights Act Reform, HC 1033 / HL Paper 191, para 30

85 Joint Committee on Human Rights, Third Report of Session 2021–2022, The Government's Independent Review of the Human Rights Act, HC 89/HL 31, chapter 3. Ministry of Justice, The Independent Human Rights Act Review Report, 2021, CP 586, chapters 2, 3 and 4. IHRAR though it "important that the respect enjoyed by the UK Courts and Judiciary in Strasbourg and the ECtHR's gratifying receptiveness to UK judicial thinking, should be widely and better appreciated domestically".

86 As defined in the European Court of Human Rights, Interlaken Follow Up, Principle of Subsidiarity, Note by the Jurisconsult, 8/7/2010

87 Paul Mahoney, when Judge at the ECtHR, noted that: "There will be less temptation for the Strasbourg Court to engage in micro-management of individual situations or even in reviewing the preceding policy-making and, thus, less inclination to disturb the rulings of the national courts if the national courts are visibly operating domestic remedies with an eye to compliance with Convention standards and case-law." The relationship between the Strasbourg court and the national courts, Paul Mahoney, Law Quarterly Review L.Q.R. 2014, 130 (Oct), 568–586

88 Discussed further in Joint Committee on Human Rights, Third Report of Session 2021–2022, The Government's Independent Review of the Human Rights Act, HC 89/HL 31, chapter 3

> Analysis of Strasbourg case-law by UK domestic courts and in particular its superior courts shows an in-depth understanding of the Court's caselaw… When the national authorities have demonstrated in cases before the Court that they have taken their obligations to secure Convention rights seriously the Court may apply the concept of subsidiarity more robustly …[89]

58. The Bill of Rights Bill, and particularly the replacement of section 2 HRA with clause 3, puts the positive judicial dialogue between UK courts and ECtHR, and thus the margin of appreciation, at risk. As Liberty put it, clause 3 would "turn what has been a dialogue into a monologue from the ECtHR, with our ability to influence Strasbourg jurisprudence significantly curtailed, and limits to our rights protections set by Strasbourg."[90]

59. **Clause 3 of the Bill of Rights would replace the sensible, balanced approach to interpretation of the Convention set out in section 2 HRA with a more complex and less effective alternative. Emphasis on the original text of the Convention, and the absence of direct reference to the case law of the European Court of Human Rights, puts at risk the development of domestic human rights protection consistent with that provided by the Strasbourg Court. Restricting UK courts' ability to go further than the European Court of Human Rights in protecting Convention rights obstructs the creation of domestic human rights case law and damages the current positive judicial dialogue between our courts and Strasbourg. This could reduce the 'margin of appreciation' currently afforded to the United Kingdom by the European Court of Human Rights.**

60. **Clause 3 increases the likelihood that domestic claimants will need to take their claims to the Strasbourg court to obtain an effective remedy for violations of their human rights and increases the likelihood of the UK being found in breach of its human rights obligations in international law.**

61. ***Section 2 of the HRA is not in need of amendment. Clause 3 should be replaced with a clause mirroring the current law (see Annex, Amendments 1 and 2).***

Positive obligations and clause 5

The importance of positive obligations

62. The doctrine of positive obligations is a central principle of the Convention. Positive obligations go beyond a duty not to interfere with Convention rights, and require that, in some circumstances, the State must take active steps to protect people's rights against interference by others. In evidence to us, the Justice Secretary said that positive obligations are "by definition" not "grounded in the convention".[91] On the contrary, the legal basis for the imposition of positive obligations arises from the Convention rights. In some cases, the express wording of certain rights imposes positive duties on states. For example, Article 13 requires states to provide for an effective remedy for breaches of Convention rights and Article 6 requires states to provide free legal assistance and interpreters in certain circumstances.[92] In other cases, positive obligations have been implied into the interpretation of a Convention right—for example, it is not possible to adequately respect

89 European Court of Human Rights (HRA0011)
90 Liberty (BOR0021)
91 Q28
92 Article 6(3)(c) and (e)

the right to life without requiring the state to ensure that there are effective laws and law enforcement machinery in place to protect life. Further, Article 1 ECHR requires states to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention—this includes both negative and positive obligations. It is not possible, therefore, to comply with the UK's obligations under the Convention without complying with positive obligations.

63. Positive obligations under the Convention have been fundamental in some very significant human rights cases, including the challenge to the police's flawed investigation into serial sex offender, John Worboys.

Box 1: Commissioner of Police of the Metropolis v DSD and another

Background

Between 2003 and 2008, John Worboys, the driver of a black cab, committed over 105 rapes and sexual assaults on women who were his passengers.[93] In March 2009, Worboys was convicted of 19 serious sexual offences committed between October 2006 and February 2008 involving twelve victims. He was subsequently sentenced to an indeterminate sentence for public protection with a minimum term of 8 years, less time on remand.[94]

Legal challenge

Two of Worboys' victims, DSD and NBV, brought legal proceedings against the police under the HRA, alleging failure to conduct effective investigations into Worboys' crimes. DSD was among his first victims. She was attacked in 2003. NBV was assaulted by Worboys in July 2007. DSD and NBV claimed that the police's failures constituted a violation of their rights under Article 3 ECHR, which provides that no one shall be subjected to torture or inhuman or degrading treatment or punishment.

Article 3 and positive obligations

One of the central issues in the case was whether Article 3 imposes a positive obligation on states to effectively investigate reported crimes perpetrated by private individuals. The High Court and the Court of Appeal held that a positive obligation to investigate did exist and that, in this case, the police had breached that obligation.

The High Court found that there were both systemic and operational failures in the course of the police investigation, which included failures to: provide training, properly supervise and manage, properly use available intelligence sources, have in place proper systems to ensure victim confidence and allocate adequate resources.[95] Without recognition of the positive obligation imposed by Article 3, these failings would not have been found to be unlawful.

The Commissioner of the Metropolitan Police appealed to the Supreme Court. The Supreme Court unanimously dismissed the appeal.[96]

The importance of positive obligations

In their evidence, the Centre for Women's Justice, providing *DSD* as an example, told us that "some of the most helpful cases relating to vindicating the rights of, and protecting the lives of, women and girls have arisen in the context of positive obligations on the State to investigate serious allegations."[97]

64. Clause 5 of the Bill would prohibit the domestic courts from applying any new positive obligations adopted by the ECtHR following enactment of the Bill ("post-commencement interpretations"). It would also require the courts, in deciding whether to apply an existing positive obligation ("pre-commencement interpretations"), to give "great weight to the need to avoid" adopting an interpretation of Convention rights that would:

a) have an impact on the ability of the public authority or of any other public authority to perform its functions;

93 The Commissioner of Police of the Metropolis -v- DSD and NBV (judiciary.uk)
94 The Parole System of England and Wales, CBP-8656, House of Commons Library, 20 June 2022
95 DSD and NBV -v- The Commissioner of Police for the Metropolis (judiciary.uk), para 246
96 Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents) (supremecourt.uk)
97 Centre for Women's Justice (BOR0055)

b) conflict with or otherwise undermine the public interest in allowing public authorities to use their own expertise when deciding how to allocate the financial and other resources available to them, including in particular the professional judgment of those involved in operational matters;

c) require the police to protect individuals who are involved in criminal activity or otherwise undermine the police's ability to determine their operational priorities;

d) require an inquiry or other investigation to be conducted to a standard that is higher than is reasonable in all the circumstances;

e) affect the operation of primary legislation (including primary legislation relating to supply and appropriation).

65. A positive obligation is defined as an "obligation to do any act". The effects of this clause are (i) a 'freeze' on the development of positive obligations in domestic law in response to new situations and (ii) a restraint on the application of existing positive obligations in domestic law.

The Government's rationale

66. The intent of clause 5 is to "guide courts to consider the wider implications of their decision (rather than just the need to do justice in the particular case)".[98] The Government explains in the Explanatory Notes to the Bill that the list of factors (set out above at paragraph 65) "is not intended to be exhaustive".[99] The underlying rationale appears to be that positive obligations impose a disproportionate burden on public authorities and fetter their operational decision-making. In our view, this rationale is flawed.

67. The courts already take into account the importance of balancing interests and proportionality in the application of positive obligations. Firstly, when determining whether or not a positive obligation exists, the ECtHR will have regard to "the fair balance to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention."[100] The domestic courts have applied the same principle, finding that striking a fair balance depends on whether the obligation in question is proportionate.[101] A public authority will show that it has acted proportionately if it proves (i) that the objective which is sought to be achieved is sufficiently justified to limit the fundamental right; (ii) that the means chosen to meet the objective are rational, fair and not arbitrary; and (iii) that the means used to impair the right are no more than necessary to accomplish that objective and are as minimal as reasonably possible.[102]

68. Secondly, there is no clear case that the positive obligations that have been imposed on public authorities, to date, are unreasonably onerous. The scope of positive obligations has been developed over time through domestic and ECtHR case law. The right to life under Article 2 is a prime example, as the duty to take positive action has been applied to

98 Explanatory Notes to the Bill of Rights Bill [Bill 117 (2022–23) - EN], para 61
99 Explanatory Notes to the Bill of Rights Bill [Bill 117 (2022–23) - EN], para 61
100 Goodwin v UK (2002) 35 EHRR 18
101 R(Pretty) v DPP [2002] 1 AC 800
102 R(Pretty) v DPP [2002] 1 AC 800

novel scenarios through case law to cover, for example, accidental deaths due to natural disasters[103] and protection against domestic violence resulting in death.[104] The threshold for the imposition of this duty under Article 2 is a high one, requiring the risk to life to be "real and immediate". In fact, the courts have, on occasion, found this test to be particularly restrictive.[105] In written evidence, the Helen Bamber Foundation and Asylum Aid note that the threshold is equally high in relation to preventing modern slavery and human trafficking, because under Article 4 ECHR (the prohibition of slavery and enforced labour), "public authorities are not required to act on a specific case until they are aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been or was at real and immediate risk of being trafficked."[106]

69. Thirdly, whilst the resources of public authorities are a legitimate concern, the Government has not provided any evidence of the resource burden upon public authorities as a direct result of their positive obligations under the Convention. The Government cites the burden of issuing threat to life notices, which they say has added complexity and expense to police operations and diverted resource towards protecting serious criminals in gangs and away from protecting ordinary citizens, without any evidence or data to provide authority for their concerns. Threat to life notices were implemented following the case of Osman v UK,[107] however, these notices were not prescribed by the ECtHR as a means of compliance with Article 2 ECHR. The measure has in fact been adopted by the Government in order to adhere to the obligation to protect life where there is a real and immediate risk. It is, therefore, open to the Government to change this measure as it sees fit. The Centre for Women's Justice also points out that these notices are used in domestic violence matters and that they have "undoubtedly saved women's lives":

> The consultation paper preceding this Bill suggested that the "threat to life" notices which have followed Osman are an operational burden on the police, outlining that 770 such notices were issued in 2019 by the 4 biggest forces. What it fails to outline is whether that resulted in people not being killed; which would surely be a positive outcome. Indeed, while the paper focuses on such notices being given to those who are purportedly involved in gang violence (implying that their lives are less worthwhile than any others) it fails to mention that such notices are also used for victims of domestic violence, "honour" based violence, and stalking.[108]

103 Oneryildiz v Turkey ECHR 30 November 2004

104 Budayeva v Russia ECHR 20 Mar 2008

105 Van Colle v Chief Constable of Hertfordshire Police [2008] UKHL 50

106 Helen Bamber Foundation, Asylum Aid (BOR0017)

107 Osman v UK (2000) 29 EHRR 245. In this case, a teacher became obsessed with one of his pupils. He shot and wounded the pupil and killed his father. The family claimed that the police had violated Article 2 by failing to protect the pupil and his father from a teacher known to have been obsessed with his pupil. The ECtHR held that, in order for a positive obligation to be engaged, the state must have known or ought to have known that there was a real and immediate risk to life and yet failed to take measures within the scope of their power, which, judged reasonably, might have been expected to avoid that risk. The Court found that the police had done all they reasonably could and there was, therefore, no violation of Article 2

108 Centre for Women's Justice (BOR0055)

70. When asked if he agrees with the evidence that threat to life notices have saved lives, the Secretary of State responded: "No, what is saving lives is the police".[109] This response ignores the fact that the police are saving lives, including the lives of women and girls, by acting in compliance with the positive obligation to protect life where there is a real and immediate risk.

Failure to comply with Convention rights and divergence with Strasbourg

Clause 5(1) - post-commencement positive obligations

71. As positive obligations inevitably continue to develop in response to novel scenarios, it is likely that the ECtHR will adopt new interpretations of Convention rights which impose a positive obligation upon states. As noted by the British Institute for Human Rights, "[n]ew situations arise all the time. For instance, during the Covid-19 pandemic we saw the importance of positive obligations to secure PPE for health and care staff as well as protecting clinically vulnerable people. It is reductionist and dangerous to seek to prevent our human rights applying in new situations."[110] When a new interpretation arises, the domestic courts will be prevented from adopting the same interpretation as the ECtHR by virtue of clause 5(1), which would prohibit courts from requiring public authorities to comply with new positive obligations. This differs to the current approach taken by the domestic courts, which is to keep pace with Strasbourg jurisprudence. Clause 5(1) is therefore likely to lead to a failure to give full effect to Convention rights in domestic law, as required by Article 1 ECHR.

72. We asked the Secretary of State why he wants to weaken the protections afforded by positive obligations which have been crucial in cases such as the Hillsborough inquest or the Worboys case. The Justice Secretary said "[n]othing in our proposals would have prevented the Hillsborough inquiry. You mentioned John Worboys as well. Again, that is the same thing".[111] We disagree. If clause 5(1) had been operative at the time of the Worboys case, courts would have been prohibited from applying 'new' positive obligations—including the investigative obligation arising from Article 3 ECHR in respect of non-State actors which was a novel interpretation in the Worboys case. Amnesty International UK warns of the implications of clause 5(1):

> Take the example of the Worboys case, which was at the time it was promulgated a 'new positive obligation' within the meaning of Clause 5(1). It is clear that the development of the operational positive obligations on police towards a duty of care to individual victims, primarily women, with regards to investigations in cases of rape or other serious sexual assault, has been a crucial tool in ongoing efforts to break the longstanding ways of working and attitudes ingrained in the way the police operated in relation to these issues. An arbitrary and sweeping ban on any future developments along these and similar lines, involving the police or other public authorities of concern, will lead to serious failings and, ultimately, human rights violations.[112]

109 Q28
110 The British Institute of Human Rights (BOR0039)
111 Q28
112 Amnesty International UK (BOR0053)

Clause 5(2) - pre-commencement positive obligations

73. Clause 5(2) requires courts to give great weight to the need to avoid a list of five factors (set out in paragraph 64 above) when considering whether to apply an existing positive obligation. In their evidence, the Equality and Human Rights Commission said that clause 5(2) may result in positive obligations being "applied in very few circumstances, thereby reducing human rights protections–including for people in vulnerable situations or marginalised communities."[113] This restrictive application of Convention rights is likely to result in a failure to comply with our obligations under the Convention. In fact, the Government explicitly states in the Explanatory Notes to the Bill that "this will prevent domestic courts from keeping pace with post-commencement judgments from the ECtHR".[114]

74. There are five scenarios listed in clause 5(2) (set out at paragraph 64 above) which are drafted extremely broadly and may therefore be applied by the courts in a myriad of cases where individuals are trying to enforce their rights against public authorities. For example, it is hard to envisage a scenario in which the application of a positive obligation would not have an impact on the ability of a public authority to perform its functions (clause 5(2)(a)) or to use their expertise to decide upon the allocation of resources (clause 5(2)(b))—in which case, the courts will be under a duty to give great weight to the need to avoid applying the positive obligation, to the detriment of the individual. Once again, this risks preventing important and welcome developments in the law that have helped to save lives. When Professor Mark Elliott, Professor of Public Law and Chair of the Faculty of Law, University of Cambridge, gave evidence to the Justice Committee, he said, "It seems clear that the kind of positive obligations that Worboys enforced would affect the police's ability to determine their own operational priorities. My assessment is that judgments like Worboys would be much less likely under the Bill of Rights".[115] The Secretary of State told us that he did not think Professor Elliot was right, and went on to say that "encouraging litigation against the police is not a particularly effective means of the oversight we all want" and risks "skew[ing] operational priorities … and skew[ing] resources".[116] We think it is plain that Professor Elliot's assessment is correct, not least because the Secretary of State's own concerns about the consequences of litigation against the police in cases like Worboys overlap with the factors set out in clause 5(2) of the Bill. We are troubled by what appears to be an acknowledgment that clause 5 will discourage litigation against the police, particularly at a time when unlawful and criminal conduct by some serving police officers has been brought into sharp focus.[117]

75. Clause 5(2)(c) appears to be intended to address the Government's concern that 'threat to life notices' place an onerous burden on the police. However, the drafting of clause 5(2)(c) is much broader than 'threats to life', requiring the courts to avoid applying a positive obligation where this would require the police to "protect individuals who are

113 Equality and Human Rights Commission (BOR0080), para 12

114 Explanatory Notes to the Bill of Rights Bill [Bill 117 (2022–23) - EN], para 70

115 Oral evidence taken before the Justice Committee on 5 July 2022, HC 562, Q43

116 Q28

117 By events such as the murder of Sarah Everard by the Metropolitan Police Officer Wayne Couzens in 2021, the sharing of images of the bodies of murder victims Biba Henry and Nicole Smallman in 2020 and the January 2022 Independent Office for Police Conduct (IOPC) report into the behaviour of officers at Charing Cross police station.

involved in criminal activity or otherwise undermine the police's ability to determine their operational priorities". This would catch all sorts of situations, such as children involved in criminal activity whose lives are at risk.

76. Clause 5(2)(d) would appear to be aimed at restricting the imposition of the obligation to undertake effective investigations, and implies that the standards currently required by Articles 2 (the right to life) and 3 (the prohibition of torture) ECHR are "higher than reasonable". Yet the investigative obligations that arise under the Convention have been vital in ensuring justice in cases such as the Worboys case (see Box 1 above). The Article 2 ECHR investigative obligation also requires enhanced inquests when the State may bear responsibility for a death, with family members entitled to participation. Without this positive obligation we would not have seen inquests conducting a full exploration of the circumstances that led to the deaths of 96 people at Hillsborough in 1989. The Centre for Women's Justice notes the importance of the investigative duty in the context of inquests:

> It would not be an overstatement to say that the HRA has revolutionised the way that inquests into state-related deaths are carried out. Many such 'Article 2 inquests' now result in families of those who have died at the hands of the state or as a consequence of state failings, being able to participate in open hearings and expose wrongdoings and cover-ups such as in the Hillsborough inquest. It has also enabled Coroners' recommendations to prevent future deaths. In the sphere of violence against women, such inquests can help identify police failings to use their powers to enforce non-molestation orders and other measures that might otherwise have prevented homicide.[118]

It is not clear why the Government believes the existing obligations to investigate certain deaths and cases of serious harm are unreasonable.

77. Clause 5(2)(e), which refers to the operation of primary legislation, is vague and could also be relevant in a wide range of cases where public authorities are acting in accordance with duties set out in primary legislation.

78. Although clause 5(2) does not place an absolute prohibition on the application of existing positive obligations, it does place a duty on the courts to give "great weight" to avoiding a series of extremely broad scenarios. It is, therefore, likely to result in the restrictive application of recognised positive obligations, which would include, for example, the duty to provide appropriate medical treatment for those detained by the state;[119] to investigate deaths and near-deaths in custody;[120] and to provide basic subsistence to asylum-seekers to avoid destitution.[121]

79. Clause 5 (7) defines a positive obligation as an 'obligation to do any act'. The broad definition of positive obligations means that the scope of this damaging clause is extremely wide-ranging. As the Community Policy Forum told us, the definition of a positive obligation in the Bill "could foreseeably include the police protecting a victim of domestic violence or mental health services performing a risk assessment before discharging a

118 Centre for Women's Justice (BOR0055)

119 Tarariyeva v Russia ECHR 14 Dec 2006

120 Amin v SSHD [2003] UKHL 51; R v Coroner for Western District of Somerset ex p Middleton [2004] UKHL 10; R (JL) v SSJ [2008] UKHL 68

121 R (Limbuela) v SSHD [2005] UKHL 66

patient who poses a risk to their own life. As such, [clause 5] undermines the benefit of the current protections for the public in the broadest terms (including protecting children, victims of stalking and sexual assault, survivors of domestic abuse, and victims of trafficking, as well as allowing bereaved families to seek justice for loved ones)."[122]

Lack of clarity between positive and negative obligations

80. Although the Government states that its intention is to make matters clearer for public authorities, the distinction between positive and negative obligations is in practice not always clear. For example, in the case of Keegan v Ireland concerning Article 8 ECHR rights (the right to respect for private and family life) in the context of adoption, the ECtHR held that "the boundaries between the State's positive and negative obligations under [Article 8 ECHR] do not lend themselves to precise definition."[123] This case involved the claim that the State had violated Article 8 ECHR rights due to the breakdown in family relationships resulting from (i) the State's failure to provide sufficient protection for the biological father (which is a positive obligation to protect) and (ii) the State's interference in the adoption procedure (which is a negative obligation to refrain from interfering in family life).

81. The domestic courts have also noted that the distinction between the two types of obligation can be unhelpful. In the case of *Limbuela*, the House of Lords held: "it seems to me generally unhelpful to attempt to analyse obligations arising under Article 3 as negative or positive, and the state's conduct as active or passive. Time and again these are shown to be false dichotomies. The real issue in all these cases is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim."[124] In his written evidence, Professor Colm O'Cinneide, Professor of Constitutional and Human Rights Law at University College London, concludes that "[t]he attempt … to define what constitutes a 'positive obligation' is utterly unworkable. It makes use of a distinction–between an obligation to do an act as distinct from refraining from doing an act–which is best described as metaphysical at best. It is also a distinction which falls apart when it comes e.g. to case-law involving reasonable accommodation or 'Thlimmenos-style' Article 14 claims,[125] where refraining from an act may also simultaneously be classified as negative discriminatory treatment."[126]

82. It is also not clear how the severing of positive obligations would apply, for example, to Convention rights that contain express provision of a positive duty. For example, the requirement under Article 5 ECHR that public authorities ensure a detained individual is brought promptly before a judge is a positive obligation arising from the right to liberty and security. If this positive duty is considered to be a "pre-commencement interpretation" of Article 5 ECHR, it would be subject to the restraints imposed on the courts by clause 5(2) and could limit the application of a fundamental element of the right to liberty. As noted by Professor Conor Gearty and Dr Giulia Gentile, "the inclusion of positive duties in

122 Community Policy Forum (BOR0016)

123 Keegan v Ireland ECHR 26 May 1994, para 49

124 [2005] UKHL 66 [2006] 1 A.C. 396 Para 92

125 Thlimmenos v. Greece, App. No. 34369/97, Eur. Ct. H.R. (April 6, 2000), http://hudoc.echr.coe.int/eng?i=001–58561. This case recognised that Article 14 covers indirect discrimination: in addition to prohibiting different treatment of people in analogous situations without justification, Article 14 "is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

126 Colm O'Cinneide (Professor of Constitutional and Human Rights Law at UCL Faculty of Laws) (BOR0072)

the wording of Convention rights means that the exclusion of positive obligations under clause 5 may be contrary to the duty of UK courts to give prevalence to the wording of ECHR provisions under clause 3 of the Bill."[127] The lack of clarity that would result from the attempt to sever positive obligations from Convention rights will undoubtedly lead to confusion for individuals, public authorities, and the courts, culminating in unnecessary satellite litigation.

Conclusions on Clause 5

83. **The suggestion that positive obligations can be severed from negative obligations and either ignored or applied in a restricted manner is untenable. The positive duties arising from the Convention are expressly or impliedly contained within the Convention rights and are an important mechanism for securing rights protection for all persons within the jurisdiction of the State.**

84. **The evidence we have received makes clear that positive obligations have been vital for securing the protection of some of the most vulnerable people in society, such as women and girls experiencing domestic violence, 'honour-based' violence, or stalking. Positive obligations upon public authorities can save lives. We are therefore extremely concerned by the restrictive approach to positive obligations contained in clause 5 of the Bill.**

85. **The prohibition on the application of new positive obligations in the domestic courts, and the restrictions placed upon the application of existing positive obligations, is likely to put the UK at odds with the jurisprudence of the European Court of Human Rights (ECtHR). It is not clear to us how the courts can simultaneously be expected to comply with Convention rights (clause 12) and yet ignore or restrict their application. As a result of clause 5, it is highly likely that there will be a divergence between domestic and ECtHR interpretations of Convention rights. If an individual is unable to rely on their full Convention rights under domestic law, the individual would need to take their case to Strasbourg to seek a remedy, potentially leading to an adverse judgment against the UK. The Government is bound in international law to comply with final adverse judgments as required under Article 46 ECHR. Clause 5 cannot remove our obligations under international law—it will simply introduce barriers to the enforcement of rights in the domestic courts, increase the time and costs of litigation for both individuals and public authorities, and create a long road to enforcement in Strasbourg.**

86. **Far from giving greater certainty to public authorities, clause 5 will inevitably lead to uncertainty and litigation as questions will arise as to what constitutes an "interpretation", how to decide whether an obligation should be cast as "positive" or "negative", and whether an interpretation is new or already in existence. This undermines the Government's objective to increase certainty for public authorities and reduce the burdens on their resources.**

87. ***Unless the Government is prepared to reconsider Clause 5, we would like to see this clause removed from the Bill (Annex, Amendment 3).***

127 Professor Conor Gearty (Professor of Human Rights Law at London School of Economics); Dr Giulia Gentile (Fellow in Law at London School of Economics) (BOR0009)

3 Approach to interpretation - domestic legislation

Section 3 HRA

88. Section 3 HRA is crucial to the legal protection of human rights in the UK. It provides that all legislation must be read compatibly with Convention rights as far as it is possible to do so. Under the Bill of Rights Bill, section 3 HRA would be repealed and not replaced. We were surprised that the current Secretary of State for Justice recently told the Justice Committee that "[t]he crux is with section 3, it is not actually repealed. The clauses and the provisions may be in a different place. It certainly overhauls it; it is not quite right to say it repeals it in its entirety."[128] We strongly disagree. The same Secretary of State wrote to this Committee about the Bill of Rights in July, and referred repeatedly to the "repeal of section 3".[129]We cannot see how the Bill could be read in any other way, and were glad that the Secretary of State did not make the same claim in his evidence to our Committee.[130]

Box 2: Text of section 3 HRA (Interpretation of legislation)

> 3. (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section—(a) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Source: Human Rights Act 1998

89. While section 3 does impose a strong interpretive obligation, it was designed, like the HRA as a whole, to achieve a balance between the protection of fundamental human rights and the right of a democratically elected Parliament to pass legislation. Thus, as matter of well-established case law, it does not permit the courts to adopt an interpretation that is "inconsistent with the scheme of the legislation or with its essential principles."[131]

90. Where a Convention-compliant interpretation of primary legislation is not possible, section 3 cannot come into play. The courts can instead make a declaration of incompatibility under section 4 HRA, which simply states their opinion that the legislation does not comply with the Convention. The courts are not able to strike down primary legislation; this is consistent with the key constitutional principle of Parliamentary sovereignty. Incompatible legislation therefore continues to have effect until action is taken by the Government and

128 Oral evidence taken before the Justice Committee on 22 November 2022, HC 883, Q109
129 Letter from the Lord Chancellor to the Chair regarding the Bill of Rights, 14 July 2022, paras 3 and 7
130 Q18
131 Ghaidan v Godin-Mendoza [2004] 2 AC 557

Parliament in response to the declaration of incompatibility.[132] There is no requirement in domestic law for them to resolve an incompatibility, although a failure to take any action would be inconsistent with the UK's obligations under the ECHR. Since the HRA came into force, the courts have treated a section 4 declaration of incompatibility as a measure of last resort and have sought to avoid incompatibility by 'reading down' legislation, that is interpreting legislation as compatible with the Convention, using section 3 wherever possible.[133] Sections 3 and 4 HRA are at the heart of what Lord Carnwath has described as "a simple and elegant way of consolidating [Convention] rights within our own law, while respecting the key principle of Parliamentary Sovereignty".[134]

Proposed repeal

91. The Government has made clear that it sees the operation of section 3 HRA as inconsistent with the correct constitutional role of the courts, because it can result in the courts reading the law to mean something that Parliament did not intend.[135] Some experts share the Government's concerns. Professor Graham Gee of the University of Sheffield told us that section 3 could be said to be "warping the separation of powers … by obscuring the distinction between the judicial and legislative function."[136] As we have previously noted, however, it is hard to identify examples of cases in which the approach taken by the court justifies criticism.[137] In the vast majority of cases the courts have been careful not to use section 3 to interpret the law in a way that is inconsistent with the intention of Parliament.[138] We note that Parliament retains its authority by being able to pass legislation overruling any section 3 interpretation that it does not agree with, and observe that this opportunity has very rarely been taken up. Furthermore, setting aside objections based on constitutional concerns, section 3 has operated as an effective protection for human rights, preventing numerous pieces of incompatible legislation from unnecessarily violating individual rights (without having to wait for resolution by

132 The ECtHR held in 2006 that a declaration of incompatibility did not amount to a domestic "effective remedy" that needed to be exhausted before a claim could be brought to the Strasbourg Court (under Article 35(1) ECHR, an applicant may only bring a claim to the ECtHR if they have exhausted all the effective remedies that are available to them in their own country) – see Burden v UK, Application No 13378/05, Judgment, 12 December 2006. In many cases a declaration of incompatibility will not provide an individual with an effective remedy because they will receive no just satisfaction and the law affecting them will not change. The ECtHR has not, however, found that a declaration of incompatibility is inherently inconsistent with Article 13 ECHR because Article 13 does not require a contracting states to put in place measures by which individuals can challenge the validity of primary legislation (Greens and MT v United Kingdom (2011) 53 EHRR 21 at [90]-[92]).

133 See, for example, Ghaidan v Godin-Mendoza [2004] 2 AC 557 at para 50. The declaration of incompatibility as a measure of last resort is discussed further in Joint Committee on Human Rights, Third Report of Session 2021–22, The Government's Independent Review of the Human Rights Act, HC 89 HL Paper 31 at paras 123–131.

134 Constitutional Law Matters, 'Lord Carnwath lecture on Human Rights Act reform – is it time for a new British Bill of Rights?', accessed 14 December 2022

135 The Explanatory Notes that accompany the Bill state that the repeal of section 3 HRA "aim[s] to rebalance the relationship between the courts and Parliament by requiring that, where legislation cannot be read compatibly with the Convention rights using orthodox principles of construction, it should be for Parliament to address the issue." Explanatory Notes to the Bill of Rights Bill [Bill 117 (2022–23) - EN]

136 Oral evidence: The Government's Independent Human Rights Act Review, HC 1161, Wednesday 24 March 2021. Similar views have been expressed by the Judicial Powers Project and Professor Adam Tomkins, amongst others.

137 Joint Committee on Human Rights, Third Report of Session 2021–22, The Government's Independent Review of the Human Rights Act, HC 89 HL Paper 31, para 105

138 This view is consistent with that of IHRAR - see Ministry of Justice, The Independent Human Rights Act Review Report, 2021, CP 586, at para 182: "The Panel's conclusion, however, is that, notwithstanding the degree of feeling sometimes injected into the debate, there is no substantive case that UK Courts have misused section 3 or 4, certainly once there had been an opportunity for the application of the HRA to settle down in practice. There is a telling gulf between the extent of the mischief suggested by some and the reality of the application of sections 3 and 4."

Government and Parliament). Section 3 also has a wider effect on the way in which public authorities interpret their functions and duties. We have previously concluded that there is no case for amending or repealing section 3 HRA.[139]

92. The IHRAR Panel proposed a minor amendment to section 3 HRA, including a reminder that the courts should look first to the normal rules of interpretation before applying the requirements of section 3 HRA[140], but expressly rejected the idea of repeal. Of the 2,256 who responded directly to the Government consultation question on reform of section 3 HRA, only 86 (4%) supported the option of repealing the section without replacing it.[141] Nevertheless, this is what the Bill of Rights would do, with significant implications.

Effect on the courts

93. The removal of section 3 would mean that, when interpreting legislation that impacts on human rights, the courts would be expected to adopt the same approach they took prior to the introduction of the HRA.[142] This was to start with standard legislative interpretation, essentially following the ordinary and natural meaning of the language of the statute, but in cases of ambiguity in the meaning, the most Convention compliant available interpretation should be preferred. This approach to ambiguity is based on the general principle that it is presumed Parliament intended to act compatibly with the UK's international obligations—including those under the ECHR.[143] This is a principle with a weaker effect than the obligation imposed by section 3 HRA, preventing the courts from finding a Convention compliant reading of legislation in all but very limited circumstances (i.e. where there is ambiguity).

94. Perhaps surprisingly, repealing section 3 HRA would, for the purposes of statutory interpretation, appear to put the ECHR in the same position as every other international human rights treaty that the UK has ratified.[144] Despite the ECHR being central to the UK human rights framework and, to a significant extent, incorporated into domestic law first by the HRA and still through the Bill of Rights Bill, its guarantees would have no greater effect on statutory interpretation than unincorporated treaties.

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139 Joint Committee on Human Rights, Third Report of Session 2021–22, The Government's Independent Review of the Human Rights Act, HC 89 HL Paper 31, chapter 4

140 Something we consider the courts are already doing.

141 Respondents were given option 1 – repeal and not replace, or option 2 – repeal and replace with "a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation". 79% of respondents opted for 'neither – prefer no change', 11% opted for 'neither', 4% opted for 'Option 1', and 4% for 'Option 2'.

142 This is the Government's intention: "Following repeal of section 3, legislation will be interpreted in accordance with the normal rules of statutory interpretation." Letter from the Lord Chancellor to the Chair regarding the Bill of Rights, 14 July 2022.

143 See R v Secretary of State for the Home Department, ex p. Brind [1991] UKHL 4 (07 February 1991) and Garland v. British Rail Engineering Ltd. [1983] 2 A.C. 751

144 Such as the main UN human rights treaties:
- the International Covenant on Economic Social and Cultural Rights (ICESCR)
- the International Covenant on Civil and Political Rights (ICCPR)
- the Convention Against Torture (CAT)
- the Convention on the Elimination of Racial Discrimination (CERD)
- the Convention on the Elimination of Discrimination Against Women (CEDAW)
- the Convention on the Rights of the Child (CRC)
- the Convention on the Rights of Persons with Disabilities (UNCRPD)

95. The most significant practical effect of removing section 3 would be an increase in the number of cases where the courts, unable to read legislation in a compatible manner, find it to be incompatible with the Convention. As the Government have recognised, this is highly likely to result in a greater number of declarations of incompatibility being issued (potentially concerning legislation that has previously been read compatibly using section 3 HRA).[145] This would not only provide no immediate remedy for the human right victims who have brought the claim, but also will leave incompatible legislation in force, affecting more people, until a resolution (in the form of primary or secondary legislation) has been introduced by Government and passed by Parliament. As the Law Society explained:

> Declarations of incompatibility provide much weaker protection as, firstly, they are reliant on government will and parliamentary time for rectifying legislation to be brought forward. Secondly, delays in responding to declarations mean that the issue is left unaddressed, potentially for years, while a violation is ongoing. With the likelihood of more declarations pressurising the parliamentary timetable, these delays will also likely become much longer.[146]

96. We recognise the concern about delays in responding to declarations of incompatibility raised by the Law Society. For example, we have recently reported on two draft remedial orders proposed by Government to resolve incompatibilities with Convention rights in legislation concerning, firstly, state immunity and, secondly, bereavement benefits.[147] The first remedial order addressed an incompatibility with Article 6 ECHR (right to a fair trial) identified by the Supreme Court in October 2017 and the second an incompatibility with Article 14 ECHR (prohibition on discrimination) identified in August 2018. If the two draft remedial orders are agreed by both Houses at the end of the 60-day period they are laid before Parliament, it will have been over five and four years respectively since the declarations of incompatibility were made.[148]

97. The time and effort taken over producing a draft remedial order may explain why the Government has, in practice, often encouraged the courts to use section 3 HRA interpretations rather than declarations of incompatibility. As the IHRAR report notes, in litigation, "it is usual for the Government to submit that UK Courts should interpret legislation compatibly with Convention rights using the section 3 interpretative power". Furthermore, "it is also usual for UK Courts to accede to the Government's view on the approach to be taken".[149] This makes it all the more surprising that the Bill seeks to remove the option of the section 3 interpretation.

145 Letter from the Lord Chancellor to the Chair regarding the Bill of Rights, 14 July 2022. It is notable, however, that clause 7 of the Bill could impact on the Court's ability to find legislation to be incompatible - see discussion of this clause below.

146 The Law Society (BOR0046)

147 Joint Committee on Human Rights, Seventh Report of Session 2022–23, Draft State Immunity Act 1978 (Remedial) Order 2022: Second Report, HC 895 HL Paper 103; Joint Committee on Human Rights, Eighth Report of Session 2022–23, Draft Bereavement Benefits (Remedial) Order 2022: Second Report, HC 834 HL Paper 108

148 Incompatibilities recognised by the courts can be addressed using the normal legislative process as well as by way of a remedial order under the Human Rights Act. It is notable, in light of the delays involved in remedial orders becoming law, that they were designed to provide a method for remedying incompatibilities that was quicker and easier than the normal legislative process.

149 Ministry of Justice, The Independent Human Rights Act Review Report, 2021, CP 586, Chapter Five, para 61. The same point has been made to this Committee by Baroness Hale, in the course of our inquiry into the Independent Human Rights Act Review.

98. In their evidence to us, Amnesty International UK raised an additional concern—that the removal of section 3 HRA could impact on the force of the declaration of incompatibility as a remedy by increasing their frequency and thereby decreasing the seriousness with which they are taken:

> [T]he removal of s.3 threatens to diminish the importance of 'declarations of incompatibility', the remaining power left to courts once s.3 is removed … [T]heir present rarity value aids in maintaining the political consensus established over the last 20 years that DoIs are serious matters that are always addressed. [P]art of their force comes from the fact that the courts have gone as far as possible to make the original legislative scheme work with the UK's human rights commitments, but have ultimately been unable to do so. This will be gone without the enhanced s.3 power.[150]

99. An increase in the number of declarations of incompatibly made by the courts would ultimately, as the Helen Bamber Foundation and Asylum Aid stated in their evidence to us: "lead to more (successful) applications being made to the Strasbourg court because people would be unable to obtain an effective remedy for their human rights in the UK courts."[151] Thus, again, the Government's proposed reform of human rights law would reduce UK victims' access to an effective remedy and increase the likelihood of the ECtHR finding against the UK. Professor Gearty and Dr Gentile explained this further:

> As a consequence [of repealing section 3 HRA], many potential ECHR violations will not be redressed by way of judicial interpretation at the domestic level; the rights-conflicting laws will not be capable of being rendered compatible by judicial interpretation … Declarations of incompatibility may increase as a result and, because these are unlikely to be seen by the Strasbourg court as effective remedies for the purposes of Article 13 [right to an effective remedy], it is highly likely that more cases will be brought before the ECtHR under the requirement of Article 34 ECHR [individual applications]. As a result of the increase of litigation before the ECtHR, the ECtHR may identify an increasing number of violations committed by the UK.[152]

Effects on other public authorities—clause 12 of the Bill

100. The obligation to read and give effect to legislation in a way that is compatible with Convention rights applies to all public authorities, not only to the courts. This means that all public authorities will be affected by the proposed repeal of section 3, because they will no longer be legally obliged to read the law that applies to them in a way that is compatible with human rights. This obligation applies whenever a public authority has to consider its powers or duties imposed by legislation, and its absence is likely to impact

150 Amnesty International UK (BOR0053)

151 Helen Bamber Foundation, Asylum Aid (BOR0017). Furthermore, as suggested in the evidence of Professor Jacques Hartmann (Professor of International Law at University of Dundee) and Dr Samuel White (Lecturer in Law at University of the West of Scotland) (BOR0015)) since "a declaration of incompatibility operates to confirm that the domestic courts consider a violation of the ECHR to have occurred" making one renders "the likelihood of an adverse decision by the ECtHR higher".

152 Professor Conor Gearty (Professor of Human Rights Law at London School of Economics); Dr Giulia Gentile (Fellow in Law at London School of Economics) (BOR0009)

on how public authorities conduct themselves in respect of human rights.[153] The British Institute of Human Rights have described section 3 as a "very important tool that allows public authorities to make rights respecting decisions."[154] The Relatives and Residents Association explained:

> The duty [under section 3 HRA] ensures that when officials are making a decision about a person's care, such as where they should live, or what care or treatment they should receive, they must apply other laws in a way which upholds the person's rights as far as possible. Fundamental rights, such as the right to family life, are thus protected when they might otherwise be infringed.[155]

101. The repeal of section 3 HRA would also impact on clause 12 of the Bill, which would provide that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right". This is a key provision for the enforcement of human rights, which establishes that the Convention rights set out in Schedule 1 of the Bill bind all public authorities. It forms the basis upon which a person affected by a public authority's incompatible acts could bring a legal claim, under clause 13.

102. Clause 12 is largely consistent with the equivalent section in the HRA, section 6. However, there are changes reflecting the fact that public authorities would no longer be required to read and give effect to legislation in a way that is compatible with Convention rights, as far as it is possible to do so (as currently required by section 3 HRA). Most clearly, public authorities will be acting lawfully despite breaching a Convention right when giving effect to or enforcing primary or subordinate legislation that is incompatible (unless, in the case of subordinate legislation, the incompatibility could be removed without being inconsistent with primary legislation).

103. The absence of an equivalent of section 3 HRA will increase the likelihood of legislation being read by courts and other public authorities in a manner that is incompatible with Convention rights, which will in turn increase the likelihood of the duty for public authorities to act compatibly being displaced by the incompatible legislation. This is recognised as a likely consequence by the Secretary of State for Justice , who has suggested that this change will "deliver greater certainty for public services to do the jobs entrusted to them, without the constant threat of having to defend against expensive human rights claims".[156] We have not seen evidence suggesting that the threat of human rights claims is preventing public services carrying out their functions; certainly not to the extent that it would justify changing the law to legalise actions that violate human rights. Indeed, the combination of repealing section 3 HRA and passing clause 12 of the Bill would result

153 Since clause 12 of the Bill provides that public authorities will not be acting unlawfully if they breach Convention rights in the course of giving effect to or enforcing incompatible primary (and some subordinate) legislation, the absence of an obligation to try to read legislation compatibly could widen the situations in which a public authority considers itself able to act incompatibly without giving rise to a domestic claim against it.

154 The British Institute of Human Rights (BOR0039))

155 Relatives and Residents Association (BOR0025). Age UK similarly raised concerns that "proposals to limit positive obligations and repeal Section 3 of the Human Rights Act will have a considerable impact on the human rights protections available to older people in their interactions with public authorities, and their ability to challenge any human rights breaches that take place in these settings." (Age UK (BOR0020))

156 The Lord Chancellor has confirmed "Repeal of section 3 HRA will likely result in an increase in the number of cases where primary legislation cannot be interpreted compatibly with the Convention rights, and therefore where the exceptions in clause 12 will apply." Letter from the Lord Chancellor to the Chair regarding the Bill of Rights, 14 July 2022

in not only more incompatible actions by public authorities being upheld by UK courts, denying victims an effective domestic remedy; but also more resort to declarations of incompatibility and reliance on the Government and Parliament to find a legislative solution; and, ultimately, more applications being made to the ECtHR.

104. The Relatives and Residents Association raised with us their concerns about the real-world implications of the combination of clause 12 and the repeal of section 3 HRA:

> It could result in health and care practitioners having to apply laws which breach rights with no power to do otherwise. Only having the option to knowingly breach the rights of someone in your care will be disempowering for health and care staff, leave them in an incredibly difficult situation and put their all-important relationship with the person relying on their care in jeopardy. This would further disempower people using care services, placed in the most vulnerable of circumstances who tell us they already feel voiceless and powerless. For older people nearing the end of their lives, waiting for the Government and Parliament to resolve problem laws is not a viable route to protecting their fundamental rights.[157]

105. **We agree with the overwhelming majority of those that responded to the Government consultation and those who submitted evidence to our Committee that section 3 HRA does not undermine parliamentary sovereignty and that it should not be repealed. Repealing section 3 HRA will leave more victims with no effective remedy, having to take claims to the European Court of Human Rights to enforce their rights. It will also result in more legislation that is incompatible with Convention rights remaining in force, affecting more people while Government decides whether and how to remedy the incompatibility. It weakens the obligation on public authorities to act compatibly with Convention rights under clause 12. Furthermore, as recognised in our previous report on the Government's consultation proposals, the section 3 HRA obligation has a key role to play in the development of a human rights culture in the public sector. Its removal will hinder and potentially undo any such development.**

106. ***Section 3 HRA should not be repealed. If the Bill of Rights is to replace the Human Rights Act, it should be amended to include a provision equivalent to section 3 HRA (see Annex, Amendment 4). Clause 12 of the Bill must also be amended to take this provision into account, recognising that it will only be lawful for public authorities to act incompatibly with Convention rights when they are required to do so by legislation that cannot be read compatibly with the Convention (see Annex, Amendments 5 and 6).***

Cases already decided using section 3 HRA—clause 40 of the Bill

107. The Government's intention is that the repeal of section 3 HRA would unravel all the compatible interpretations made under that section since the HRA came into force.[158] This would happen because these judicial interpretations have not amended the legislation, they have merely established how the courts should interpret the law in a Convention compliant manner in accordance with section 3 HRA. Without section 3 in place, the

157 Relatives and Residents Association (BOR0025)

158 This is clear from the operation of clause 40, discussed below, although, as the MoJ have confirmed in correspondence, this does not have retrospective effect so will not reopen the litigation in which the section 3 interpretation was applied; only how that interpretation would be applied to cases henceforth.

courts, in future, when faced with the same legislation, will not be under an obligation, or indeed have the ability, to read it compatibly with the Convention. They will instead be forced to reinterpret the legislation using only orthodox interpretive principles. It is unclear, however, how the repeal of section 3 HRA will affect a court that appears to be bound by the rules of precedent to follow a section 3 interpretation already reached by a superior court. This could require an appeal to a higher court able to depart from the earlier decision. Alternatively, the lower court may consider the prior interpretation to have been reached "through" section 3 and therefore to be irrelevant to an interpretation reached without that section being in play.[159] Clarity on this issue may well depend on it being resolved by the courts.[160]

108. In any event, it is highly questionable why the Government would want to undo the work done by the courts to resolve incompatibilities identified in legislation over the past 22 years. As previously noted, any judicial interpretation that was considered inappropriate could have been corrected through the normal legislative process. This has not happened, indicating that there was no widespread opinion that the interpretations were damaging or wrong.

Clause 40

109. The Bill of Rights Bill does, however, give the Government the option to retain some historic section 3 HRA interpretations. Clause 40 of the Bill gives the Secretary of State the power to, by regulations, preserve or restore the effect of a judgment that "appears to the Secretary of State to have been made in reliance on section 3" of the HRA. The regulations would be made using the affirmative procedure, which requires both Houses of Parliament to agree the regulation. However, only the Secretary of State can initiate the process to retain such judgments in law, and whilst the regulations are subject to parliamentary approval, Parliament has no power to makes its own assessment of which judgments should be retained. The Secretary of State is given two years from commencement until this power lapses.

110. Thus, under clause 40, it is for the Secretary of State to decide which interpretations were made using section 3 and, crucially, which of those interpretations should and should not be preserved by legislative change. If the Secretary of State chooses not to use their power under this clause, it is likely that this would result in the courts reverting to *incompatible* interpretations of the legislation in question, otherwise section 3 would not have been needed in the first place.

111. There is nothing in the Bill to indicate the grounds on which the Secretary of State would decide whether a section 3 interpretation should be preserved or abandoned. It appears on the face of the Bill to be a matter of discretion for Government, with involvement by Parliament only once a decision to preserve an interpretation has been taken.[161] In its response to our report on *Human Rights Act Reform*, the Government indicated that clause 40 would not be frequently used, it being intended "to ensure legal certainty where

159 This is the approach persuasively set out in the evidence of Dr Kyle Murray (Lecturer in Law at City Law School, City, University of London) (BOR0051)

160 The likelihood of legal uncertainty and significant litigation resulting from the repeal of section 3 HRA is discussed further below.

161 The affirmative procedure will apply where the Secretary of State chooses to preserve a compatible interpretation by amending primary legislation and the negative procedure where he does so by amending subordinate legislation.

an interpretation made under section 3 is no longer capable of being made once section 3 is repealed but is, for example, an established part of the legislative scheme."[162] In response to a request to provide more detail on which section 3 interpretations would be retained, the Secretary of State merely explained that "[w]e have been examining section 3 judgments with reference to whether the legislation is still in force, the extent to which section 3 was necessary for the interpretation, and what the effect of the interpretation falling away would be … This work will continue."[163]

112. The power that clause 40 would grant to the Secretary of State was referred to in evidence to us as "extraordinary",[164] "unprecedented",[165] "unchecked"[166] and "highly dangerous".[167] The Relatives and Residents Association describe clause 40 as "deeply concerning … putting power in the hands of the Secretary of State to pick and choose which judgments apply. It undermines 22 years of human rights jurisprudence." They provide an example of how clause 40 could affect the rights of members of the public:

> For example, people in same-sex relationships receiving mental health support would have to wait for an order from the Secretary of State as to whether their partners are deemed their 'nearest relative' under the Mental Health Act, rolling the clock back two decades and bringing discriminatory and rights-breaching practice back into our health and care systems.[168]

Legal uncertainty

113. Whether or not clause 40 is objected to as a matter of principle, it appears clear that the combination of section 3 and clause 40 will create significant legal uncertainty. Professor Tom Hickman KC, Professor of Public Law at UCL and barrister at Blackstone Chambers, told us:

> there will inevitably have to be a lot of re-litigation of issues that have previously been resolved because all the questions about how rights should be interpreted will need to be looked at again. It will create a great deal of uncertainty, a great deal of litigation, and it would be highly destabilising. The idea that it is going to improve the clarity and stability of the law is clearly wrong.[169]

162 Joint Committee on Human Rights, First Special Report of Session 2022–23, Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22, HC 608

163 Letter from Secretary of State to JCHR Chair, 14 July 2022. The size of the Government's task was noted by Lord Mance in his recent Thomas More Lecture, "The Protection of Rights – this way, that way, forwards, backwards …", 26 October 2022: "What is evidently envisaged is a Ministry of Justice review of all judgments interpreting any legislation, primary and secondary, which have been handed down since the HRA came into force in 2000, followed by a statutory instrument. One hopes that there will be plenty of capacity for so easy a task, alongside that envisaged by the EU Retained Law bill. Clause 40 would be likely to be controversial, at every stage, from enactment to implementation."

164 JUSTICE (BOR0071)

165 JUSTICE (BOR0071)

166 UNISON (BOR0026)

167 Article 39 (BOR0076)

168 Relatives and Residents Association (BOR0025)

169 Q10 [Professor Tom Hickman]

114. The Children's Society made the additional observation that "[t]he Government's own Impact Assessment raises the confusion Clause 40 would inevitably create, setting out: 'it is difficult to ascertain reliably how many cases have drawn on section 3'. Without even this starting line, how can legal certainty be maintained."[170]

115. The British Institute of Human Rights stated that legal uncertainty caused by the repeal of section 3 and introduction of clause 40 would "create chaos which ultimately will lead to more breaches of people's human rights and place public bodies and their staff in incredibly difficult and confusing positions."[171] Hogan Lovells added that it may also affect businesses, which will "struggle to know which judgments that have involved use of the interpretative obligation (on which they may want to rely for commercial human rights protection) are likely to stand and thus what protections they can continue to rely on in their commercial decision making."[172]

116. Clause 40 only gives the Secretary of State the power to preserve section 3 interpretations made by the courts. Humanists UK reminded us that section 3 applies beyond the courts, but the Bill provides no mechanism for non-judicial interpretations to be preserved:

> Clause 40 is silent on the impact of 'readings in' readily made through non-judicial public bodies … Over 60 local authorities in England have incorporated humanists as full members [of Standing Advisory Councils on Religious Education] through such an interpretation of 'religion' without the need for litigation. By relying solely on case law, Clause 40 appears to only grant the Secretary of State the power to preserve the most contested readings-in that have required litigation to resolve, while remaining silent on those readings in which are better established—a patently ridiculous outcome.[173]

117. **In the absence of any record of which judgments have relied on section 3, there are likely to be substantial disagreements, and therefore substantial litigation, over whether some cases did or did not involve the use of section 3 and whether the interpretation adopted has or has not been undone by the repeal of that section. It would be helpful if the courts were in future to indicate clearly when they are relying on section 3 HRA, or on an equivalent replacement provision in the Bill of Rights, and for a record of those instances to be kept.**

118. **Should section 3 HRA be repealed, it will result in significant legal uncertainty over the status of statutory interpretations made prior to the Bill of Rights coming into force. Whilst some uncertainty may be justified in the interests of positive reform, the repeal of section 3 is unnecessary and harmful to human rights. Clause 40 would do little to resolve the uncertainty and harm caused. It would also run counter to the Government's intention to enhance parliamentary sovereignty, placing too much power in the hands of the Secretary of State to decide which laws should and should not remain compliant with human rights.**

170 The Children's Society (BOR0073)
171 The British Institute of Human Rights (BOR0039)
172 Hogan Lovells International LLP (BOR0045)
173 Humanists UK (BOR0059)

119. ***We have recommended that a clause equivalent to section 3 HRA is added to the Bill. Quite apart from our concerns about its appropriateness and its impact, clause 40 would serve no purpose if section 3 HRA is not repealed. We therefore recommend clause 40 is removed from the Bill (see Annex, Amendment 7).***

Clause 10—subordinate legislation and declarations of incompatibility

120. As discussed above, the repeal of section 3 HRA will almost certainly result in the courts issuing greater numbers of declarations of incompatibility.[174] This is also likely to be a consequence of clause 10, the provision of the Bill of Rights that would give courts the power to make such declarations.

121. As under section 4 HRA, clause 10 would permit declarations of incompatibility to be made in respect of primary legislation that is found to be incompatible with a Convention right. However, clause 10 would make one significant change to the existing power to issue declarations of incompatibility in respect of subordinate legislation. Section 4 HRA only permits declarations of incompatibility to be made in respect of subordinate legislation in the rare case where primary legislation prevents removal of the incompatibility—i.e. where to provide an alternative remedy would defy primary legislation. Under clause 10(1)(b) of the Bill of Rights Bill, however, a court would be able to issue a declaration of incompatibility in respect of any subordinate legislation that it has not quashed or declared invalid.

122. This means that, under the Bill of Rights, judges in the High Court and above who identify subordinate legislation that is incompatible with a Convention right would not have the ability to adopt a Convention compliant interpretation (due to the repeal of section 3 HRA), but would have the option of issuing a declaration of incompatibility. This would be available alongside the other discretionary remedies available to the courts, most obviously the power to quash the legislation or declare it invalid.

Justification for extending power to make declarations of incompatibility

123. The declaration of incompatibility was introduced in the HRA to allow for a balance between the protection of human rights and the constitutional principle of parliamentary sovereignty—that is that parliament is the supreme legal authority in the UK with the ability to create or amend any law. A power for the courts to quash primary legislation on human rights grounds was considered to go too far, but denying any remedy at all if primary legislation is found to be incompatible with human rights was plainly inadequate. The declaration of incompatibility allows the courts to indicate that legislation is incompatible with Convention rights without trespassing on parliamentary sovereignty. Subordinate legislation is made by Government, albeit with Parliamentary approval, and can be quashed by the courts when found to be unlawful. There is therefore no constitutional justification for extending the ability to issue declarations of incompatibility beyond that provided for in the HRA.

124. Should the interpretive obligation under section 3 HRA be repealed by the Bill of Rights, in the absence of ambiguity, the courts would not have the option of adopting a

174 Subject to the potential effect of clause 7, which could prevent the courts properly assessing the compatibility of legislation with Convention rights (see Chapter 4).

Convention compliant reading of legislation that appears to be incompatible. Removing this interpretive obligation is very likely to result in subordinate legislation being found to be incompatible with Convention rights, and therefore unlawful, more often. It is possible that the extension of declarations of incompatibility to all subordinate legislation is designed to provide courts with an alternative way of resolving challenges to subordinate legislation without quashing the incompatible provision. The Government has previously stated that quashing orders "can sometimes have a disproportionate effect compared to the impact of the procedural error being reviewed."[175] Whether or not they were justified, the Government's concerns have largely been met by changes introduced in the Judicial Review and Courts Act 2022 that make quashing orders far more flexible—they can now be suspended or made to have prospective effect only. Thus, providing an additional alternative to quashing orders also appears to be an inadequate justification for the changes made by clause 10 of the Bill.

Implications of extending power to make declarations of incompatibility

125. If clause 10 becomes law, the number of declarations of incompatibility made by the courts is likely to increase beyond the increase already resulting from the repeal of section 3, simply because there is far greater potential for one of the many statutory instruments approved by Parliament to be incompatible with Convention rights than for the relatively small number of Acts of Parliament. As an alternative to quashing legislation, the declaration of incompatibility may be a more palatable remedy from a defendant's perspective, but it is plainly inferior for any claimant whose rights have been infringed. As already noted, it leaves victims without an adequate remedy and incompatible legislation still in effect (with no guarantee that it will be remedied). When asked about the likely increase in declarations of incompatibility, and the impact that would have on victims being able to secure effective remedies, the Secretary of State told us: "[y]ou can make an argument that [the increase] would strengthen accountability, but in any event it is the proper constitutional approach."[176] We disagree on both counts, particularly in respect of declarations of incompatibility for secondary legislation.

126. **A declaration of incompatibility does not provide victims with a prompt and effective remedy for human rights violations. It nevertheless represents a reasonable compromise between the protection of human rights and respect for parliamentary sovereignty. Without this strong constitutional justification there is no need for resort to a declaration of incompatibility, and no such justification applies to giving the courts the power to making declarations of incompatibility in respect of all subordinate legislation. Particularly given the remedial flexibility recently confirmed for the courts in the Judicial Review and Courts Act 2022, there is no justification for extending declarations of incompatibility beyond their current application under the HRA.**

127. ***Clause 10 of the Bill should be amended to reinstate the position under the Human Rights Act: restricting the availability of declarations of incompatibility to circumstances in which the courts have identified an incompatibility with Convention rights in either a provision of primary legislation, or in a provision of subordinate legislation that cannot be removed as a result of primary legislation (see Annex, Amendment 8).***

175 Judicial Review Reform The Government Response to the Independent Review of Administrative Law, March 2021, CP 408 at para 53

176 Q34

4 The relationship between the Executive, the Legislature, and the Judiciary

Parliamentary sovereignty

128. The premise of the Bill of Rights Bill as introduced, as set out in its first clause, is that Parliamentary sovereignty has somehow been under threat owing to the HRA and the relationship that it set with the ECtHR. In a Parliamentary democracy, the Bill states, decisions about the balance between different policy aims, different Convention rights, and the rights of different persons are "properly made by Parliament".[177] The legislation then affirms that judgments, decisions and interim measures of the ECtHR do not affect the right of Parliament to legislate.

129. Parliament is sovereign. There are no limits on Parliament's ability to legislate; it passed the Human Rights Act into law and can choose, through this Bill or any other Bill, to repeal it. As Baroness Kennedy of the Shaws told us, "[t]here is a pretence that somehow Parliament is being denuded of its powers because of the Human Rights Act, and it is just not true".[178] Nevertheless, the United Kingdom remains under an obligation in international law to comply with the treaties it ratifies. This includes the ECHR and the obligation to secure the rights it contains to everyone within its jurisdiction.

130. Parliament's role in our human rights framework is vital. Under the existing HRA and the Government's plans for the Bill of Rights, UK courts cannot strike down incompatible primary legislation. Instead, the Courts can make a declaration of incompatibility, leaving it to the Government and Parliament to decide how the situation should be remedied. As our predecessor Committee in 2005 explained, "[t]his constitutional compromise leaves Parliament with a crucial responsibility for the protection of human rights".[179]

Judicial deference towards Parliament and clause 7

131. The Government argues that the boundaries between the legislative and judicial branches of the state, Parliament and the courts, have become blurred, in part as a result of the HRA. As it explained in the consultation that preceded the introduction of the Bill of Rights:

> The shift of law-making power away from Parliament towards the courts, in defining rights and weighing them against the broader public interest, has resulted in a democratic deficit. The human rights inflation we have seen over the past decade and more, has led to a sense among many that the system has lost touch with common sense, extending beyond the oversight and control of democratically elected representatives.[180]

177 Bill of Rights Bill, Clause 1, [Bill 117(2022–23)]
178 Oral evidence taken on 6 July 2022, HC 550 (2022–23), Q16 [Baroness Kennedy of the Shaws]
179 Joint Committee on Human Rights, Nineteenth Report of Session 2004–05, The Work of the Committee in the 2001–2005 Parliament, HL Paper 112/ HC 552
180 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights - Consultation, December 2021, CP 588, para 177

132. The Government wanted the Bill of Rights to "provide greater legal certainty and respect for the separation of powers between the judicial and legislative branches of government" and to "prevent the incremental expansion of rights without proper democratic oversight".[181]

133. The idea that the courts have become too activist and too involved in issues that should be the preserve of democratically elected bodies, often referred to as "judicial overreach", is nothing new and a popular one in some quarters—as is the idea that the courts' role is not a democratic one. These are not, however, concerns that have been highlighted in the evidence we have received. We are not satisfied that claims of "judicial overreach" paint an accurate picture of the relationship between the courts and either the legislative or executive arms of Government.[182] As the late Lord Bingham explained in 2004 in the seminal case of *A & others* concerning the indefinite detention of suspected terrorists:

> [T]he function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic … The 1998 Act gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it: "The courts are charged by Parliament with delineating the boundaries of a rights-based democracy".[183]

134. Rather than claims of judicial overreach, a more frequently raised concern in the evidence we received is the potential for the Bill of Rights Bill to damage the principle of comity, whereby Parliament and the courts respect each others' roles, by legislating to restrict and "micro-manage" the judicial branch of the state.[184] Clause 7 of the Bill represents the archetype of this effect. It is intended to ensure the courts 'respect the will of Parliament' by protecting "Parliament's ability to exercise its judgement in balancing complex and diverse socio-economic policies, with the wider interests of society".[185] The Explanatory Notes that accompany the Bill further explain that it "will require courts, when determining questions relating to Convention rights in contexts where Parliament has legislated, to give the greatest possible weight to Parliament's view of the public interest."

181 Ibid, para 186

182 The Free Speech Union, in their written evidence, provided a more nuanced perspective on the constitutional interaction between Parliament and the courts: "Parliamentary sovereignty is the cornerstone of our constitution, but parliament does not legislate in a vacuum. As stated by Lord Steyn in 1998, "Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law." Such a democracy does not operate on majority rule only, but rather recognises that Parliamentary democracy is underpinned by fundamental rights as set out in the common law for centuries and, more recently, in the ECHR." Free Speech Union (BOR0043)

183 A & others v Secretary of State for the Home Department [2004] UKHL 56, para 42. Quote from Professor Jowell taken from "Judicial Deference: servility, civility or institutional capacity?" [2003] PL 592, 597.

184 The term "micro-manage" in this context is taken from the work of Professor Mark Elliot, Chair of the Faculty of Law at the University of Cambridge, notably his blog Public Law for Everyone, "The UK's (new) Bill of Rights", 22 June 2022

185 Explanatory Notes to the Bill of Rights Bill [Bill 117 (2022–23) - EN]

The operation of clause 7

135. While the broad intention of clause 7 may be straightforward, its precise operation is more complicated and somewhat difficult to decipher. It would take effect if:

a) A court is deciding whether a provision of an Act, or the act of a public authority in accordance with a provision of an Act, is compatible with Convention rights; and

b) In order to do so, the court needs to decide whether "the effect of the provision on the way in which Convention rights are secured strikes an appropriate balance" between different Convention rights and/or policy aims.

136. In such a case, clause 7 would have two effects on the court's decision-making process:

a) The court would be required to accept that Parliament has already decided that the Act in question "strikes an appropriate balance" between whichever rights or policy aims are under consideration; and

b) The court would be required to "give the greatest possible weight" to the principle that decisions about such balances are properly made by Parliament.

137. Put simply, this provision will push the courts towards accepting that Parliament has legislated appropriately when that legislation is being challenged on human rights grounds. The Secretary of State told us in oral evidence that: "[a]ll we are saying is that the courts must have regard to [Parliament's position]. It is not binding them. It is not extinguishing the courts' discretion."[186] The term "the greatest possible weight" has, however, plainly been carefully chosen. While it has no legislative precedent (Lord Sumption stated in oral evidence to us that it did "not belong to the language of legal analysis at all"[187]), its likely effect can be discerned. That is to go much further than simply requiring the courts to "have regard" to Parliament's views. Instead, it would establish that there are very limited circumstances in which courts will be able to conclude that the balance struck by Parliament in legislation was wrong and thus find that legislation incompatible with the ECHR.

Does it make any difference?

138. Some witnesses suggested to us that clause 7 does little more than restate the current position that the courts take. As Lord Pannick put it, in his oral evidence, having regard to what Parliament has decided is already "what courts spend their time doing".[188] Sir Peter Gross commented that "given the philosophy of judicial restraint, it might be said that Clause 7 is unnecessary and rather strange surplusage."[189] In written evidence, Professor Gearty and Dr Gentile added:

186 Q33
187 Q10
188 Oral evidence taken on 6 July 2022, HC 550 (2022–23)
189 Q1

> It has always been clear, and remains so under the presidency of Lord Reed, that the Supreme Court takes with enormous seriousness its duty to respect the roles of the other branches of state. The clause attempts to direct courts on how to do their job, as unacceptable as it is unnecessary.[190]

139. By way of demonstrating that the courts already do much of what clause 7 is trying to achieve, Lord Sumption and Lord Pannick referred us to the Supreme Court case of SC.[191] We agree that the courts already recognise the importance of deferring to the democratically elected arms of the State on certain issues. Nevertheless, we consider that clause 7 goes beyond the position reached by the Supreme Court in SC, which can be summarised as follows:

a) When considering the compatibility of primary legislation with Convention rights, the court's role is to assess whether the legislation actually results in a violation. It is not to assess whether Parliament considered the issue. This will often require the courts to decide whether the primary legislation has struck a reasonable balance between competing interests.[192]

b) Where Parliament can be inferred as having formed a judgment on the balancing of the interests or rights at stake, this may be a relevant factor in the court's assessment because of the respect the court will afford the view of the legislature. When deciding whether this inference can be made, the courts should go no further than "ascertaining whether matters relevant to compatibility were raised during the legislative process … to avoid assessing the adequacy or cogency of Parliament's consideration of them".[193]

c) The degree of respect due to the balance struck by Parliament will vary depending on the subject matter of the legislation and when it was passed—particular deference will be due in respect of general measures of social and economic strategy.[194]

d) If there is no indication that Parliament has considered the balance of interests or rights in question, then that factor will be absent from the court's assessment (it

190 Professor Conor Gearty (Professor of Human Rights Law at London School of Economics); Dr Giulia Gentile (Fellow in Law at London School of Economics) (BOR0009)

191 R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26. Lord Pannick quoted the following passage from the judgment: "The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning ... Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies." Oral evidence taken on 6 July 2022, HC 550 (2022–23)

192 R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26, Para 182

193 R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26, Para 183: "The distinction between determining whether, as a question of historical fact, an issue was before Parliament, on the one hand, and determining the cogency of Parliament's evaluation of that issue, on the other hand, is real and must be respected."

194 R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26, Para 180: "[T]he degree of respect which the courts should show to primary legislation in this context will depend on the circumstances. Among the relevant factors may be the subject-matter of the legislation, and whether it is relatively recent or dates from an age with different values from the present time." See also para 203: ""Since the legislation is a general measure of social and economic strategy, involving an assessment of priorities in the context of the allocation of limited state resources, it follows that Parliament's assessment that the difference in treatment is justified should be treated by the courts with the greatest respect."

> should not be taken as a factor against upholding the legislation's compatibility). The court should still pay appropriate respect to the will of Parliament expressed in the legislation.[195]

140. This approach is appropriate because any more deferential approach would risk putting the UK courts out of sync with the ECtHR. As recognised in SC:

> [T]he European court takes account of whether the legislature has considered the matters which are relevant to a measure's compatibility with the Convention, although that is by no means determinative of its decision. Since the European court is likely to take that into account, the objective of the Human Rights Act suggests that domestic courts should do likewise, in order to enable Convention rights to be properly enforced domestically and not only by recourse to Strasbourg.[196]

141. While clause 7 would not prevent courts assessing the compatibility of legislation (doing so would, of course, render the declaration of incompatibility redundant), it would prevent them from considering whether Parliament had formed a judgment on the balance of policy aims or rights in question and instead require them to accept that Parliament had decided that the balance struck was an appropriate one. The requirement in clause 7 would apply even if it was self-evident that the balance of rights in question had never occurred to a single member of Parliament, for example, when legislation is applied in unforeseen circumstances. Furthermore, once the court has been forced to conclude that Parliament has decided legislation has struck an appropriate balance it is also effectively prevented from varying the weight to be given to Parliament's view, depending on the subject-matter of the Act and when it was passed.

Impact of clause 7

142. The proposal in clause 7 fails to pay due respect to the key role that the courts play in protecting human rights and to recognise the reality of the legislative process—that it cannot, alone, be relied upon to predict and cater for all potential human rights issues that might arise. It would be naïve to assume that every potential clash of interests raised before the courts, possibly many years down the line, was anticipated and considered during a Bill's passage through Parliament. As the Law Society state in their written evidence to us:

> When enacting legislation, Parliament cannot foresee all the circumstances in which the law will apply or the consequences of these. Even with the best of intentions, an Act of Parliament may have unintended, unduly harsh consequences for a particular person or class of people. Balancing rights issues against other factors–as our courts are experts in doing–is highly dependent on the facts and context of the case. It is therefore important that courts are able to conduct the independent assessment needed in complicated human rights cases to ensure a fair outcome.[197]

195 R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26, Para 182
196 R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26, para 181
197 The Law Society (BOR0046)

143. The potential consequences of clause 7 were highlighted in the submissions of the Children and Young People's Commissioner Scotland, who argue that the perception of a "'judicial extension' of the ECHR … mischaracterises the often difficult and nuanced balancing exercise which courts undertake when considering cases involving qualified rights. Nowhere is this more pronounced than in cases involving the rights of children. Further weighting the balance in favour of Parliament creates a risk that courts will be unable to properly consider the full impact that a measure has on a child, and to give full effect to the best interests of the child."[198]

144. Clause 7 cannot be considered in isolation from the rest of the Bill of Rights Bill. The absence of an interpretive obligation equivalent to that in section 3 HRA means that under the Bill of Rights the courts would be more likely to be tasked with finding whether or not legislation is incompatible with Convention rights (rather than seeking to read it compatibly). Therefore, there are likely to be more cases in which clause 7 would come into play, influencing the courts towards finding legislation to be compatible.

145. **In most circumstances, clause 7 will make little difference to the approach taken by the courts as they already show significant respect for the decisions reached by Parliament. However, in those circumstances where Parliament has not considered particular implications of its legislation, and where individual rights rather than broad policy issues are at stake, clause 7 could tie the courts' hands when they are attempting to engage in an effective assessment of compatibility. Ultimately, legislation that a court acting freely may consider to be incompatible with the Convention could instead be given a clean bill of health. This is inconsistent with the UK's obligations under the ECHR. It is likely to put the UK courts out of step with the ECtHR, resulting in victims within the UK needing to take their cases to Strasbourg directly rather than domestic courts in order to enforce their rights, and in Parliament eventually having to legislate to remedy the incompatibility years later.**

146. ***Clause 7 is largely unnecessary and, where it would have effect, would be inconsistent with the UK's obligations under the ECHR. Unless the Government is prepared to reconsider clause 7, we would like to see it removed from the Bill (see Annex, Amendment 9).***

Parliament and Human Rights

In praise of section 19 of the Human Rights Act

147. The HRA contains, at section 19(1), a requirement that a minister, before second reading of a government bill, makes a statement about its compatibility with the ECHR. The minister may either make a statement that in their view, the provisions of the Bill are compatible with Convention rights (a section 19(1)(a) statement of compatibility); or if they are unable to make a statement of compatibility, a statement that they nevertheless wish the House to proceed with the Bill (a section 19(1)(b) statement).[199] There is no such provision in the Bill of Rights Bill. This is deeply problematic.

198 Children and Young People's Commissioner Scotland (BOR0057)

199 We note that the Environment Act 2021, at section 20, includes a similar provision requiring the Minister introducing a bill to indicate whether in his view it contains provision which, if enacted, would be environmental law and whether the Bill "will not have the effect of reducing the level of environmental protection".

148. Parliament should be informed when it is being asked by government to pass legislation that may breach human rights; the section 19 statement does this effectively. It allows members of Parliament to interrogate human rights concerns during the passage of a government bill, and provides a springboard for this Committee's legislative scrutiny. As the then Home Secretary Rt Hon Jack Straw set out during the second reading debate on the Human Rights Bill in 1998, the requirement was intended to "have a significant impact on the scrutiny of draft legislation within Government and by Parliament". He told the House, "In my judgment, it will greatly assist Parliament's consideration of Bills by highlighting the potential implications for human rights".[200] We believe section 19 achieves this.

149. As well as informing Parliament, section 19 statements drive a process within government that ensures human rights concerns are taken seriously. Paul Evans, a previous clerk of this Committee and retired senior House of Commons official explained that, "the nature of that personal statement forces the Minister to ask questions of civil servants, policy developers, legal drafters, and satisfy themselves personally. It is quite important that they must sign the statement and put their name to it and that drives a process behind the scenes, which I think must be very positive".[201] The Cabinet Office Guide to Making Legislation explains the process: formal advice must be provided by departmental legal advisers with assistance from legal advisers in the Ministry of Justice Human Rights Division and, ultimately, the Law Officers as necessary.[202] The Cabinet Committee that considers government legislation before introduction, the Parliamentary Business and Legislation (PBL) Committee, will always want to know that this work has been done and is satisfactory, and that the relevant section 19 statement has been signed.[203]

150. The Government argues that the choice offered by section 19 somehow restricts policymaking. In response to questions from this Committee, the Secretary of State wrote that "[t]he government believes that the simplistic binary imposed by section 19 of the HRA fails to reflect the complexity and nuance of compatibility analysis. The stigma attached to the making of a section 19(1)(b) statement risks acting as a deterrent to innovative policy-making, even in cases where the legislation in question may ultimately be successfully defended in court".[204] In his evidence to our Committee, the Secretary of State explained his view that the section 19 certification was, in effect, a 49/51 rule:

> Where there is a 45% to 50% prospect of success, there is an argument that we want to be less small-C conservative in our approach to litigation and avoid a binary test. You can argue that that has had a chilling effect, not just in big areas like [counter-terrorism] but in other areas where we wanted to innovate legislatively, but unless we can hit the 51% threshold, that very binary threshold, we have our hands tied.[205]

200 HC Deb, 16 Feb 1998, col779
201 Oral evidence taken on 6 July 2022, HC 550 (2022–23), Q3
202 Cabinet Office, Guide to Making Legislation, 2022, para 11.17
203 Cabinet Office, Guide to Making Legislation, 2022, p154
204 Letter from the Lord Chancellor relating to the Bill of Rights and ECHR memorandum, dated 14 July
205 Q34

151. We disagree with the Government's characterisation. Section 19 does not tie anyone's hands. If there is stigma associated with a section 19(1)(b) statement, the provision is arguably doing its job rather well in making ministers think carefully about the impact of its legislative programme on human rights, and requiring them to certify their view to Parliament. We understand that most Ministers take the section 19 obligation very seriously, as Lord Wolfson the former Minister for Human Rights told us earlier this year.[206]

152. Section 19 statements allow for some uncertainty. Section 19(1)(b) HRA can be used where there is ambiguity as to whether a provision of a Bill is compatible with human rights due to developments (or potential future developments) in the law.[207] Even where there is a section 19(1)(a) statement made, it does not mean that the provisions will be found to be compatible with Convention rights by the courts.[208] The statement merely indicates the view of the Minister. At the time of publication of our Human Rights Act Reform report in April 2022, the courts had issued 19 declarations of incompatibility that relate to Acts in respect of which a section 19(1)(a) statement was made—i.e. where, despite a Ministerial statement of compatibility, that legislation was subsequently found to be incompatible with Convention rights.

153. The Government's consultation paper on reforming the Human Rights Act had asked whether there was a case for changing section 19. The analysis noted that: "3,702 respondents mentioned that they did not believe there was a case for change. Of the 1,180 who responded directly to this question, 81 respondents thought that there is a case for change" (although it is unclear from the analysis how many of those supported changes to improve the use of section 19, as compared with repeal of section 19 altogether).[209] Evidence submitted to our inquiry also repeatedly states that there is no justification for abolishing section 19.[210]

154. In our report in response to the Government's consultation we called section 19 "a vital tool in understanding the Government's intention and in assisting Parliament's scrutiny of Bills for human rights compatibility, as well as improving transparency".[211] The Government's response to our report stated that they did not consider that the removal of section 19 would limit either Parliament understanding the Government's intention or assisting Parliament with scrutinising new legislation.[212] Our view, as a parliamentary committee that scrutinises new legislation, is that the Government's position does not reflect our own experience.

206 Oral evidence taken on 2 February 2022, HC 1033 (2021–22), Q28

207 It is rare, although not unknown, for a Minister to issue a section 19(1)(b) statement. For example, the Government issued one in relation to the Communications Act 2003. The Government did so on the basis that it considered the ban on political advertising was compatible with Article 10 of the Convention (freedom of expression), but there appeared to be ECtHR caselaw to the contrary, which in turn cast doubt on the compatibility of the ban. Ultimately, the ban was found to be compatible by both the UK Courts and ECtHR in the Animal Defenders International litigation. House of Lords - R (On The Application of Animal Defenders International) V Secretary of State For Culture, Media and Sport (Respondent) (parliament.uk) and Animal Defenders International v United Kingdom [2013] ECHR 362

208 A point made by the Secretary of State himself at Q34

209 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights Consultation Response, June 2022, CP 704, para 87

210 E.g. Dr Alex Latham-Gambi (Lecturer in Law at Swansea University) (BOR0008), Mr Michael Lane (Doctoral Researcher & Visiting Lecturer at Birmingham City University (School of Law)) (BOR0013) and News Media Association (BOR0036).

211 Joint Committee on Human Rights, Thirteenth Report of Session 2021–22, Human Rights Act Reform, HC 1033 / HL Paper 191, para 117, para 69

212 Joint Committee on Human Rights, First Special Report of Session 2022–23, Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22, HC 608, para 21

155. Our report had put forward some suggestions for strengthening rather than weakening the section 19 duty. These included the following:

- Making the obligation bite upon introduction of a Bill rather than at second reading;
- Extending section 19 statements to cover compatibility with all human rights standards, including common law and international obligations binding on the UK.

156. **Section 19 of the Human Rights Act has its value in requiring the Minister to consider the impact of their legislation on Convention rights, which are protected under UK law. The Minister then confirms to Parliament that this process has taken place, and notifies Parliamentarians as to whether they are being asked to pass legislation that cannot be clearly stated to comply with our international obligations under the Convention. This should not be problematic. Ministers should want their legislation to be compatible with our Convention obligations and should take these obligations seriously. They must be open and clear with Parliament about the likely compatibility of their proposals with the ECHR.**

157. ***Section 19 of the Human Rights Act must not be repealed. Its provisions should instead be strengthened to require statements of compatibility to be provided upon introduction of a Bill rather than before second reading. The Bill should be amended to this effect (see Annex, Amendment 10).***

Information provided to Parliament

158. Along with the section 19 statement, the Government provides this Committee with an explanation to justify the Minister's assessment of human rights compatibility of bills. This comes either within the Explanatory Notes accompanying the Bill, or in a separate ECHR Memorandum if the explanations are lengthier. Where a separate memorandum is provided, this is then published on the Parliamentary website alongside other information about the Bill. The explanatory information helps our consideration of whether the correct issues have been thought about by the Government, and the correct balance has been struck in protecting different rights and policy interests when Parliament legislates.

159. The human rights memoranda are not just helpful for Parliament, but also the Government and the Courts, as Murray Hunt, Director at the Bingham Centre for the Rule of Law and former legal adviser to this Committee, told us:

> [The ECHR memo] is an absolutely crucial piece of information for the Government to demonstrate what they are doing, for Parliament to check that the Government are doing a good job of internally assessing compatibility, and then subsequently when these laws get litigated—as they sometimes do—for the court to be able to see to what extent there has been conscientious consideration of ECHR compatibility issues.[213]

160. The quality of the information in ECHR memoranda is, however, variable. Whilst some explanations do contain full and detailed analysis of human rights issues engaged, others have only a cursory acknowledgement of human rights while lacking the necessary

213 Oral evidence taken on 6 July 2022, HC 550 (2022–23), Q3 [Murray Hunt]

detailed justifications and analysis; others again contain significant gaps in the information or reasoning. Unfortunately, we still find ourselves having to write to Government departments either informally or formally to request more and better information to assist us in our work. Both Lord Pannick and Baroness Kennedy, who regularly read the ECHR memoranda for Government Bills, noted that the standard of analysis was not rigorous enough. Lord Pannick commented that, "[t]hey could usefully use a greater depth of analysis and a franker analysis of the problems that are posed" whilst Baroness Kennedy agreed, stating, "I would like them to be of better quality".[214]

161. Recent examples of ECHR memos we have had to query include:

- the Data Protection and Digital Information Bill: we wrote to the Secretary of State for Culture Media and Sport noting that:

  > The Explanatory Notes provides general information that "Some of the provisions in the Bill may engage Article 8" before giving a few examples of relevant clauses, rather than setting out any case law or providing any detail on how any interference can be justified and proportionate. Only two clauses are referred to, in a bill which totals over 100 clauses and 13 schedules.[215]

- The National Security Bill: new government clauses were added at Committee Stage introducing a foreign influence registration scheme. No ECHR memo was produced to accompany these clauses and the Bill had finished its passage in the House of Commons before any human rights analysis was provided by the Government;[216]

- The ECHR memo accompanying the Bill of Rights Bill itself fell far short of the standard we would hope to see. As we wrote to the department at the time:

  > Whilst [the ECHR Memo] described some of the clauses and asserted compliance with human rights, it contained very little analysis to back-up the Government's assertions or to enable Parliament to understand the reasoning that supported the Government's position. Moreover, some clauses of relevance to enforcing human rights were not even mentioned in the Memorandum. For example, the Memorandum failed to address clause 24 which directs the UK courts and public authorities not to comply with interim measures of the ECtHR, which is a breach of Article 34 ECHR.[217]

162. Murray Hunt explained how ECHR memoranda were the result of scrutiny work by the JCHR, who would routinely request information on Bills. Over time, the Government was persuaded that it would be in the department's own interests to provide the Committee with a version of the human rights analysis that was already produced internally within Government as part of the process for producing a government bill. He told us:

214 Oral evidence taken on 6 July 2022, HC 550 (2022–23), Q15

215 Letter from the Chair of the Joint Committee on Human Rights to the Secretary of State for Digital, Culture, Media and Sport relating to the Data Protection and Digital Information Bill, dated 20 October 2022

216 Joint Committee on Human Rights, Fifth Report of Session 2022–23, Legislative Scrutiny: National Security Bill, HC 297/ HL Paper 73, para 165

217 Letter from the Acting Chair to the Lord Chancellor relating to the Bill of Rights human rights memorandum, dated 30 June 2022

> If Section 19 were lost, all that is at risk. Of course, an undertaking could be extracted, perhaps by this committee, from the Government that even if Section 19 were to be lost the memoranda would still be provided, and perhaps a commitment that they could be improved.[218]

163. The Government has stated that ECHR memoranda will continue to be provided to Parliament after section 19 is repealed, telling us that "[p]roposed legislation will still be accompanied by analysis of human rights implications, which will provide a transparent basis for parliamentary scrutiny".[219] The Secretary of State made the same commitment in his oral evidence, saying " [the repeal of section 19] does not mean that there will not be a proper human rights analysis when legislation is introduced".[220] The Secretary of State continued "I am happy to be clear on what we envisage as a matter of practice". It concerns us that this commitment would be too easy for a future government to row back from, especially without section 19 driving internal processes within Government.

164. Professor Conor Gearty and Dr Giulia Gentile told us that "[f]ar from removing the section 19 power, the Bill should have required more than is currently required, in the form of not only such a declaration but also the reasons for the making of the declaration. This would truly add to parliamentary oversight".[221]

165. **The quality of information provided to Parliament to enable it to perform its constitutional role is vital. Some ECHR memoranda are not of a sufficient quality to assist our scrutiny.** ***The Government must improve the timeliness and quality of the information it provides to Parliament about the human rights implications of its legislation. The Government should also put its commitment to publishing human rights reasonings and justification for all Government Bills, which we welcome, on a statutory footing. The Bill of Rights should be amended to this effect (see Annex, Amendment 10).***

Scrutiny of Government action to address human rights violations

Duty to notify Parliament of failure to comply with the Convention

166. The Bill, in clause 25, requires the Secretary of State to lay before Parliament notice of any adverse ECtHR judgment against the UK, or a voluntary UK declaration that it has failed to comply with the Convention. There is nothing inherently problematic in this proposal; increased provision of information to Parliament is to be welcomed. It can, however, be done without legislation: the Government could commit to informing both Houses through a Written Ministerial Statement when there are adverse judgments or indeed declarations of incompatibility.

167. It is possible that after this information is provided to Parliament, either under clause 25 or under a non-legislative mechanism, one or both Chambers might wish to hold a debate. The nature of this parliamentary debate, however, matters. The UK has a clear

218 Oral evidence taken on 6 July 2022, HC 550 (2022–23), Q3 [Murray Hunt]
219 Letter from the Lord Chancellor relating to the Bill of Rights and ECHR memorandum, dated 14 July
220 Q34
221 Professor Conor Gearty (Professor of Human Rights Law at London School of Economics); Dr Giulia Gentile (Fellow in Law at London School of Economics) (BOR0009)

obligation under Article 46(1) ECHR to abide by the final judgments of the ECtHR. In his evidence to our Committee, the Secretary of State made reference to prisoner voting and the *Hirst* case.[222] He told us that:

> One of the arguments that was made to us is, but has Parliament properly considered this? Is this just an oversight? A lot of the legislation on barring prisoners from voting was very old, so we made the argument that Parliament had considered this and there were various different debates; I remember the Back-Bench business debates and Westminster Hall debates on this. This is done out of respect and as a platform to allow for that kind of dialogue, but also because it was asked explicitly of us: "Has Parliament really considered this?" It should give some comfort to Strasbourg that we are properly engaged in dialogue and that Parliament is not ignoring their rulings.[223]

168. The Government's consultation paper had proposed that there might be a "democratic shield". This seemed to imply that Parliament might be used as some sort of "defence" where the Government do not wish to comply with the UK's legally binding obligations to respect the human rights of those within its jurisdiction (Article 1 ECHR) and to abide by the final judgments of the ECtHR (Article 46(1) ECHR). We therefore welcome the statement from the Secretary of State for Justice in correspondence with this Committee that, "[t]he government also intends that the UK will continue to comply with those judgments by which it is bound as party pursuant to Article 46".[224] We trust that the current administration and those that follow it will not deviate from this commitment to comply with judgments from the Court.

169. It might be useful if any such debates in Parliament were informed by the work of this Committee. We can envisage a process by which, once Parliament has been informed of an adverse decision, this Committee has a set period in which to report, after which a debate may take place. We think there is merit in exploring a change to Standing Orders along these lines, as suggested by Paul Evans in his oral evidence.[225]

170. We could also usefully have a dialogue with the Government on the information they might provide alongside the notification of an adverse judgment. It would be helpful if the notification was accompanied by an action plan, setting out the issues in the case, along with the Government's proposed timescale and method for addressing the judgment. Such a development should not be too burdensome on the Government, who already produce such Action Plans and Action Reports for the Council of Europe's Committee of Ministers in response to adverse ECtHR judgments.

171. ***Parliament should be informed of adverse judgements by the European Court of Human Rights. This could occur by convention rather than statute. The Government should also provide Parliament in such cases with an action plan, setting out how the Government intends to resolve the issue that led to the judgement, and its proposed timeframe for doing so.***

222 Hirst v. The United Kingdom (No. 2) [2005] ECHR 681 (6 October 2005)
223 Q35
224 Letter from the Lord Chancellor relating to the Bill of Rights and ECHR memorandum dated 14 July
225 Oral evidence taken on 6 July 2022, HC 550 (2022–23), Q8 [Paul Evans]

172. ***The Government should also inform Parliament when declarations of incompatibility are made by domestic courts in the same way as for adverse ECtHR judgments. Again, such information would be helpfully accompanied by an action plan setting out the issues in the case alongside the proposed timescale for addressing the incompatibility.***

173. ***We ask the Government to engage with us on agreeing a process for informing Parliament where there are declarations of incompatibility made by domestic courts.***

The remedial order process

174. The Bill of Rights Bill contains, at Clause 26 and Schedule 2, provisions for remedial regulations to be made by ministers to amend legislation that has been found incompatible with the ECHR. These provisions would largely replicate the existing provisions in the HRA for remedial orders. There are two main differences, neither of which we find problematic but neither of which appear particularly necessary either. Remedial orders would be renamed "remedial regulations", which simply reflects modern drafting practice (although we note our own Standing Orders in both Houses refer to remedial orders and would require updating accordingly). Moreover, the remedial power would not be available to amend the Bill of Rights (whereas it is available, and has been used, to amend the Human Rights Act).

175. The provisions restrict the potential use of remedial regulations to declarations of incompatibility and ECtHR judgments arising after the entry into force of the Bill of Rights, which risks incompatibilities already identified being unable to be remedied except by primary legislation. This should be resolved.

176. ***Clause 26 should be amended to ensure that the remedial power is available in respect of existing incompatibilities as well as those that arise in future (see Annex, Amendments 11 and 12).***

177. This Committee, and its predecessor committees, have made suggestions for ways in which the remedial order process might be improved.[226] In our report on Human Rights Act Reform we recommended that:

- It could be useful to consider shortening the timeframes for remedial Orders to make the remedial process more expeditious. The first timeframe could perhaps be shortened from 60 days to 50 days for the first report in respect of a proposed draft remedial order; and the second one from 60 days to 30 days. That would mean that the overall time for the urgent process could be 80 days.[227]

- Following a declaration of incompatibility, the responsible Minister should write to the Committee setting out his proposed timetable and method for addressing

226 See for example, Joint Committee on Human Rights, Fifteenth Report of Session 2009–10, Enhancing Parliament's Role in Relation to Human Rights Judgments, HL Paper 85 /HC 455, and Joint Committee on Human Rights, Seventh Report of Session 2001–02, The Making of Remedial Orders, HL 58 Paper/ HC 473

227 Joint Committee on Human Rights, Thirteenth Report of Session 2021–22, Human Rights Act Reform, HC 1033 / HL Paper 191, para 117

> that incompatibility. The Committee can then consider and agree that timetable with the Government, and can then help to hold both Government and other actors to account in taking timely action to address such violations.[228]

178. The Government, in their response to our report, stated that, "We note the Committee's proposals for shortening the timeframes for remedial orders, and this is something the Government will consider further. We also note the Committee's suggestions for the Government to engage more formally with Parliament on proposed timetables and methods for addressing incompatibilities". We expect the Government to engage more fully with these recommendations.

179. There are other changes to the process, which have been raised in evidence to us, that we believe merit further exploration. Murray Hunt suggested that this Committee might be given the power of initiative in bringing forward proposals to remedy incompatibilities if the Government has failed to respond in a timely manner.[229] We have also noticed some uncertainty from Government departments in how to lay remedial orders in line with the requirements in Schedule 2. It appears to us that the Schedule could be improved upon, and that the Cabinet Office should provide be better guidance on the process available to Government departments.

180. ***The Government should amend the remedial regulations provisions to ensure that there is no risk of the procedure being unavailable where declarations of incompatibility occur before the Bill becomes law. We ask the Government to consider shortening the time frames for remedial regulations as we have previously proposed. The remedial order process seems to cause difficulties for some Government departments. The drafting of the schedule should be updated to make the remedial process and its requirements easier to follow.***

228 Ibid, para 121

229 Oral evidence taken on 6 July 2022, HC 550 (2022–23), [Murray Hunt]

5 Restrictions on enforcement and remedies

Litigation under the Human Rights Act 1998

181. Legal recognition of human rights is of little value without a mechanism to enforce those rights. The HRA backs up the section 6 obligation on all public authorities to act compatibly with the Convention rights with express recognition in section 7 that a victim (or potential victim) of a breach of this obligation can bring a claim in court, either to prevent the breach taking place or to receive a remedy if it has already happened. Human rights claims are commonly brought by way of judicial review where the High Court can be asked to quash a decision that is incompatible with human rights, to direct that an incompatible action is not taken, to strike down incompatible subordinate legislation or to declare that primary legislation is incompatible.[230] However, human rights claims can also be brought by way of a normal civil action, where the remedy that is generally sought is compensation, referred to as damages.

182. The HRA provides for damages to be awarded for human rights violations if the court is satisfied that they are necessary to afford "just satisfaction", which is the term used in the ECHR to mean, essentially, an effective remedy. Where a human rights breach has already taken place and so cannot be prevented, damages are often (but by no means always) the only way in which a court can recognise the experience of the victim and grant them "just satisfaction". In determining whether to award damages and how much to award, the courts are obliged under the HRA to take into account the principles applied by the ECtHR when it considers compensation. The Supreme Court has held that the amount of damages awarded should broadly reflect the level of awards made by the ECtHR in comparable cases brought by applicants from the UK or other countries with a similar cost of living.[231]

Government proposals

183. In the consultation that preceded the Bill of Rights Bill, the Government made clear that it considered the ability to bring human rights claims against public authorities was being abused. It said that "frivolous or spurious" claims were being brought, which "devalue[d] the concept of human rights" and resulted in costs being incurred by the public authorities having to respond to them. From the few examples the Government provided, it appeared the main objection was to unsuccessful claims brought by serving prisoners.[232]

184. We have previously expressed our view that the Government has failed to provide sufficient evidence to support its claims that this is a real problem in need of a solution.[233] The Government's response to our report on *Human Rights Act Reform* reiterated the need

230 As a result of the Judicial Review and Courts Act 2022, quashing orders can now be suspended and can have prospective effect only. Damages may also be awarded in a judicial review claim when a breach of Convention rights has been established.

231 R (Faulkner) v Secretary of State for Justice [2013] UKSC 23

232 See further Joint Committee on Human Rights, Thirteenth Report of Session 2021–22, Human Rights Act Reform, HC 1033 HL Paper 191, paras 174–175

233 Ibid

"to ensure that trivial claims do not undermine public confidence in human rights more broadly", but did not provide any further evidence to support this need.[234] Our concern about the Government's failure to substantiate it claims is shared by many of those who responded to the Committee's call for evidence. For example, Child Poverty Action Group said that "underlying this question appears to be the belief that awards of damages in HRA claims are too many and too high. Given the general approach of courts to HRA damages claims, this belief is likely to be misplaced, and the [Government] consultation provides no empirical evidence of its truth."[235]

185. The Bill of Rights Bill, nevertheless, includes a number of changes to the way in which human rights claims would be brought and remedied:

a) The introduction of a permission stage in clause 15, which would prevent claims being brought unless a claimant had suffered "significant disadvantage";

b) Changes to the courts' approach to damages in clause 18, including:

   i) Prohibiting any award of damages higher than what would be made by the Strasbourg court;

   ii) An obligation on the courts to take into account relevant conduct of the claimant (even if it is unrelated to the claim in question) when considering whether to award damages and how much;

   iii) An obligation on the courts to give "great weight to" the importance of minimising the effect an award of damages might have on a public authority's ability to perform its functions.

186. These proposals appear designed to prevent human rights claims that the Government considers unjustified being brought; to prevent damages being awarded to 'unworthy' claimants; and to prevent damages awards causing problems for public authorities.

Risk of limiting effective domestic enforcement of human rights

187. Legislating to limit the ability of individual victims of human rights violations runs counter to the UK's international law obligations under the ECHR:

a) Firstly, under Article 1 ECHR the UK has committed to "secure to everyone within their jurisdiction the rights and freedoms" within the Convention; denying some victims the opportunity to enforce their rights would not meet this obligation.

b) Secondly, under Article 13 ECHR victims of human rights violations have a right to an "effective remedy before a national authority". As Professor Conor Gearty and Dr Giulia Gentile explain: "the purpose of Article 13 ECHR is to ensure that individuals can obtain relief at national level for violations of their ECHR rights before having to set in motion the international machinery of complaint

234 Joint Committee on Human Rights, First Special Report of Session 2022–23, Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22, HC 608

235 Child Poverty Action Group (BOR0012)

> before the ECtHR."[236] While this does not necessarily require a remedy from a *court*, removing access to court or limiting the ability of a court to provide just satisfaction in the absence of any other mechanism to obtain an effective remedy would fall foul of Article 13.

188. Thus, any obstacle placed in the way of domestic enforcement of human rights risks placing the UK Government in breach of its obligations under Article 1 and 13. More practically, such an obstacle will once again increase the need for victims of human rights violations to take their claim to the ECtHR.

Government's specific proposals

Permission stage

189. The proposed permission stage would exclude cases where a public authority has acted unlawfully, in breach of fundamental human rights, but where the victim could not show that they had suffered "significant disadvantage". Many who responded to our call for evidence were troubled by the proposal to introduce the new permission stage. The Centre for Women's Justice said it would "necessarily create a barrier to accessing the courts".[237] JUSTICE, the law reform and human rights charity, agreed that it would "add a further barrier to rights claims, likely dissuading individuals from enforcing their rights through the courts and reducing the accountability of public bodies."[238] The Law Society explained that they "are concerned that this high threshold would permit routine violations, effectively creating an 'acceptable' class of human rights abuses. This could have a chilling effect on justice by either preventing meritorious cases from being heard or dissuading individuals from bringing them in the first place."[239]

190. Quite what amounts to significant disadvantage is unclear. In our report on protecting human rights in care settings, we discussed the importance of visits to those in care settings and their family members.[240] Unlawfully denying a family member the ability to visit a loved one would undoubtedly violate Article 8 ECHR, but we are troubled that we cannot be certain it would result in a disadvantage sufficiently "significant" to pass the proposed permission stage. We note that the Bill would allow courts to disregard the need for permission, but only for "reasons of wholly exceptional public interest."[241] This very limited exception provides no guarantees that individuals will be able to access the courts. It is not clear that it would cover meritorious claims for widespread but low impact violations of rights—such as major breaches of privacy that affect thousands but have only minor effects on each individual concerned.

236 Professor Conor Gearty (Professor of Human Rights Law at London School of Economics); Dr Giulia Gentile (Fellow in Law at London School of Economics) (BOR0009)

237 Centre for Women's Justice (BOR0055)

238 JUSTICE (BOR0071)

239 The Law Society (BOR0046). The Association of Personal Injury Lawyers also argued that "[t]he introduction of a permission stage for human rights claims, which requires claimants to show they have suffered "significant disadvantage", will send a message from the Government that some breaches of human rights are acceptable. This message could dissuade people from using the courts because they may believe that what happened to them [was] acceptable, when it was not." (BOR0024)

240 Footnote to relevant paragraph and report

241 Clause 15(4)

191. No permission stage requiring a certain level of harm applies in other legal claims for damages. We asked the Secretary of State why such an obstacle should apply to those bringing human rights claims when it does not to those bringing claims in tort (delict in Scotland) or contract. He noted that: "[y]ou have to show loss if you want to bring a negligence claim and a contractual claim."[242] We do not accept that this is equivalent. It is more akin to the existing requirement in any human rights claim for a claimant to show that he is a "victim".[243] The Bill of Rights Bill would impose an additional requirement to show a particular degree of victimhood. Furthermore, neither tort nor contract claims involve a distinct permission stage at which loss must be established—loss is pleaded and then proven in the course of the trial, or proof in Scotland.

192. While a permission stage does already exist in public law judicial review proceedings it is designed to weed out claims with no hopes of success - not claims that might be successful but in which the claimant has not suffered sufficient harm. As the Law Society noted, the Government's proposal "is a departure from other forms of permission stage which are used to assess the merits and likelihood of success of a claim, not how much harm has been suffered. It therefore appears to be applying a higher standard to human rights claims than for other areas of law".[244] This would, disturbingly, downplay the importance of respecting human rights as against other legal obligations, including those imposed by contract or tort law.

193. The Secretary of State emphasised to us that the proposed permission stage would deal with human rights arguments being "tacked on at the end of a string of other claims that may be made against a public body".[245] We do not agree with the criticism implicit in this comment. Human rights claims must be raised in domestic proceedings before they are taken to the ECtHR, or they will be declared inadmissible by that court.[246] A lawyer 'tacking on' human rights arguments is preserving their client's position to ensure that they will not lose the possibility of a future claim to the Strasbourg Court.

194. The "significant disadvantage" test was modelled on the ECtHR's own admissibility criterion, which requires applicants to demonstrate that they have suffered "significant disadvantage" as part of the admissibility stage of any claim.[247] Applying the same test in domestic law, however, fails to take into account the key principle of 'subsidiarity' that underpins the ECHR system as a whole and Article 13 in particular. It is primarily for the States signed up to the Convention to resolve human rights issues, which is why an applicant is required to exhaust domestic remedies before they bring an application to

242 Q36
243 See section 7 of the HRA and Article 34 of the ECHR.
244 The Law Society (BOR0046)
245 Q39
246 An aspect of the obligation to exhaust domestic remedies under Article 35(1) ECHR. This is consistent with "the subsidiary character of the Convention machinery", ensuring that the domestic courts have been given an opportunity to resolve the human rights issue before it is taken to the ECtHR. See the admissibility decision in the recent case of Lee v United Kingdom, App. No. 18860/19, 7 December 2021.
247 Confirmed by the Government in its response to the JCHR Report on Human Rights Act Reform: Joint Committee on Human Rights, First Special Report of Session 2022–23, Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22, HC 608. See Article 35(3)(b) ECHR.

Strasbourg.[248] The ECtHR is there as a back-stop for those cases that cannot be resolved domestically.[249] Limiting the cases that reach that court is not the same as denying victims any access to court at all. The Law Society made the same point in its evidence to us:

> International courts have only subsidiary jurisdiction–acting as a 'safety net'–and so it is understandable that higher thresholds may be applied. Domestic courts, in contrast, have primary jurisdiction and are expected to provide wider access to justice.[250]

195. Lord Mance, former Judge of the Supreme Court, has also dismissed the suggestion that the permission stage is legitimate because it merely reflects the approach taken by the ECtHR:

> The ECtHR's test is for review at the international level. The Convention contemplates no such test for a first instance domestic claim. Admissibility criteria commonly differ at first instance and on review. The Ministry's explanation is no justification for this new test.[251]

196. The admissibility rules of the ECtHR, whatever they might say, do not affect the obligations of the UK under the Convention, including Articles 1 and 13. Thus, a failure in domestic law to secure the Convention rights of everyone within the jurisdiction, and to provide them with an effective remedy, remains a violation of the Convention regardless of how the Strasbourg court approaches admissibility.

197. **While the proposal to introduce a new permission stage will only have an impact on human rights claims in which no significant disadvantage has been suffered, it will still prevent meritorious claims, potentially affecting many individuals, being heard. Legislating to establish a class of permissible human rights violations, and restricting human rights claims in a manner that does not apply to legal claims brought on other grounds, undermines the UK's commitment to uphold human rights. *The Government should reconsider whether introducing the permission stage will achieve its aims, and whether it would leave the UK in breach of its international obligations. Unless the Government is prepared to reconsider clause 15, we would like to see it removed from the Bill (see Annex, Amendment 13).***

Damages—upper limit

198. Clause 18(3) of the Bill would prohibit a court from awarding an amount of damages which is greater than the amount that the court believes the ECtHR would award. Domestic courts seek to make damages awards that are consistent with what would be awarded by the ECtHR in any event. This is because section 8(4) of the HRA currently requires them to take into account the principles applied by the ECtHR.[252] The difference to what is proposed under the Bill of Rights is that the courts are not bound by the approach of

248 Article 35(1) ECHR

249 The ECtHR cannot act as a court of first instance or even appeal for all of the 46 nations across the Council of Europe. Significant reforms, including revisions to the admissibility test, have been required to ensure that the Court is not overwhelmed - see in particular Protocol 14 to the ECHR, Council of Europe Treaty Series No. 194, 13 May 2004

250 The Law Society (BOR0046)

251 Lord Mance, The Thomas More Lecture, "The Protection of Rights – this way, that way, forwards, backwards …", 26 October 2022.

252 See R (Greenfield) v Secretary of State for the Home Department [2005] UKHL 14

the ECtHR. It is hard to see why it is necessary for them to be so bound if they consider the interests of justice would be met by a more generous approach. Once again, the Bill would restrict the freedom of domestic courts to depart from ECtHR case law, which is the opposite of what the Government proposes in other areas of the Bill.

199. **There is no need for domestic courts to be prohibited from, exceptionally, making a damages award that is more generous than that which would be made by the ECtHR. *This prohibition should be removed from the Bill in favour of the existing general obligation to take into account the principles applied by the European Court of Human Rights in relation to the award of compensation (see Annex, Amendments 14 and 15).***

Conduct and damages

200. The Government placed emphasis on responsibilities as well as on rights in their consultation on human rights act reform, which carried with it the implication that human rights are dependent on meeting responsibilities. This implication has found form in the Bill of Rights Bill, most obviously through the proposal for the courts to take into account the wider conduct of the claimant when considering damages.

201. In evidence to this Committee the Secretary of State suggested that this proposal was simply extending the principle of 'contributory negligence' to human rights claims:

> When you want to apply for compensation, it is quite right that a court takes into account what you did. Was it contributory to the wrong that you say you have suffered? We have that in negligence and I think it is right that we have it in human rights cases.[253]

202. Contributory negligence, however, goes to the question of causation—if a claimant's own fault has *contributed* to the loss, that should be taken into account. The proposal in the Bill of Rights Bill goes much further, expressly permitting the courts to take into account any conduct that is "relevant" "whether or not the conduct is related to the unlawful act."[254]

203. The Government has, nevertheless, stated that this proposal is consistent with the approach already taken by the ECtHR and domestic courts. It is correct that there have been ECtHR and domestic cases in which the courts have not awarded or have reduced damages due to the applicant or claimant's conduct. However, these have been extreme cases in which the reprehensible conduct has been closely related to the circumstances of the human rights violation.

204. The key case relied upon is *McCann v UK*, which saw the ECtHR decline to award damages after terrorist suspects were killed, in breach of their Article 2 rights, whilst actively pursuing a plot to plant a bomb in Gibraltar.[255] The ECtHR judgment provided little detail on why the award was not considered appropriate. Given that the men killed had been intending to carry out a serious terror attack, it could reasonably be argued that their conduct directly contributed to the actions that led to their deaths, meaning that the responsibility of the State was diminished. Alternatively, it could be argued that their conduct was so reprehensible that taking an 'equitable approach' to damages, their

253 Q37
254 Clause 18(5)(a)
255 McCann v United Kingdom (1995) 21 EHRR 97

surviving family should not receive any. Even if this second view is taken, it is clear that the reprehensible conduct of the deceased men was both extreme and also central to the actions that resulted in the violation of their rights.

205. It does not appear to be the case that the conduct of the applicant is taken into account by the Strasbourg court as a general rule, or, in fact, very often. The judgment in *McCann* can be contrasted with numerous other ECtHR judgments in which damages were awarded to applicants despite them having been found to have failed to meet their responsibilities (including by committing serious criminal offences).[256]

206. Any proposal to deny an individual a remedy for a human rights violation on the basis of their past conduct risks transgressing a fundamental principle underlying human rights: "their universality and application to each and every person on the simple basis of their being human", as the Prison Reform Trust described it.[257] Professor Conor Gearty and Dr Giulia Gentile explained: "The essence of human rights is that a person's dignity is not linked to, and capable of being lost as a result of, their conduct. Viewed in the round this measure links conduct to rights protection to a disturbing degree."[258] Dr Alex Latham-Gambi of Birmingham University also considered that this proposal threatens a central tenet of human rights law: "Human rights are those fundamental rights possessed by all simply by virtue of being human, not privileges dependent upon good conduct. To suggest that someone who fails to respect the rights of others might find themselves outside of the protection of human rights law is to reject the modern ideal of human rights altogether."[259]

207. The Government have stated that express provision for taking into account relevant conduct of a claimant will allow "a fair system" with "courts [given] wide discretion when considering these factors. Significantly, it is for the court to consider whether any particular conduct on the part of the claimant is relevant to the case."[260] The Prison Reform Trust voiced concerns about the breadth of this discretion:

> [a]llowing the remedy given to individuals in compensation for infringements of their human rights to be reduced or withheld altogether on the basis of anything they have ever done would effectively turn a court's determination of remedies into a wider judicial referendum on an applicant's life–a dangerous and anti-democratic path to go down.[261]

208. Evidence provided to us also noted that a proposal to reduce or remove damages based on previous conduct could have a particular impact on specific groups, such as individuals in prisons and youth offender institutions. The Prison Reform Trust emphasised that it

256 For example, in Demir v Turkey (2001) 33 E.H.R.R. 43 two claimants were awarded damages for a breach of Article 5(3) (the right to be brought before a court promptly after arrest) despite ultimately being found guilty of terrorist offences; in Raninen v Finland (1998) 26 E.H.R.R. 563 the claimant committed offences by refusing compulsory military service but still recovered damages for his wrongful arrest and detention under Article 5; and in Petra v Romania (2001) 33 E.H.R.R. 5 a convicted murderer whose letters from prison to his wife and to the court were routinely intercepted was given substantial damages under Article 8 (with no mention of his past conduct).

257 Prison Reform Trust (BOR0056)

258 Professor Conor Gearty (Professor of Human Rights Law at London School of Economics); Dr Giulia Gentile (Fellow in Law at London School of Economics) (BOR0009)

259 Dr Alex Latham-Gambi (Lecturer in Law at Swansea University) (BOR0008)

260 Joint Committee on Human Rights, First Special Report of Session 2022–23, Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22, HC 608

261 Prison Reform Trust (BOR0056)

was vital for such individuals, under the direct control of the State, to be able to effectively enforce their human rights.[262] Similar concerns were raised by Mencap about a different group: "We are concerned that misunderstanding of, and indeed criminalisation of people with a learning disability, due to unmet needs in relation to behaviour that challenges, could see negative inferences drawn in relation to their 'conduct'."[263]

209. **Human rights by their nature are universal—they are inherent in the human condition and not dependent on good conduct. Any efforts to categorise certain groups of people as being less deserving of human rights protection is contrary to the very concept of human rights.** ***Directly legislating for previous conduct to be taken into account when awarding damages encourages the courts to make judgments on whether a victim deserves an effective remedy for a violation of their rights. Clause 18(5)(a) poses a risk to the universal nature of human rights and should be removed from the Bill (see Annex, Amendment 14 and 15).***

Reducing damages based on impact on public authorities

210. The proposal in clause 18(6) also attracted significant criticism in the evidence submitted to us. This provision would require the courts to give "great weight" to the importance of minimising the effect an award of damages might have on a public authority's ability to perform its functions (which includes having regard to awards of damages that may be made in similar cases in future—see clause 18(7)). This is the only consideration to which the courts would be required to give "great weight" when considering whether to award damages and in what amount. It would appear, therefore, that the intention is for the courts to give it greater importance and priority than any other factor.

211. The Secretary of State told us that in introducing clause 18(6) "what we want to avoid is litigation being used as a tool to paralyse public bodies that are doing important roles … We want public bodies performing their functions lawfully and compatibly with human rights. What we do not want is to encourage a litigation culture."[264]

212. We do not think the way to discourage a 'litigation culture' is to deprive human rights victims of an adequate remedy for their loss. We are troubled by any provision that seeks to move the court's focus from providing "just satisfaction" to an established victim of a human rights violation to avoiding inconvenience for a public authority, most likely to be the one that has violated the victim's human rights. Such an approach is very hard to reconcile with the obligation to provide an effective remedy under Article 13 ECHR, as well as the overarching obligation to secure human rights under Article 1 ECHR. Neither of these core obligations suggests that the enforcement of fundamental human rights can be made contingent on ensuring that the state does not find it harder to perform its functions. Rights and Security International told us that:

> We believe that this factor is irrelevant: when rights are at issue, the only legal questions at hand are whether the state has violated a person's rights and if so, what remedies are necessary to make that person whole and/or prevent a recurrence of the situation.[265]

262 Prison Reform Trust (BOR0056)
263 Mencap, Challenging Behaviour Foundation (BOR0034)
264 Q37
265 Rights & Security International (BOR0030) Rights & Security International (BOR0030)

213. This provision fails to emphasise that the best way for public authorities to avoid paying damages that may impact on their ability to perform their functions is for them not to act unlawfully by violating human rights. This simple but powerful point was made by the Helen Bamber Foundation and Asylum Aid: "[T]he solution to concern about the impact of a potential damages award on a public authority is for that authority not to act in ways that are contrary to human rights."[266]

214. Connectedly, part of the role of damages is to dissuade defendants from acting unlawfully. As Rights and Security International noted: "Damages do indeed impact resources, and this is what makes them effective as an incentive in favour of ensuring rights-respecting behaviours and a deterrent against rights-violating ones." JUSTICE were also critical of the failure of clause 18(6) to: "recognise the incentivisation that damages can provide to ensure that public authorities protect fundamental human rights."[267]

215. **The focus of any assessment of damages in a human rights claim should be the need to provide the victim with an effective remedy. Requiring the courts to give "great weight" to the importance of minimising the effect an award of damages might have on a public authority's ability to perform its functions distracts from this focus, prioritising instead the interests of the body responsible for the human rights violation.** ***We recommend that clause 18(6) is removed from the Bill. The existing obligation to take into account the principles applied by the ECtHR in relation to the award of compensation should be reinstated (see Annex, Amendments 14 and 15).***

Enforcement of rights: additional concerns

216. While the proposed changes to the enforcement of human rights discussed above reflect Government concerns about excessive and unjustified human rights claims, we have noted two further ways in which the Bill of Rights could narrow the ability to enforce human rights which lack adequate explanation.

Clause 13 (Proceedings)

217. Clause 13 of the Bill would give individuals the ability to enforce their rights through the courts. It would replace section 7 HRA and largely replicates what that section provides. There is one notable difference, however. While both section 7 HRA and clause 13 provide that a person who claims that a public authority has acted incompatibly with Convention rights, and who is a victim of that act, may bring proceedings under the respective Act,[268] section 7 also allows that person to "rely on the Convention right or rights concerned in any legal proceedings". By contrast, clause 13(2) states that the person may also:

> (b) rely on the Convention right or rights concerned—
>
> (i) in any legal proceedings brought against the person, or
>
> (ii) in establishing a cause of action arising otherwise than under this Act.

266 Helen Bamber Foundation, Asylum Aid (BOR0017)
267 JUSTICE (BOR0071)
268 Including by way of judicial review, as specified in clause 13(3)

218. It thus appears that the language used in clause 13 has slightly narrowed the circumstances in which a person who is not bringing a claim under the Act may rely on the Convention right or rights concerned. There is nothing in the Bill of Rights Bill to confirm that a victim can rely on their Convention rights in proceedings where they are neither defending a claim nor establishing their own cause of action, such as children concerned in family law proceedings or families involved in inquests. The Explanatory Notes to the Bill do not set out the reason for this change from the position under section 7 of the HRA.

219. **Whether or not it is deliberate, clause 13 of the Bill unnecessarily risks narrowing the circumstances in which individuals can rely on their Convention rights.** ***The Bill should be amended to make clear that Convention rights can be relied on in any legal proceedings (see Annex, Amendments 16 and 17).***

Consequential amendments—National Human Rights Institutions

220. Currently, the Equality and Human Rights Commission (EHRC) and the Northern Ireland Human Rights Commission (NIHRC) (the National Human Rights Institutions (NHRIs) for Great Britain and Northern Ireland respectively) are permitted by statute to bring proceedings under the HRA despite not having victim status.[269] This allows them the important ability to bring human rights violations before the courts in a representative capacity. We would have expected the consequential amendments in Schedule 5 of the Bill to have made clear that this ability is retained under the Bill of Rights Bill. They do not do so. As Amnesty International UK explained: "Unless rectified this will make it near impossible for EHRC [and NIHRC] to bring 'own name' human rights challenges".[270]

221. **The ability of the Equality and Human Rights Commission and the Northern Ireland Human Rights Commission to bring cases under the Human Rights Act of their own motion is an important part of their function as human rights champions. It is possible that the omission of the retention of this ability from Schedule 5 of the Bill is inadvertent. In any event, it needs to be rectified.** ***We recommend that Schedule 5 of Bill is amended to make clear that the Equality and Human Rights Commission and the Northern Ireland Human Rights Commission retain their ability to bring own motion cases (see Annex, Amendments 18 and 19).***

Enforcement of rights: welcome change

222. Clause 19 of the Bill covers judicial acts and sets out the limited circumstances in which they can be challenged on human rights grounds. It largely reproduces section 9 of the HRA by (a) requiring human rights challenges to judicial decisions to be brought by way of appeal or, in limited circumstances, by judicial review and (b) prohibiting the courts from paying out damages for judicial acts done in good faith other than in certain exceptional circumstances. The one change that the Bill of Rights would make is to add a further targeted exception to the judicial immunity provisions, enabling damages to be awarded in respect of a judicial act done in good faith if it is (i) incompatible with Article 8 of the Convention (the right to respect for private and family life), and (ii) inconsistent with the requirements of procedural fairness. This is intended to remedy the breach of Article 8

269 See s30(3)(a) Equality Act 2006 and s71(2A) of the Northern Ireland Act 1998

270 Amnesty International UK (BOR0053)

and Article 13 ECHR identified by the ECtHR in *SW v United Kingdom*, ensuring that the clause is consistent with the need to provide an effective remedy to a person whose Article 8 rights are breached in these circumstances.[271]

223. **We welcome the Government's response in clause 19 to the judgment of the European Court of Human Rights in S.W. v United Kingdom. It would correct section 9 of the Human Rights Act, which is currently inconsistent with the European Convention on Human Rights to the extent that it prohibits damages being awarded for judicial acts done in good faith that violate the right to a fair procedure guaranteed by Article 8 (the right to respect for private and family life).**

271 S.W. v United Kingdom, App. No. 87/18, 22 September 2021. See further: Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2021–2022, pp.31–32. The applicant, SW, was a social worker, and acted as an expert witness in care proceedings. The judge in those proceedings, without warning, made a number of critical comments about SW in his judgment which were passed to her employer and led her to being dismissed from her job. SW suffered various health issues as a result of the stress associated with the accusations made, and was unable to work. She appealed to the Court of Appeal, which acknowledged that the process by which the judge came to make the criticisms was manifestly unfair, and directed that the criticisms be of no effect and removed from the judgment. The Court found that there had been an infringement of her Article 8 rights, as a result of the unfair procedure. However, SW was unable to claim compensation in the domestic courts because of section 9(3) of the HRA which at that time stated: "In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention."

6 Approach to international legal obligations

224. The UK is a dualist state—international law only becomes part of domestic law when it is expressly incorporated. Unless it is incorporated into domestic law, it is not directly enforceable in our domestic courts. However, dualism does not mean that the UK is not bound by its international law obligations—they remain legally binding and enforceable as a matter of international law. When the UK enters into treaty obligations, such as those under the Convention, it must perform its obligations in good faith. There are doubts that the Bill complies with the UK's obligations under international law to comply with the Convention. In fact, Lord Pannick QC told us that: "No serious person could possibly think that the contents of this Bill in its entirety… comply with convention rights."[272]

225. The Bill indicates a disregard for the UK's obligations under international law. As we have already noted, clause 5 is likely to put the UK in breach of its obligation to give full effect to Convention rights owing to the restrictions placed on the courts when interpreting positive obligations. The Government accepts that the Bill will lead to an increase in declarations of incompatibility and, in our view, it is also likely to result in an increase in adverse ECtHR judgments against the UK.[273] This undermines the principle of *pacta sunt servanda*, which provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. This is a principle of customary international law and is therefore universally legally binding on all states. It is also codified within the Vienna Convention on the Law of Treaties, which the UK signed in 1970.[274]

226. In their written evidence, Professor Conor Gearty and Dr Giulia Gentile state that the Bill's "selective approach to international law, picking and choosing between which of its obligations to follow and which to disown, damages further the country's reputation as a bastion of the rule of law".[275] This Chapter considers two clauses of the Bill which are particularly problematic with regard to the UK's approach to international law: clause 14 and clause 24.

Extraterritorial application of the Convention to overseas military operations

227. Clause 14 prohibits individuals from bringing human rights claims, or relying on Convention rights, in relation to acts or proposed acts of public authorities in the course of overseas military operations. It does so by providing the following:

a) Clause 14 creates an exclusion from the rights of victims to bring proceedings (Clause 13) by providing that clause 13 does not confer a right upon a person to bring proceedings against a public authority for acts done or proposed to be done outside of the British Islands in the context of military operations overseas.

272 Oral evidence taken on 6 July 2022, HC 550 (2022–23) Q14

273 Explanatory Notes to the Bill of Rights Bill [Bill 117 (2022–23) - EN], and Letter to the Chair from the Lord Chancellor regarding the Bill of Rights, dated 14 July 2022 to the Chair from the Lord Chancellor regarding the Bill of Rights, dated 14 July 2022

274 Article 26 Vienna Convention on the Law of Treaties 1969

275 Professor Conor Gearty (Professor of Human Rights Law at London School of Economics); Dr Giulia Gentile (Fellow in Law at London School of Economics) (BOR0009)

b) Acts done within the British Islands are also excluded from clause 13 where they are done (or proposed to be done) wholly for the purposes of overseas military operations, and the person is (or would be) outside the British Islands at the time the act is (or would be) done. This would cover, for example, decisions taken in the UK which have an operational effect overseas, for example, a decision to launch a strike.

c) Where the person directly affected by the act is prevented from bringing proceedings by this clause, a person who is an indirect victim due to their relationship with the directly affected person also may not bring a claim or rely on Convention rights (for example, where the affected person has been killed and a family member wishes to bring a claim on their behalf).

d) Persons are also prevented from bringing human rights claims or relying on Convention rights in the context of any inquiries or other investigations into an act (or proposed act) done in the course of overseas military operations. The intention is to limit the scope of the positive obligations arising under Articles 2 and 3 to conduct effective investigations into deaths and serious harm.

228. Clause 14 does not, however, prevent a person from relying on Convention rights in any criminal proceedings.[276]

229. If this clause were to enter into force upon enactment of the Bill, it would undoubtedly be incompatible with the Convention, as the UK is bound to apply Convention rights outside of its territorial jurisdiction in certain circumstances (discussed below). In recognition of this, clause 39 provides that the Secretary of State may only bring clause 14 into effect if he is satisfied that to do so is consistent with the UK's obligations under the Convention.

Government's position

230. In its consultation paper, the Government argues that "the extension of human rights law to armed conflict has … resulted in the actions of our armed forces being subject to increasing legal challenge. This has in turn created considerable legal and therefore operational uncertainties for our armed forces."[277] Further, the Government states that:

> it is clear from the travaux preparatoires [preparatory works] to the Convention that the drafters intended the Convention to apply only on States Parties' territories. However, despite being presented with strong arguments to the contrary, the courts have ruled that the Convention, in certain circumstances, extends to overseas armed conflict. As a result of judgments such as Al-Skeini v UK and Smith v Ministry of Defence, the actions of troops and military decision makers can now be subject to human rights challenges, even though the Convention was not intended to apply extraterritorially and was never designed to regulate conflict situations.[278]

276 Clause 14(5)
277 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021, page 43
278 Ibid. page 43

231. The IHRAR were asked to consider this issue and concluded: "the current position of the HRA's extra-territorial application is unsatisfactory, reflecting the troubling expansion of the Convention's application. The territorial scope of the Convention ought to be addressed by a national conversation advocated to IHRAR during the Armed Forces Roundtable, together with Governmental discussions in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR."[279]

Current legal position on extraterritorial application of the Convention and HRA

232. Article 1 of the Convention sets out its territorial scope. It provides that Convention states are required to give effect to Convention rights 'within their jurisdiction'. However, a number of cases before the ECtHR have established that, in limited circumstances, jurisdiction can extend outside the physical territory of the state. This is essentially where the state has effective control over another area, or where a state's agents have control over an individual. The ECtHR has, more recently, recognised that there may also be "special features" that establish a jurisdictional link so as to trigger the Article 2 ECHR obligation to conduct an effective investigation into a death occurring outside territory. These included, in particular, a state's exclusive jurisdiction over its troops with respect to serious crimes and its obligation to investigate under other provisions of both international and domestic law.[280]

233. The territorial and extra-territorial jurisdiction of the HRA is determined by, and consistent with, the ECtHR's interpretation of the Convention's territorial jurisdiction, because the HRA gives effect to Convention rights in domestic law. The extra-territorial effect of the HRA applies to civilians, but also means that soldiers and other UK military personnel do not automatically lose the ability to enforce their human rights as a result of being deployed outside the UK. In *Smith v Ministry of Defence*, a claim brought on behalf of soldiers who had been killed by improvised explosive devices in Iraq, the Supreme Court held that the extra-territorial nature of the Convention meant that the UK's jurisdiction extended to securing the protection of Article 2 rights to members of its armed forces when serving outside its territory.[281]

234. In their response to the Government consultation, the Centre for Military Justice expressed their view that the UK courts and ECtHR have displayed considerable deference to the need to ensure no judicial encroachment on the battlefield, highlighting that: "[T]he HRA has assisted numerous bereaved military families to understand the wider circumstances in which their loved ones came to die, whether they died during the course of overseas operations or whether they died as a consequence of failures within their own units, at home … Those families and many others like them were only able to get answers, and secure improvements in policies that protect other soldiers, after long battles with the state and because of the ECHR."[282]

279 The Government's Independent Review of the Human Rights Act, HC 89/HL 31, Summary of Recommendations, page vii

280 Hanan v Germany, Application Number 4871/16, 16 February 2021

281 Smith v Ministry of Defence [2014] A.C. 52

282 Centre for Military Justice, CMJ response to the Government Consultation, 'Human Rights Act Reform: A Modern Bill of Rights', 8 March 2022

Implications of clause 14

235. It is clear that any solution to address the scope of extraterritorial applicability must be dealt with at the international level. Changing domestic law will not alter the UK's international obligations, so any domestic constraints on the UK's liability arising from overseas military operations where effective control is being exercised would leave the UK in breach of the Convention. In its response to our HRA Reform report, the Government recognised that "there is not a unilateral domestic solution to this issue" and said that it would "continue to work with partners in the Council of Europe to address the issue of the extraterritorial application of the Convention at the international level."[283] However, in the Explanatory Notes to the Bill, the Government suggests two possible options which may be undertaken for the Secretary of State to be satisfied that clause 14 would be Convention-compliant: the first would be the introduction of "alternative domestic remedies within a subsequent Act"; the second would be the "revision of extraterritorial jurisdiction under the Convention itself".[284]It is not clear which approach the Government will be taking.

236. According to the Government, clause 14 is intended "to signal at domestic level our commitment to the principle that claims relating to overseas military operations should not be brought under human rights legislation, as the Convention was not originally intended to apply extraterritorially and was never designed to regulate conflict situations."[285]97 It has no legal effect unless and until clause 39 is applied. In its written evidence, Rights and Security International state, "regardless of whether it intends to enter into negotiations with the Council of Europe on amending the treaty, clause 14 indicates the government's lack of good faith in performing its obligations under the ECHR—itself a breach of international law."[286]

237. **Clause 14, together with clause 39, paves the way for future legislation to limit the extraterritorial application of the Convention by excluding acts done in the course of overseas military operations. At present, service personnel, veterans, and affected civilians will continue to have the right to bring claims, or rely on Convention rights in domestic law, as provided for by the Bill of Rights. Provided it is not brought into force, clause 14 does not breach the Convention, given its deferred commencement. It merely signals the Government's intention.**

238. **Unless the UK successfully renegotiates the scope of extraterritorial jurisdiction under the Convention to exclude overseas military operations, if the Government wants to bring clause 14 into force it will have to ensure that effective remedies are still available in domestic law for breaches of Convention rights which occur in the course of overseas military operations. If the UK enacts alternative remedies to 'fill the gap' left by clause 14, these must be effective within the meaning of Article 13 ECHR (i.e., the remedy must be effective in practice and its exercise must not be unjustifiably hindered by the state). These alternative remedies must be considered by Parliament**

283 Joint Committee on Human Rights, First Special Report of Session 2022–23, Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22, HC 608, para 63

284 Explanatory Notes to the Bill of Rights Bill [Bill 117 (2022–23) - EN], para 129

285 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021, para 102

286 Rights & Security International (BOR0030). This is often termed the pacta sunt servanda principle, as codified in Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, Article 26. Although the Vienna Convention entered into force after the ECHR, the principle has been a customary norm of international law for over a century: see Jean Salmon, 'Volume I, Part III Observance, Application and Interpretation, s.1 Observance of Treaties, Art. 26', in Oliver Corten and Pierre Klein (eds.), The Vienna Conventions on the Law of Treaties (Oxford: Oxford University Press, 2011).BOR0030).

and subject to proper scrutiny to assess Convention-compliance. Any failure to provide for effective remedies for breaches of Convention rights in domestic law will result in increased litigation in Strasbourg.

239. ***Unless the Government is prepared to reconsider clause 14, we would like to see it removed from the Bill (see Annex, Amendment 20). Such a provision should only be included if and when alternative remedies are available that have been subject to parliamentary scrutiny such that Parliament (and not just the Secretary of State) is satisfied that excluding overseas military operations from the scope of the Bill of Rights would be compatible with the Convention.***

Interim measures

Interim measures under Rule 39

240. Clause 24 of the Bill concerns interim measures of the ECtHR, issued under Rule 39 of the Court's rules.[287] These are urgent measures of the ECtHR which are issued before an application has been concluded (akin to an interim injunction in domestic proceedings). According to established practice, they are only issued in exceptional circumstances, where the court considers there is an 'imminent risk of irreparable damage' that would either prevent an applicant bringing a claim before the court or render that claim pointless.[288] They are most frequently issued in deportation or extradition cases where there is a credible threat to life under Article 2, or of torture or inhuman or degrading treatment under Article 3 ECHR.[289]

Clause 24(1)

241. Clause 24(1) provides that no account is to be taken of any interim measure issued by the ECtHR "for the purposes of determining the rights and obligations under domestic law of a public authority or any other person." While this provision appears, at face value, problematic, its legal effect is arguably innocuous as it is confined to rights and obligations under *domestic law*. The obligation to comply with (or take account of) interim measures is not currently incorporated into domestic law—interim measures are binding on the UK as a matter of *international law*. Interim measures are part of the Court's rules and not set out within the text of the Convention itself.Article 46 of the Convention commits the UK to abide by final judgments of the Court and does not expressly mention interim measures. However, the ECtHR Grand Chamber has held that a failure to comply with interim measures would amount to a violation of Article 34 of the Convention, which

287 Rules of the Court, dated 3 October 2022, Registry of the Court
288 ECtHR factsheet on Interim Measures, November 2022.
289 ECtHR factsheet on Interim Measures, November 2022.

requires parties "not to hinder in any way the effective exercise" of the right of applicants to bring their claims before the court.[290] It is therefore well established in ECtHR case law that interim measures are legally binding on States.

242. Therefore, an instruction to take "no account" of interim measures for the purpose of determining rights and obligations under *domestic* law does nothing to alter the existing position under international law. On this interpretation, clause 24(1) is an anodyne restatement of the current position, yet another example of the Government creating domestic law that not only fails to incorporate its international legal obligations but expressly prohibits their implementation in domestic law.

Clause 24 (2) and (3)

243. Despite the fact that clause 24(1) appears to reflect the current position in domestic law, clause 24(2) and (3) are more problematic as they may hinder the ability of the courts to take into account interim decisions of the ECtHR which may be highly relevant to a case under their consideration. Clause 24(2) and (3) of the Bill would prohibit a court from having any regard to any interim measure issued by the ECtHR when it is considering whether to grant relief which might affect Convention rights. This would presumably apply to a court considering granting an interim injunction to prevent a plane taking off, as in the case concerning removal of asylum seekers to Rwanda (discussed below). Even if a court, as a public authority, is not strictly bound by an interim measure from Strasbourg as a matter of domestic law, the fact that the ECtHR has issued an interim measure which binds the State (including all branches of the State) as a matter of international law is plainly a relevant matter that the court should take into account when deciding whether it should grant relief. This clause would hinder the courts from taking account of highly relevant considerations and potentially put the UK in breach of its international legal obligations under the Convention.

Reaction to Rwanda?

244. Clause 24 was not proposed in the Government's consultation paper nor raised by IHRAR. Neither is the clause covered by the Government's ECHR memorandum despite it plainly raising concerns about compatibility with the Convention. This leads us to question whether the clause was added into the Bill in response to the interim measures issued by the ECtHR in respect of the proposed removal of asylum seekers from the UK to Rwanda.[291] The UK Government complied with these measures and the flight to Rwanda did not take off as scheduled. There have been various criticisms made by Government Ministers of the Court's use of interim measures following this decision. For example, in July, the Daily Telegraph reported that Rt Hon Priti Patel MP, the then Home Secretary, as saying the decision of the ECtHR was "scandalous" and "opaque", and suggested that the

290 Paladi v. Moldova (2008) 47 EHRR 15: "87. The Court reiterates that the obligation laid down in Article 34 in fine requires the Contracting States to refrain…from any act or omission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure…88. The same holds true as regards compliance with interim measures as provided for by Rule 39, since such measures are indicated by the Court for the purpose of ensuring the effectiveness of the right of individual petition…It follows that Article 34 will be breached if the authorities of a Contracting State fail to take all steps which could reasonably have been taken in order to comply with the measure indicated by the Court."

291 'The European Court grants urgent interim measure in case concerning asylum seeker's imminent removal from the UK to Rwanda', Press Release, 14 June 2022, ECHR 197

decision was "politically motivated".[292] Following the decision, the then Attorney General (now Home Secretary), Rt Hon Suella Braverman KC MP, expressed her view that the British people "are rightly baffled why our immigration controls can still be blocked by European judges. It's time to complete Brexit and let the British people decide who can and cannot stay in our country."[293] The Secretary of State is reported to have said, "It is flawed that rule 39 orders from Strasbourg can have an injunctive effect, for example stopping those planes taking off. That's something our bill of rights will address."[294]

245. In evidence to us, the Secretary of State stated quite clearly that he thought it was wrong for interim measures of the ECtHR to be binding on states, on the basis that they are not provided for in the text of the Convention.[295] When it was put to the Secretary of State that interim measures are binding under Article 34 of the Convention, he responded that this was an assumption of power by a judicial body without any democratic oversight.[296] We find this position concerning for three reasons. Firstly, the ECtHR must be able to interpret the Convention and develop the law in the same way that domestic courts interpret legislation and develop the law—it quite properly assessed its power to issue binding interim measures in light of developments in international law.[297] This is not a power grab by the Court, on the contrary, it is the usual way that courts operate. Secondly, as a matter of common sense, it is clearly crucial that courts, including the ECtHR and other international guardians of human rights, can exercise injunctive powers in order to prevent irreparable harm from occurring before cases can be heard in full.[298] Thirdly, irrespective of the genesis of interim measures and the grievances held by the Justice Secretary, they are binding as a matter of law and cannot simply be ignored by state parties who take issue with the origins of the Court's injunctive powers.

A signal of future breaches of international law?

246. Clause 24 is concerning as it signals the Government's disregard for the interim measures of the ECtHR and displays a worrying disrespect for our international legal obligations. As the Law Society notes, "it is deeply concerning that the provision appears to signal the Government's intention to refuse to comply with interim measures of the ECtHR. This would be a serious breach of international law."[299] It does not, however, necessarily mean that the Government will ignore future interim measures of the ECtHR—it just prohibits other public authorities from taking them into account. In the Ministry of Justice's response to our letter regarding the Bill's ECHR memorandum, the Government stated that clause 24 "does not prevent public authorities or others from complying with interim measures"—and that the Government considers it to be compatible with Article 34 ECHR. This seems untenable, as clause 24(3) explicitly prohibits courts from having regard to interim measures in certain cases.

292 'Priti Patel: 'Scandalous' grounding of Rwanda flight shows it's time we quit ECHR', The Telegraph, 17 June 2022
293 Attorney General: Time to complete Brexit in wake of Rwanda flight grounding, The Independent, 19 June 2022
294 Plan to reverse European Court Rwanda rulings, BBC News, 22 June 2022
295 Q24
296 Q24
297 Mamatkulov and Askarov v.Turkey, Judgment of 4 February 2005 (Grand Chamber) at paras 110–117
298 In Mamatkulov, the ECtHR referenced the UN Human Rights Committee, the UN Committee Against Torture, the Inter American Court of Human Rights and the International Court of Justice, stating that: "international courts and institutions have stressed the importance and purpose of interim measures and pointed out that compliance with such measures was necessary to ensure the effectiveness of their decisions on the merits" (paras 110–117).
299 The Law Society (BOR0046)

247. The Bingham Centre for the Rule of Law has argued that clause 24 would be inconsistent with the Convention. It argues that the UK is under an obligation to "secure to everyone within their jurisdiction the rights and freedoms in the Convention, and since interim measures are granted by the Court to provide protection for the Convention rights that appear in Schedule 1 to the Act, a failure to comply with interim measures risks breaching those rights. Thus, disregarding interim measures defies the very purpose of the Act and the obligation under Article 1 ECHR. This approach runs somewhat counter to the UK's dualist view of international law."[300]

248. **The UK is bound under Article 34 of the Convention to comply with interim measures issued by the European Court of Human Rights. Clause 24 appears to signal to the European Court of Human Rights the current Government's dislike for the Court's recent interim decision regarding Rwanda. Clause 24(1) appears to have no legal effect in domestic law, but arguably shows a disregard for our international legal obligations. However, clause 24(2) and (3) gives the express instruction to public authorities, courts, or any other person to disregard our international legal obligations. This is concerning and undermines the principle that the UK will act in good faith with its international legal obligations.**

249. ***Unless the Government is prepared to reconsider clause 24, we would like to see it removed from the Bill (see Annex, Amendment 21). In its place express provision should be made in the Bill to incorporate into domestic law our existing obligation to comply with interim measures as an essential means to secure the right to individual petition and the full enjoyment of Convention rights within our jurisdiction (see Annex, Amendment 2).***

300 "The 'Bill of Rights' and Interim Measures of the European Court of Human Rights", Bingham Centre, July 2022

7 Tipping the balance and future reforms

250. A number of clauses within the Bill signal the Government's intention to bring forward future legislative or policy changes, such as reforms to parole board decision-making, amendments to deportation legislation, and potential changes to the extraterritorial application of the Convention in the context of overseas military operations (considered above in Chapter 6). Clause 4 seeks to strengthen freedom of speech albeit with some notable exceptions. Clause 6 seeks to insulate parole board decisions from successful human rights challenges by ensuring the courts must give the "greatest weight possible" to public safety. Clause 8 seeks to insulate future deportation laws from successful human rights challenges by introducing an extremely high threshold for the application of Article 8 rights. Clause 20 seeks to prohibit the courts from properly assessing the deportations under the 'deportation with assurances' policy. As such, the various provisions of the Bill pave the way for future reforms and seek to insulate the Government's legislative agenda from successful challenge. Notably, some of these provisions seek to restrict the full enjoyment of Convention rights in relation to certain categories of people—namely, prisoners and foreign national offenders. This Chapter explores these provisions of the Bill.

Freedom of speech

251. Clause 4 requires courts to "give great weight" to the importance of protecting freedom of speech whenever the courts are determining a question which has arisen in connection with that right. Importantly, this clause does not require the courts to "give great weight" to all aspects of freedom of expression (Article 10 ECHR)—instead, it defines "the right to freedom of speech as the Convention right to freedom of expression (set out in Article 10) to the extent that the right relates to imparting ideas, opinions, or information by speech, writing or images (including in electronic form). This, therefore, excludes the right to express oneself through other actions, to hold opinions and to receive information and ideas without interference by public authorities. In his letter to us dated 14 July, the Secretary of State for Justice said that this approach "reflects the importance of free speech in our society and will ensure that individuals feel empowered to partake in wide-ranging public debate." In evidence to the Justice Committee on 22 November, the Secretary of State indicated that the Bill may be used as a vehicle for dealing with Strategic Lawsuits Against Public Participation (SLAPPs) by way of future Government amendments.[301]

301 Oral evidence, Justice Committee, 22 November 2022: When asked if he would bring forward any amendments to the Bill, he responded "There is one area where I am looking for a legislative vehicle, which is SLAPPs." While there is no agreed legal definition of a SLAPP, in evidence to us, Caroline Kean, Consultant Partner at Wiggin LLP described a SLAPP: "Broadly [as] a lawsuit or a letter before action, any sort of claim, that is more about suppressing debate and intimidating a publisher from publishing or trying to get them to withdraw publication than about vindicating reputation and properly securing damages." Sara Mansoori KC, Barrister at Matrix Chambers concurred with elements of that definition stating a SLAPP is "a groundless claim, where the purpose is not to seek genuine vindication of your reputation; instead, it is a malicious act to try to prevent free speech from being properly published." Oral evidence taken before the Joint Committee on Human Rights 2 November 2022, HC (2022–23) 840, Q1.

252. In written evidence, Liberty said that, "[c]onspicuously missing from the Government's definition of "freedom of speech" in the [Bill of Rights] (as compared to Article 10 ECHR) is the right to receive information. This is concerning, especially given the Government's history of lack of transparency in relation to Freedom of Information requests."[302] The News Media Association state, "[w]e have misgivings over the use of the more restrictive "freedom of speech" rather than "freedom of expression" and do not understand the rationale for omitting the right to "receive" ideas, opinions, or information from the definition in the Bill of Rights. This could potentially have a chilling effect on newsgathering."[303]

253. Although the Government has placed great emphasis on this Bill being a vehicle for strengthening free speech, it is not clear what the impact of this clause will be. The courts are already required to have "particular regard to the importance" of freedom of expression (as set out in section 12 HRA). It is not clear that this provision of the HRA has made any material difference to the balancing exercise undertaken by the courts when assessing competing rights. As such, it is not clear that clause 4 will have any greater effect than its predecessor in the HRA. It is worth noting, however, that where the courts are complying with clause 4, they are exempted from the prohibition on expanding the protection of Convention rights beyond the ECtHR's interpretation[304] that appears in clause 3(3).[305]

254. The requirement to give "great weight" to freedom of speech does not preclude the courts giving great weight to other Convention rights. This provision does not, therefore necessarily mean that free speech should prevail. The courts may take the view that private life is also to be given "great weight" in certain contexts (under Article 8, the right to respect for private and family life). The protection given to speech will continue to vary according to the context of the case and, one assumes, certain types of speech (such as political speech) will be given more weight than other forms of speech. Where competing qualified rights are in play, the courts will still need to undertake a balancing exercise.

255. As stated by Lord Hoffman in *Campbell v MGN*, when discussing Articles 8 (right to respect for private and family life) and 10 (freedom of expression):

> Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need …[306]

256. Similarly, Lord Steyn in the case of *In re S (A Child)* states:

> First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus

302 Liberty (BOR0021)
303 News Media Association (BOR0036)
304 Unless the court has no reasonable doubt that the ECtHR would adopt that interpretation if the case were before it - clause 3(3)
305 Clause 3(4)
306 Campbell v MGN [2004] UKHL 22

> on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.[307]

If, however, the courts depart from this approach and give insufficient weight to Article 8 rights in order to prioritise free speech, this could lead to the UK being found to have not adequately protected Article 8 rights.

257. There are four exceptions to the requirement that the courts give "great weight" to the importance of protecting free speech set out in clause 4(3). These are:

a) Criminal proceedings or the determination of whether a criminal offence created by legislation is compatible with a Convention right in any proceedings.

b) The determination of whether the disclosure of information would be in breach of an obligation of confidence arising under an agreement or resulting from a professional relationship.

c) The determination of questions relating to a person's citizenship or whether a person is entitled to enter or remain in the UK.

d) The determination of questions which affect or may affect national security.

258. Exception 'b' appears to be intended to exclude, for example, breaches of legal professional privilege or medical confidentiality which may be reasonable exceptions. The other three exceptions shield the Government from the ability of individuals to rely on an enhanced right to free speech in certain contexts. Reach Plc, a British newspaper, magazine, and digital publisher, warns "[T]he exemption for determination of matters which raise a question of whether the disclosure of information would be in breach of confidence could lead to uncertainty in the civil courts. [M]isuse of private information is now recognised by the courts as a standalone cause of action, but prior to the decision in Vidal-Hall v Google was generally pursued as a claim for breach of confidence. In practice, such claims may be pursued as alternatives. The application of the exemption could result in a confused position whereby parts of a claim for misuse of private information might require great weight to be given to the right to freedom of speech, but not so in respect of other aspects of the claim … ."[308]

259. The exception for criminal proceedings prevents individuals from being able to rely on clause 4 to argue that a criminal offence breaches their 'enhanced' right to free speech. An example of this is the context of protests, where individuals may argue that the creation of criminal offences is incompatible with Article 10 as the sanction is an unnecessary and/or disproportionate interference with free speech. The "great weight" provision in clause 4 will not assist individuals seeking to rely on free speech rights if the Government decides to legislate to criminalise certain forms of speech. Clause 4(3) therefore endeavours to ensure that the courts do not give extra weight to free speech where Parliament has sought to criminalise it.

307 In re S (a Child) (Identification: Restrictions on Publication): HL 28 Oct 2004
308 Reach plc (BOR0044)

260. The clause provides an exception for immigration cases, which prevents individuals from relying on clause 4 in the context of challenging an immigration decision. This presumably is intended to ensure that individuals do not have a stronger case against the Government when challenging decisions to refuse entry, for example, where the Government has decided not to allow entry because of things they have said or might say which are not conducive to the public good.

261. The final exception for national security ensures that the strengthened weight provided to freedom of speech does not restrict a public authority's ability to limit free speech where it is in the interests of national security to do so. The Free Speech Union told us that, as a whole, "the clause 4 exemptions undermine the Bill's supposed commitment to the principle of freedom of expression. The clause 4 exemptions are circumstances where the paramountcy of free speech should, in fact, carry the most weight if the principle is to have any legitimacy."[309]

262. **It is not clear how the courts will interpret and apply the need to give "great weight" to free speech contained within clause 4. This is a similar requirement to the existing obligation in section 12 HRA to give particular regard to freedom of expression, which does not appear to have had any material impact on the balancing of Convention rights where Article 10 (freedom of expression) is engaged. The impact of clause 4(1) is therefore uncertain.**

263. **Clause 4(2) excludes from the "great weight" provision some of the most important scenarios in which the State may wish to restrict free speech: criminal proceedings and compatibility of criminal offences, certain immigration decisions, and decisions concerning national security. These are areas in which decisions taken by the State are likely to interfere with the right to free speech. The strengthened right to free speech will therefore only apply selectively.**

264. **In our view, the rights contained in Article 10 should not be severed—the right to receive information is equally as important as the right to impart information. Nor should free speech be placed on a pedestal over and above other potentially competing rights. The fundamental principle underlying qualified Convention rights is that they are equal and must be weighed against each other. We do not believe that a case has been made out that freedom of speech should prevail over other rights in a selective manner. *Unless the Government is prepared to reconsider clause 4, we would like to see it removed from the Bill (see Annex, Amendment 22).***

The rights of persons subject to custodial sentences

265. Clause 6 of the Bill would introduce a new obligation on the courts when considering claims that the human rights of a person subject to a custodial sentence (in respect of a criminal offence they have committed) have been breached. In such cases the court would be required to "give the greatest possible weight to the importance of reducing the risk to the public" from persons who have been given custodial sentences.[310] Although this issue was not raised in the Government's consultation paper on HRA Reform, the Government has stated that this provision is intended to "oblige all those who interpret Convention rights to have regard to the importance of reducing risk to the public from those who

309 Free Speech Union (BOR0043)
310 Clause 6

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."[311]

266. Clause 6 has a wide scope in respect of who it applies to, but a narrow scope when it comes to the types of decisions it affects:

a) A person is considered to be subject to a custodial sentence for the duration of that sentence, even if they are not in custody. This means clause 6 would apply to determinate sentence prisoners who are serving part of their sentence on licence in the community. It also suggests that the clause will apply to indeterminate and life sentence prisoners indefinitely. The clause will not, however, apply in respect of prisoners held on remand (i.e. who are imprisoned awaiting trial or sentence).

b) Since clause 6(1) states that 6(2) applies only where the court is determining a question as to whether a right has been breached, it should not apply to a decision concerning remedies. Thus, once it has been established that a prisoner's rights have been breached, the way that breach can be remedied (e.g. through release or through damages) will not be influenced by clause 6(2).

c) Clause 6 only relates to decisions made by courts or tribunals. It will apparently, therefore, not apply to decisions of the Parole Board–the body that makes the most decisions which determine whether prisoners should be released.

d) Clause 6(7) expressly excludes this clause having any impact on claims for breach of non-derogable rights–namely those guaranteed under Article 2 (right to life), Article 3 (prohibition on torture), Article 4(1) (prohibition on slavery) and Article 7 (no punishment without law).

267. Clause 6(2) will apply where a prisoner (or person on licence) argues that their rights under the Convention (other than under Articles 2, 3, 4(1) or 7) have been breached. To give two examples:

a) A prisoner moved into the segregation unit of a prison for an extended period argues that his lack of association violates Article 8 (the right to respect for family and private life) and seeks damages. The court in deciding whether or not Article 8 was breached, when considering the necessity and proportionality of the interference, must give "the greatest possible weight" to the importance of reducing the risk to the public.

b) A prisoner who has been granted parole is arguing that their Article 9 rights (freedom of thought, conscience, and religion) have been breached by the terms of their probation licence—which prevents them entering an area where their church is located. When the court decides whether the licence condition has breached Article 9 rights, when considering the necessity and proportionality of the interference, they must give "the greatest possible weight" to the importance of reducing the risk to the public.

311 The Government's Human Rights Act Reform, A Modern Bill of Rights, Consultation Response, para 16

268. Clause 6 can only have effect if the safety of the public was affected by the decision whether to place the prisoner in segregation or the decision whether to allow the prisoner on licence to visit their church. If the court is satisfied that the risk to the public is not affected, it cannot rationally give weight to the importance of that risk being reduced.

Justification for clause 6

269. The Explanatory Notes to the Bill make clear that these changes will:

> strengthen the Government's forthcoming parole reforms, by 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… It will also strengthen the Government's hand in contesting human rights claims from prisoners opposing their placement in a separation centre and the Government's ability to defend human rights claims brought regarding the deportation of foreign national offenders.[312]

270. These justifications are reflected in clause 6(3), which sets out two non-exhaustive examples of alleged breaches of Convention rights to which clause 6(2) would apply: alleged breaches arising from a decision whether a person in custody should be released; and a decision as to whether a person in custody should be placed in a particular part of a prison.

271. Considering the rationale provided in the Explanatory Notes:

a) It is clear that this provision is designed to strengthen the hand of Government when contesting human rights claims, and thus to weaken human rights protections.

b) In respect of parole reforms, the Government is proposing the introduction of greater ministerial oversight of Parole Board decisions.[313] This would include a system whereby the Secretary of State could review and refuse decisions to release made by the Parole Board in respect of the most serious prisoners. Clause 6 would then apply to any legal challenge to such a decision which raised human rights arguments. Clause 6 has the potential to disrupt the balancing exercise that the court would be required to undertake if it was assessing whether any interference with, most obviously, Article 8 (right to private and family life) was justified. However, the practical impact of the clause may well be limited. The safety of the public is already at the core of the decisions made by the Parole Board, and it is highly likely that in the course of any appeal arising in the context of the release of a serious offender on parole the court would already be giving great weight to the need to reduce the risk to the public.

c) The same can be said in respect of the placement of prisoners into separation centres. Being placed in a separation centre will constitute an interference with a prisoner's Article 8 rights, as it will prevent, or at least disrupt, their association with others within the prison, and with visitors, and may well have an impact on

312 Explanatory Notes to the Bill of Rights Bill [Bill 117 (2022–23) - EN], para 33

313 See "Root and Branch Review of the Parole System: The Future of the Parole System in England and Wales" CP 654

mental health.[314] Nevertheless, separation centre referrals are only made in rare cases, and generally where the prisoner represents a risk to national security or of terrorism.[315] This means that in such cases, due weight will already be given to the importance of reducing risk to the public and it will already only be in exceptional cases that other factors will outweigh it.

d) In respect of the deportation of foreign national prisoners, this clause will again apply in circumstances where the public interest in deportation, which encompasses the importance of reducing the risk to the UK public, is already given significant emphasis. Clause 6 is therefore unlikely to materially affect such decisions.

272. **It does not appear that the practical impact of clause 6 is likely to be significant. However, in those rare cases where the courts may currently consider that there is an individual right at stake which is so important that it outweighs the importance of reducing risk to the public, this clause could prevent the court reaching a decision which it considers consistent with the Convention. A clause that seeks to bind the hands of the courts when assessing whether an individual's rights have been violated is inherently problematic. The courts need to be able to conduct a genuine proportionality assessment or they risk being unable to adequately enforce human rights. *Unless the Government is prepared to reconsider clause 6, we would like to see it removed from the Bill (see Annex, Amendment 23).***

Deportations

273. Clause 8 prohibits courts from finding that deportation provisions contained in legislation are incompatible with Article 8 ECHR (the right to a private and family life), unless the provision would require the public authority to act in a way which would result in "manifest harm" to a qualifying member of the deportee's family that is so "extreme" that the harm would override the "paramount" public interest in deportation. "Extreme harm" is defined as that which is "exceptional and overwhelming" and incapable of being mitigated or is irreversible. It is only in the "most compelling" circumstances that a court can find that deportation would cause extreme harm, unless the effect is on a qualifying child, in which case the threshold is lower (although the exact threshold for children is not set out).

The Government's position

274. The Government has made clear that, in its view, the deportation of foreign national offenders (FNOs) is routinely being frustrated by human rights law. The Government consultation states that "the confidence of the wider public in our human rights framework is eroded when foreign criminals and others who present a serious threat to our society—including those linked with terrorist activity–can evade deportation, because their human

314 Article 8 ECHR guarantees respect for physical and moral integrity, which may include mental health.

315 Rule 46A Prison Rules 1999 enables the Secretary of State to order separation where it appears desirable on one or more of 4 grounds: i. The interests of national security. ii. To prevent the commission, preparation or instigation of an act of terrorism, a terrorism offence, or an offence with a terrorist connection, whether in prison or otherwise. iii. To prevent the dissemination of views or beliefs that might encourage or induce others to commit any such act or offence, whether in prison or otherwise, or to protect or safeguard others from such views or beliefs. iv. To prevent any political, religious, racial or other views or beliefs being used to undermine good order and discipline in a prison.

rights are given greater weight than the safety and security of the public."[316] In evidence to the Justice Committee, the Justice Secretary referred to "the use of Article 8 and the right to family life by foreign national offenders to frustrate deportation orders"[317] and stated that "the UK courts under the HRA were using article 8 as a fetter for deportation".[318]

Current legal framework on deportation

275. The Secretary of State has a general power to deport on grounds that someone's presence in the UK is not conducive to the public good. Unless certain circumstances apply, the Home Secretary must make a deportation order against a "foreign criminal", defined as a person who has been convicted of an offence and sentenced to 12 months' imprisonment as a result.[319] There is a defence that removal of the individual would breach his or her rights under the ECHR, and in particular the right to family and private life under Article 8.[320] However, through a number of changes to the immigration rules (in 2012) and primary legislation (in 2014), the Government has set limitations on the extent to which Article 8 rights can be argued in deportation cases. Those convicted of a crime and sentenced to more than 12 months' imprisonment (but no more than 4 years) can be deported unless they can show they fall into one of two exceptions.[321] Those who are convicted of a crime and sentenced to four or more years in prison (or more than one year and does not fit within the exceptions above) will need to show that there are "very compelling circumstances" in their case to outweigh the public interest in their removal. In sum, there is essentially a presumption that where a person has been sentenced to more than 12 months' imprisonment and cannot fit within an exception, deportation will take place, unless very compelling circumstances can be shown that it should not.

276. The threshold is already high. As set out by the Court of Appeal, when considering deportation cases: "The starting point in considering exceptional circumstances is not neutral … .Rather, the scales are heavily weighted in favour of deportation and something very compelling is required to swing the outcome in favour of a foreign criminal whom Parliament has said should be deported."[322]

Human rights implications

277. The scope of this clause is limited to challenges to deportation orders based on the incompatibility of legislation with Article 8. It does not apply to challenges to deportation decisions made by the Secretary of State under deportation legislation. This is important as it significantly narrows the scope of this clause.

278. Although the Government's policy objective appears to be aimed at making it harder for Foreign National Offenders (FNOs) to successfully rely on their Article 8 rights under the existing deportation laws, clause 8 of the Bill does not in fact alter the current deportation

316 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021, para 292
317 Q98
318 Q99
319 Section 32(5) of the UK Borders Act 2007
320 Section 33(2)(a) of the UK Borders Act 2007
321 The first exception is that C has been lawfully resident in the UK for most of C's life; C is socially and culturally integrated into the UK; and there would be very significant obstacles to C's integration into the country to which C is proposed to be deported (section 117C(4)). The second exception is that C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of deportation on the partner or child would be unduly harsh (section 117C(5)).
322 SSHD v CT (Vietnam) [2016] EWCA Civ 488

legislation in any way. It is, instead, an attempt to insulate deportation legislation from declarations of incompatibility based on the right to private and family life (Article 8). Given the existing deportation legislation has been found to be compatible by the ECtHR, this appears to signal the Government's future intent to amend deportation legislation in a way which restricts Article 8 rights even further.

279. At present, according to existing ECtHR case law, the UK's legal framework governing deportations has been held to be Convention-compliant as it currently allows for a balancing exercise to take place, even if that balancing exercise is stacked in favour of the state.[323] The ECtHR has adopted the principle that, ordinarily, when it comes to the question of the lawfulness of deportation and its compatibility of Article 8 ECHR, it will refrain from interfering in the conclusion arrived by the national authorities in this respect, so long as that conclusion was itself the result of a proper Convention-compliant balancing exercise, which adequately applies the Article 8 case law to the facts of each case.[324]

280. In order to continue to comply with Convention rights, and thus for the UK to be able to enjoy the full extent of its margin of appreciation, the courts must be able to undertake a balancing exercise and proportionality assessment when considering FNO deportations.[325] The ECtHR will ask itself two questions: firstly, does the national law allow for the proper consideration of ECHR rights (often private and family life)? Secondly, on the facts of the case, was the deportation an interference with Convention, and did the domestic courts come to the right conclusion?

281. It is unlikely, in our view, that clause 8 could be considered to "allow for the proper consideration of ECHR rights", for the following reasons:

a) If the domestic courts were assessing the compatibility of a deportation provision, clause 8 would appear to preclude any material consideration of the Article 8 rights of the individuals affected by deportation decisions, i.e., the deportees themselves. Clause 8 provides that the courts cannot declare a deportation provision is incompatible with Convention rights unless the provision requires a public authority to act in a way which causes "manifest harm" to a qualifying family member that is so extreme that it overrides the paramount public interest in deportation. Notably, it is only the rights of qualifying family members and qualifying children which could be taken into account by the courts. Any "manifest" and "extreme" harm caused to the deportees could not be taken into account when assessing the compatibility of the provisions with Article 8.

b) Even though the Article 8 rights of qualifying family members can be taken into account, the threshold for interference with their rights Article 8 is incredibly high ("manifest harm", meaning "extreme harm" which is "exceptional and overwhelming" and "incapable of being mitigated, or is irreversible"—unless the harm would be to a qualifying child). This bar is so high it will be extremely difficult for an individual to prove, on the balance of probabilities,

323 Unuane v UK (80343/17 24 Nov 2020

324 Ndidi v UK (Application no. 41215/14)

325 Boultif v Switzerland (2001) 33 EHRR 50, Üner v Netherlands (46410/99) [2006] 10 WLUK 496 and Maslov v Austria (1638/03) [2008] 6 WLUK 542

that a deportation provision would result in this level of harm. Clause 8 would therefore appear to tip the balance too far by putting compliance with Article 8 out of reach in all but the rarest of cases.

c) The definitions of "qualifying family members" and "qualifying child" are also problematic. Qualifying family members are limited to a qualifying child or dependent who is a British citizen or otherwise settled in the UK. This excludes family members who are not dependent upon the deportee but who may nevertheless have a genuine and subsisting relationship with the deportee. A qualifying child is limited to children with whom the deportee has "always had and continues to have a genuine and subsisting parental relationship, and who is a British citizen or has lived in the UK for seven years or more. The use of the term "always" may exclude adopted or step-children who have not "always" had a genuine and subsisting relationship with their mother or father, but who have done since the time they were adopted or became a stepchild. This definition also excludes children who are living in the UK who are not British citizens but cannot meet the threshold of being "settled" in the UK (i.e., seven years). This clause is therefore highly likely to be incompatible with Article 8 read with Article 14 due to the discriminatory effect.

Relationship with clause 7

282. The concerns arising from clause 8 are heightened by the potential effect of clause 7, which would require the courts to regard Parliament as having decided that clause 8 constitutes an appropriate balance between Article 8 rights and the public interest in deportation. The courts must then give the "greatest possible weight" to the principle that such decisions about balancing rights are for Parliament (not the courts). Clause 7, like clause 8, is an endeavour to restrain the courts from finding that a legislative provision is incompatible with the Convention. Deportation is an area in which domestic courts may find that their ability to undertake a proportionality assessment is fettered to such an extent that they are unable to take a different view to that taken by Parliament (on the basis that "decisions about how such a balance should be struck are properly made by Parliament" and that decisions by Parliament must be given the "greatest weight possible"). This is particularly concerning given the repeal of section 19 HRA—without statements of compatibility and no guarantee of accompanying ECHR memos of sufficient quality, this will hinder the ability of Parliament to make proper human rights assessments.

283. As a consequence, clause 7 and clause 8 combined seek to insulate deportation legislation from successful future challenges on the grounds of incompatibility with Article 8. The Government's response to our report on HRA reform appears to suggest that this is the case: "the Bill does not impinge upon the ability of the courts to determine appeals under existing legislation, but rather creates a framework to guide courts as to future legislation in this area."[326] The Ministry of Justice's latest annual report confirms this, stating that the Bill "will apply when a court considers deportation laws, especially those that may seek in the future to make it more difficult for foreign criminals to use Article 8 to appeal their deportation".[327]

326 Joint Committee on Human Rights, Thirteenth Report of Session 2021–22, Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22, HC 1033, para 61

327 Ministry of Justice, Responding to Human Rights Judgments, Report to the JCHR on the Government's Response to human rights judgments 2021–22, December 2022, CP 763, p9

Conclusions on clause 8

284. **Clause 8 is an attempt to restrain the courts from finding that deportation legislation is incompatible with Article 8. The scope is narrow, as it does not apply to challenges to individual deportation decisions. It is designed to make it difficult for the courts to find that deportation legislation is incompatible with Article 8 in all but the rarest of cases. This clause may signal the Government's intention to amend the deportation regime in a way which is highly restrictive of Article 8 rights.**

285. **If the Government legislates to restrict the application of Article 8 rights even further than the current regime, clause 8 will make it extremely difficult for an individual to successfully challenge deportation laws in the domestic courts based on incompatibility with Article 8. This is because the threshold for finding that a deportation provision is incompatible is extraordinarily high, requiring that the provision would result in "manifest" and "extreme" harm to a limited category of persons. Although states are given a wide margin of appreciation in relation to deportation laws and the balance between the public interest and individual rights to private and family life, the extreme restrictions placed on the courts by clause 8 would almost extinguish Article 8 rights entirely.**

286. ***As clause 8 precludes any proper balancing exercise to be undertaken by the courts, this clause is likely to be incompatible with the procedural requirements of Article 8. Unless the Government is prepared to give serious consideration to changing its approach to clause 8, we would like to see it removed from the Bill (see Annex, Amendment 24).***

Limiting the courts powers to allow appeals against deportations

287. Clause 20 provides for limits upon the powers of the courts when they are considering appeals against deportation brought by "foreign criminals" on Article 6 grounds (right to a fair trial) that removal from the UK would be unlawful. "Foreign criminals" are defined[328] as persons who are not British citizens, who are convicted of an offence, who are sentenced to at least twelve months, or the offence is specified by order as a serious offence. Clause 20(2) requires that the tribunal hearing an appeal against deportation must dismiss it unless it considers that dismissing the appeal would cause a breach of Article 6 that is so fundamental as to amount to a nullification of the right to a fair trial.

Nullification of Article 6

288. It is a violation of Article 6 for a person to be removed from the UK to another country where they may face a "flagrant denial" of the right to a fair trial.[329] The ECtHR has held that "the word 'flagrant' is intended to convey … a breach … which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed".[330] The approach in clause 20(2) therefore appears to codify the existing case law in respect of Article 6. To the extent that this is a simple codification of the existing case law, clause 20(2) is compatible with Article 6.

328 By reference to section 32 UK Borders Act 2007

329 Harkins v. the United Kingdom (dec.) Application No. 71537/14 [GC], paras 62–65

330 Mamatkulov and Askarov v Turkey App. nos. 46827/99 and 46951/99, 4 February 2005, para.OIII 14.

Deportation with assurances

289. Clause 20(3) provides that where the Secretary of State's decision to deport a person was informed by deportation assurances, then the court must presume that the Secretary of State's assessment of those assurances is correct. The court must treat those assurances as determinative, and dismiss the appeal accordingly, unless it considers that it "could not reasonably conclude that the assurances would be sufficient to prevent a breach of Article 6 that is so fundamental as to amount to a nullification of the right to a fair trial." Clause 20 only applies where the deportation appeal concerns the right to a fair trial and the decision to deport has been informed by deportation assurances. It does not therefore prohibit the courts from assessing the reliability of deportation assurances in relation to any other Convention rights. The scope of Clause 20(3) is therefore narrowly constructed and would not bind the courts when considering a deportation appeal based on assurances regarding torture or inhuman or degrading treatment, for example.

290. The policy of deportation with assurances (DWA) aims to facilitate the deportation to of foreign nationals suspected of terrorism. The objective of DWA is to obtain assurances from the Government of the receiving state which are sufficiently credible to allow deportation to take place without infringing the human rights of the deportee or the obligations of the state under international law.

291. It is likely that the impact of this clause will be very narrow given the low numbers of deportation cases informed by assurances over recent years. In 2017, the Independent Reviewer of Terrorism that:

> between 2005 and 2011, the Labour and Coalition Governments negotiated generic assurances from six countries: Jordan, Libya, Lebanon, Algeria, Ethiopia and Morocco. By 2011, nine people had been deported in accordance with these arrangements, in each case to Algeria. Since then, there have been two further deportations with assurances, to Jordan in 2012 and 2013. A further person was subject to administrative removal to Morocco, with assurances in 2013.[331]

The majority of these agreements were negotiated in relation to Article 3 concerns (i.e., to provide assurances to the UK that individuals subject to deportation would not experience ill-treatment contrary to Article 3 on return). However, in the case of Mr. Othman (discussed below), the risk that he would be tried on the basis of evidence obtained from others by torture was addressed by procedural assurances in the form of a Mutual Legal Assistance Treaty.[332]

292. The UK's DWA policy has been considered by the ECtHR and does not, in principle, violate the Convention. However, there have been legal challenges to the assurances given to the Government, some of which were successful. For example, the Court of Appeal held that the assurances obtained from Colonel Gaddafi of Libya were insufficient[333] and a similar ruling was made by the Special Immigration Appeals Commission in relation to Algeria.[334] In these cases, the court has undertaken assessment of the assurances and

331 Anderson, D., Independent Reviewer of Terrorism, Deportation With Assurances, 2017
332 Ibid
333 AS and DD (Libya) v Secretary of State for the Home Department [2008] EWCA Civ 289
334 BB,PP,W.U,Y and Z v Secretary of State for the Home Department, Appeal Nos. SC/39/2005 &c.,18 April 2016

taken a different view to the Government as to whether they are sufficient. The court's ability to review the assurances has been an important safeguard in addressing the risk of human rights violations resulting from deportations.

293. In the case of Othman v UK, the ECtHR considered whether the deportation of Mr Othman to Jordan would breach his Article 3 and Article 6 rights. The ECtHR held that the DWA policy was not wrong in principle but held that: "assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment."[335] The Court set out its approach to its assessment of assurances: "the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon."[336] In doing so, the Court has regard to various factors, including: whether the assurances are specific or are general and vague; if the assurances have been issued by the central government of the receiving state, and whether local authorities can be expected to abide by them; whether the assurances concern treatment which is legal or illegal in the receiving state; whether they have been given by a Contracting State; the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances.[337]

294. It is clear from the Government's consultation paper that they take issue with this case, stating: "In the case of Abu Qatada, the Strasbourg Court overruled the House of Lords … …… in finding, for the first time in a particular case before it, that the right to a fair trial (Article 6) could be asserted by a claimant, regarded by a State Party as involved in serious terrorist activity, to defeat a deportation order. While the facts were specific to the particular case, the ruling opened up the case law to further incremental judicial expansions in the use of Article 6 to frustrate deportation orders, well beyond the terms of the Convention, or previous case law from Strasbourg."[338] It is therefore likely that the Government's view of this case provides the rationale for clause 20.

295. **The effect of clause 20(3) would be to preclude the domestic courts from applying the factors set out by the European Court of Human Rights in case of Othman, which ensures that deportation assurances are not taken at face value but rather are subject to a rigorous assessment of sufficiency by the courts. However, the prohibition on the courts would only apply in relation to fair trial challenges to deportation. It is not clear why the Government has decided to prohibit the assessment of deportation assurances only in the case of Article 6, particularly given that most deportation with assurances cases appear to concern the risk of treatment contrary to Article 3. It is likely that the practical effect of clause 20(3) will therefore be very limited. However, in the rare cases where clause 20(3) applies, any failure to adequately assess the sufficiency of deportation assurances may amount to a violation of Article 6 and Article 13, as the deportee is effectively stripped of the right of effective access to a court and the**

335 Othman v UK ECHR 9 May 2012 para 187

336 Ibid para 189

337 Other factors include: whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers; whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible; and whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.

338 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021, para 10

right to a remedy that a court would otherwise be able to provide. The removal of this judicial safeguard may also lead to an enhanced risk of breaches of the rights of persons deported to face trial upon return. *Clause 20 should be amended to restore judicial safeguards (see Annex, Amendment 25).*

Jury trial

296. Clause 9 provides that jury trials are one of the ways in which fair trial rights are secured in the UK. Clause 9(2) sets out the circumstances in which the right to be tried by jury is not available. The Government has said to us that "[r]ecognising trial by jury in the Bill of Rights reflects the importance of jury trials and their significance in UK traditions. By recognising jury trials in the Bill, we will demonstrate the UK's commitment to trial by jury as one mode of trial capable of providing a fair trial under Article 6 of the Convention."[339] This clause appears to us to be largely symbolic, whilst perhaps attempting to ward off any threat from Strasbourg in the event that cases are brought before the court challenging the compatibility of jury trials with fair trial rights.

297. Clause 9 does not make any material difference to the existing right to trial by jury. The right to elect a jury trial in certain circumstances is currently provided for within legislation in England and Wales,[340] although the origins of this right go back to the Magna Carta 1215, which recognised the right (of some) to be tried by one's peers. However, this right is not available to all. In England, Wales and Northern Ireland, there are three categories of criminal offences—the categorisation of the offence determines whether a defendant will have the right to elect a jury trial. Defendants charged with summary only offences[341] have no right to a jury trial. Defendants charged with indictable only offences[342] are sent to the Crown Court for a jury trial automatically. Defendants charged with an either-way offence[343] have the right to elect a jury trial if their case could be tried in either the Magistrates' Court or the Crown Court.

298. The Scottish Government told us, "The use of trial by jury is long established for the prosecution of serious offences in Scotland. However, there is no right per se to a trial by jury".[344] It provided further explanation of jury trial in Scotland in its response to the Government's consultation on reform of the Human Rights Act:

> Whether an offence will be tried by a jury will generally depend on how the prosecution of specific offences has been provided for in statute, the powers of Scottish courts under the Criminal Procedure (Scotland) Act 1995, and the decision of the prosecutor on the most appropriate court to

339 Joint Committee on Human Rights, Thirteenth Report of Session 2021–22, Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22, HC 1033, para 56

340 Section 20 Magistrates Court Act 1980

341 Summary offences are the most minor offences – these offences will almost always be prosecuted in the Magistrates Courts and carry a maximum sentence of 6 months' imprisonment and/or a fine of up to £5000. A defendant charged with a summary offence does not have the right to a jury trial in a Crown Court. Examples of such offences include driving offences, minor criminal damage and common assault.

342 An indictable-only offence is a serious criminal offence that is triable only on indictment (trial by jury) in the Crown Court. These are the most serious offences and can never be tried in the Magistrates Courts, e.g. murder, manslaughter, robbery and rape.

343 An either-way offence is an offence that may be more or less serious depending on the particular circumstances, such as theft. It can be tried in either the Crown Court or in the Magistrates Court, if the lower court considers it has sufficient powers to hear the case.

344 The Scottish Government (BOR0052)

> hear the case. The vast majority of trials in the Scottish criminal justice system, which are for less serious offending, are heard by way of summary procedure which involves a judge-only trial and does not involve a jury.
>
> The Scottish Government is currently consulting on a variety of proposals relating to jury trials in Scotland, as committed to in last year's Programme for Government. Enshrining a "right to jury trial" does not form part of those proposals.[345]

299. The inconsistency between the protection of jury trial in different parts of the UK means the Bill of Rights would diverge from the concept that the rights it protects are universal, as not all rights would be given effect in all four jurisdictions. It will be a matter for the Scottish Parliament to determine whether to make any amendments to their criminal justice system.

300. In evidence to us, Lord Wolfson, the then Minister for Justice in the Lords, when asked the point of including this right in a Bill of Rights, noted that there have been challenges to the right to jury trial in Strasbourg (albeit unsuccessful to date) and that "the concept of a jury is somewhat unusual" in other Convention states.[346] When appearing before us on 14 December 2022, the Secretary of State said that he recognises "that a jury trial is part of the right to a fair trial, but it is not particularly common on the continent, with some exceptions."[347] This implies some concern that jury trials may be successfully challenged in Strasbourg. However, the ECtHR has noted that several member States have a lay jury system, guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences. A State's choice of a particular criminal justice system is in principle outside the scope of the supervision of the ECtHR provided that the system chosen does not contravene the principles set forth in the Convention.[348]

301. **Clause 9 has no obvious legal significance. Its inclusion appears to be largely symbolic and arguably a signal to Strasbourg of the importance of jury trials within our system. It is unlikely that jury trials in the UK would fall foul of Article 6 as long as procedural safeguards remain in place. We consider clause 9 to be unnecessary.**

345 The Scottish Government, Human Rights Act reform consultation: Scottish Government response, 8 March 2022, paras 130–131

346 Q23 [Lord Wolfson]

347 Q27

348 Taxquet v Belgium ECHR 16 November 2010; Achour v. France [GC], no. 67335/01 ECHR 10 November 2004 para 51

8 Human rights in the devolved nations

The Human Rights Act in the devolved nations

302. The HRA is woven into the constitutional arrangements of the devolved nations. It plays an important role in defining the competence of the Scottish Parliament, Northern Ireland Assembly and the Welsh Senedd. The Scotland Act 1998 (SA), Northern Ireland Act 1998 (NIA) and the Government of Wales Act 2006 (GoWA) all state that any legislation made by the devolved legislatures that is incompatible with the Convention rights, as defined in the HRA, is outside competence.[349] The Acts also prohibit Ministers in the devolved nations from making legislation that is incompatible with Convention rights.[350]

303. In their evidence to us, the National Human Rights Institutions of the four nations of the UK, the Equality and Human Rights Commission (EHRC), the Scottish Human Rights Commission (SHRC) and the Northern Ireland Human Rights Commission (NIHRC) were in unanimous agreement that the HRA has helped to embed a human rights culture in public services and has made enforcing human rights more accessible across all nations of the UK.[351] For example, the former Chair of the SHRC, Judith Robertson, told us embedding the HRA into the devolution settlement for Scotland has led to Convention rights becoming "a very strong part of the fabric of Scotland's laws or judicial analysis and, crucially, the legislative competence of the Scottish Parliament". The result, she said, had been the development of a rights-based culture in Scotland.[352] As the Scottish Law Society noted, this embedding means that questions about the compatibility of legislation passed by the Scottish Parliament with Convention rights are usually dealt with under the SA rather than the HRA.[353]

304. Moreover, the HRA is a crucial part of the peace settlement in Northern Ireland. In the Belfast/Good Friday Agreement, the UK Government committed to "complete incorporation into Northern Ireland law of the [ECHR], with direct access to the court, and remedies for breach of the Convention, including the power for the courts to overrule Assembly legislation on the grounds of inconsistency".[354] The HRA fulfils the requirement to incorporate the ECHR into Northern Ireland law. In her evidence to us, Alyson Kilpatrick, the Chief Commissioner of the NIHRC, described "direct access to the court and remedies for breach of the Convention" as "a key component of the peace process itself and certainly of the outworkings of the peace process that are continuing."[355]

349 Scotland Act 1998, s.29, Northern Ireland Act, s.6 and Government of Wales Act 2006, s.108A(2)(e).
350 Scotland Act, s.57Northern Ireland Act 1998, s.24 and Government of Wales Act, s.81.
351 Q49.
352 Q38.
353 Law Society of Scotland submission to IHRAR. Charles Whitmore, Research Associate, School of Law and Politics and the Wales Governance Centre at Cardiff University, told us the position was similar in Wales. See Q60.
354 The Belfast Agreement 1998, Rights, Safeguards and Equality of Opportunity, para 2.
355 Q51.

The impact of the Bill in the devolved nations

305. The Bill of Rights Bill, in the Government's own words, is intended to be a "Bill of Rights for the whole of the United Kingdom". Whilst the Bill continues to incorporate the Convention Rights into domestic law, changing how those rights are incorporated would have an impact on the people and governance of Scotland, Northern Ireland and Wales.[356]

Legislative competence

306. Although the HRA is a reserved matter, repealing and replacing it with the Bill in its proposed form has the potential to impact areas of devolved competence. Professor Aileen McHarg, Professor of Public Law and Human Rights at Durham Law School, told us that insofar as the HRA is used as a "dictionary" for the SA "changing the rules on interpretation of convention rights will change the ways in which those limit the actions of the Scottish Government or the competence of Scottish legislation."[357] Various clauses in the Bill, including clauses 3 and 5, would change how courts interpret Convention rights and would, therefore, have an impact in Scotland, Wales and Northern Ireland.

307. Professor McHarg went on to say she had "no doubt that because of the way the Human Rights Act and the devolution statutes interact, any changes to the Human Rights Act will have knock-on consequences for the scope of devolved competence."[358] This was mirrored by Charles Whitmore, Research Associate, School of Law and Politics and the Wales Governance Centre at Cardiff University, who said the Government's "proposals have a significant constitutional implication, and the notion of convention rights is materially significant to the competence of the Senedd."[359]

The issue of consent

308. Section 28 of the SA and section 107 of GoWA 2006 recognise "that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent" of the Scottish Parliament and the Welsh Assembly. This is the statutory expression of what is known as the Sewel convention. Although in Miller 1 the Supreme Court found that the Sewel convention was not legally enforceable, they emphasised that the convention has an important role in facilitating a harmonious relationship between the UK Parliament and the devolved legislatures.[360]

309. In her evidence to us Professor McHarg highlighted that the Government's proposed changes would likely engage the Sewel convention. The Sewel convention is engaged where:

a) provisions of Bills could have been made by devolved legislatures and

b) if provisions modify the legislative competence or functions of the devolved institutions.

356 We note the changes to the Scotland Act 1998 (SA), Northern Ireland Act 1998 (NIA), and the Government of Wales Act 2006 (GoWA) contained in Schedule 5 to the Bill.

357 Q57.

358 Q58.

359 Q60.

360 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5 at para 151.

310. The Government has confirmed it is seeking the consent of the devolved nations and the Explanatory Notes to the Bill make clear which of the clauses the Government think will require a legislative consent motion.[361] However, in his evidence to us, the Lord Chancellor refused to confirm or deny whether he would respect the decision of the devolved nations if they withheld consent.[362] Charles Whitmore told us that where the Government proceeds with a Bill without legislative consent this can put the devolution settlement "under significant strain" and noted the perception in Wales that there is "a trend for legislation to be increasingly passed despite the Senedd withholding legislative consent."[363]

311. It is not yet clear whether consent will be forthcoming, but the Scottish and Welsh Governments have made clear that they do not support the Bill. On 2 March 2022 the Scottish and Welsh Governments issued a joint statement and wrote to the Lord Chancellor describing the UK Government's plans to replace the HRA with a Bill of Rights as an "ideologically motivated attack on freedoms and liberties". They went on: "The proposals for a 'modern Bill of Rights' are both unwelcome and unnecessary. We are very clear that the interests of people in Scotland and Wales are best protected by retaining the Human Rights Act in its current form."[364]

312. Many stakeholders in the devolved nations have also been critical of the Bill in their evidence to this inquiry. For example, Human Rights Consortium Scotland told us:

> Over 130 Scottish organisations have said that this Bill 'will undermine all of our human rights and significantly impact the realisation of rights for individuals whose human rights are currently most at risk. The UK Government's proposals for reform are out of step with political and public opinion in Scotland. There is overwhelming support across Scotland to go forwards and not backwards on human rights, for a strong human rights legal framework and not one that is watered down.[365]

313. We also heard that from the NIHRC and Charles Whitmore that in Northern Ireland and Wales respectively, there is support for the HRA and an appetite for the further embedding of human rights.[366] Charles Whitmore told us:

> … the development of a human rights culture is viewed almost universally in a positive light in Wales. This is a legacy of the Human Rights Act and convention operating in a devolved context. It contrasts very sharply with the proposals that are before us, which organisations agree will inhibit access to justice and wrongly frame this human rights culture as a negative.[367]

314. In their evidence, the EHRC reiterated that point, stating "the Bill must not prevent governments in Scotland and Wales from strengthening human rights in their nations".[368]

361 Explanatory Notes to the Bill of Rights Bill [Bill 117 (2022–23) - EN], Annex.
362 Q41.
363 Q60.
364 Scottish Government and Welsh Government, Joint Statement on Human Rights Act Reform, 2 March 2022 and Joint letter to the Lord Chancellor, dated 1 March 2022.
365 Q55.
366 Q49 [Alyson Kilpatrick].
367 Q60.
368 Equality and Human Rights Commission (BOR0080), para 20

315. Some stakeholders in the devolved nations have, however, been supportive of the Government's proposals. For example, Professor Adam Tomkins, John Millar Chair of Public Law at Glasgow University has said that the HRA "is not perfect–show me the legislation which is!–and, like any other enactment, it is capable of being improved."[369]

316. Given the potentially significant impacts of the Bill in the devolved nations and the lack of consensus regarding reform, we agree with Alyson Kilpatrick, who said that seeking consent from the devolved legislatures would be a "more democratic" option and would enable consideration of the specific impact of the Bill each of the devolved nations.[370] We also note the statement made by Baroness Falkner of Margravine, Chair of the EHRC, who told us "I would be very wary of a Government who, having consulted and encountered stiff opposition, were determined to go ahead."[371]

317. **The HRA plays an important role in the constitutional arrangements of the devolved nations and has contributed to the embedding of a human rights culture. We have heard that there is strong support for the HRA in the devolved nations and an appetite for the strengthening of human rights.** ***Given the significant impacts on the devolved settlements, the Government should not pursue reform of the HRA without the consent of the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly.***

369 "Reforming the Human Rights Act will make our rights protections all the stronger" 22 December 2021.
370 Q55.
371 Ibid.

9 Our Concluding Views

318. In the previous chapters we have provided our analysis of the specific clauses in the Bill. We have recommended that many of them should be removed or significantly amended. In this final chapter, we take a step back from the detail and identify some, underlying difficulties that can be traced through the clauses in the Bill.

Undermining the universality of human rights

319. The starting point for any discussion of rights is that human rights are universal: they apply to everyone. This essential principle underpins the ECHR and the Universal Declaration on Human Rights, from which it is inspired.[372] As Elizabeth Prochaska, Barrister at 11KBW and former Legal Director at the Equality and Human Rights Commission, told us:

> The clue to what human rights are is in the name: they are human rights; they are universal and exist because of our humanity, not because of what we have done as people in our lives. There are really no qualifiers to that.[373]

320. The rights in the ECHR do not belong only to those who are well-behaved and who meet their responsibilities. How human rights are applied and how competing rights are balanced may vary depending on the context, but that does not affect their universal nature. As we have remarked elsewhere, human rights should be protected for all, including those who at any particular time are regarded as transgressors.[374] However, several clauses in the Bill would undermine the principle of universality. Clauses 8 and 20 (on deportation), 6 (which applies to those subject to a custodial sentence) and 18 (which would require courts to consider a claimant's prior conduct when awarding damages for breach of their Convention rights) single out specific groups of people, limiting their ability to rely on their rights.

321. The Community Policy Forum told us that the proposals in the Bill would create a dichotomy between those seen as "'bad' and underserving of human rights… and the 'good' and 'deserving' members of wider society".[375] In relation to Clause 6, the Prison Reform Trust also noted that, "it is precisely in custodial institutions like prisons and youth offender institutions that human rights protections are most vital, because individuals are under the control of the State."[376] We agree with these assessments and believe these clauses signal a very unwelcome development in the UK human rights framework.

372 The preamble to the ECHR refers to the UDHR and its aim of securing "the universal and effective recognition and observance of the Rights therein declared". It is of interest in the context of recognising 'responsibilities' that Article 29 para 1 of the Universal Declaration of Human Rights, provides that: "Everyone has duties to the community in which alone the free and full development of his personality is possible."

373 Q44 [Elizabeth Prochaska]

374 Joint Committee on Human Rights, Third Report of Session 2022–23, The Violation of Family Life: Adoption of Children of Unmarried Women 1949–1976, HC 270 HL Paper 43, para 81

375 Community Policy Forum (BOR0016)

376 Prison Reform Trust (BOR0056)

Weakening human rights protection

322. A number of clauses of the Bill would limit the power of the courts to assess Convention compliance when determining human rights cases. Others would make it harder for individuals affected by human rights violations to bring a claim before the courts and, if they are nevertheless successful in that claim, to secure damages by way of a remedy.

323. Given that the Bill would remove the courts' obligations under the HRA to take into account ECtHR case-law and interpret legislation compatibly with Convention rights, it appears highly likely that more individuals will be forced to take their case to the ECtHR in Strasbourg in order to enforce their rights. Many of the people who will have to be left to pursue their claim in Strasbourg will not have the time, nor the resources, to do so. This would undermine one of the central, and what we think should be uncontentious, aims of the HRA to "bring rights home"[377] and instead will "send rights away."[378] Individuals who want to vindicate their rights will be left to incur the cost and delay of taking their case to the ECtHR. We agree with the Helen Bamber Foundation and Asylum Aid, who said "Rights protections should not be restricted to those who have the sufficient resources and capacity to go to Strasbourg."[379]

324. The Bill is also likely to have an impact on people trying to enforce their human rights out of court. Stakeholders expressed concern that the Bill could lead to both a significant lowering of standards in public authority service provision and confusion for public authorities when determining their legal obligations. For example, the British Institute for Human Rights RITES Committee, a body made up of individuals, public officials and charity workers who work with the HRA, told us that clause 5 (which restricts the application of positive obligations) would make it more difficult for vulnerable individuals, and those who advocate for them, to ensure their rights are being respected by public authorities. Daisy Long, RITES Committee expert and independent social worker said:

> Removal of positive obligations … will make our [local authorities] and NHS bodies less accountable to both citizens and the system of justice … If public bodies are no longer required to act in these circumstances, instead adopting a reactive duty, it is likely that a 'he who shouts loudest' (or whose carers or parents shout loudest) management approach will be adopted across our pressurised public services, leaving those unable to speak up (or have someone to speak up for them) voiceless, including children and young people.[380]

325. This Committee and its predecessors have previously recommended that human rights enforcement in the UK should be strengthened, not weakened. For example, in its 2018 *Enforcing Human Rights* report the Committee made several recommendations aimed at improving the human rights framework in the UK. The Committee said:

377 The Command Paper announcing the Human Rights Bill was entitled "Rights brought home; the Human Rights Bill", October 1997, CM 3782

378 At present there the number of judgments against the UK by the ECtHR is low, with the latest Ministry of Judgment statistics showing there were only 7 ECtHR judgments against the UK in 2021 (5 of which were adverse). See 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 2021–2022, CP 588, December 2022, page 13.

379 Helen Bamber Foundation, Asylum Aid (BOR0017)

380 British Institute of Human Rights: The RITES Committee (BOR0027)

- The powers of the Equality and Human Rights Commission should be strengthened so it can undertake investigations into named bodies for breach of the HRA,
- The Government, National Human Rights Institutions and human rights advocates should seek ways of engaging more effectively with the public about how different human rights are balanced,
- That it shared the concerns of many witnesses that the pressures caused by legal aid reforms were having a severe impact on legal aid professionals which was leading to consequent grave concerns for access to justice, the rule of law and enforcement of human rights in the UK.[381]

326. Unfortunately, the Bill of Rights does not incorporate any of the improvements for enforcing human rights that have been suggested by this Committee, the Joint Committee on Human Rights in previous Parliaments, the IHRAR Panel and many other organisations in the two decades since the HRA came into force. Instead, the Bill will limit the effective enforcement of human rights in the UK, protecting the interests of the state rather than individuals whose rights have been infringed. It is regrettable that the Government does not appear to have given any serious consideration to how the human rights landscape could be strengthened.

Rhetoric versus reality

327. The Government has stated that the Bill will "strengthen" the protection of human rights in the UK, "restore common sense to the application of human rights" and will "provide legal certainty".[382] However, a number of those who submitted evidence highlighted that the Government's rhetoric about what the Bill will achieve is, in many ways, out-of-step with how the clauses will operate in practice. For example, Lord Pannick told us that:

> … it seems to me absolutely plain that much of this Bill will put this country in breach of our obligations under the convention and yet the Lord Chancellor has repeatedly stated that the Government will continue to be a member of the Council of Europe and they will continue to be a signatory of the convention, complying with its obligations. Something has to give. If this Bill were being sold in the shops the Lord Chancellor, in my view, would be at risk of prosecution for false or deceptive advertising.[383]

328. A number of respondents and commentators agree with Lord Pannick. We have outlined above a number of ways in which the Bill would risk the UK being found in breach of its international obligations under the ECHR. As such, many of the provisions of the Bill are at risk of undermining the Government's current commitment to remain party to the ECHR. This is concerning at a time where senior Government Ministers, including the Secretary of State, appear to be refusing to rule out future withdrawal from

381 Joint Committee on Human Rights, Tenth Report of Session 2017–2019, Enforcing human rights, HC 669 HL Paper 171.
382 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021
383 Q20

the ECHR.[384] If the Government is to stay party to the Convention, they should do so with integrity. We cannot pick and choose which Convention rights we want to observe or for whom we want to observe them.

329. Several other examples of where there may be a mismatch between rhetoric and reality was also made by Liberty, who wrote:

> In the name of 'taking back control', [the Bill] will send more British people to Strasbourg for justice. In an attempt to 'inject common sense' to the justice system it will introduce considerable confusion and complexity. To 'enhance the sovereignty of Parliament' it will relegate it beneath the executive, and to arrest 'undemocratic' judicial interpretation, it will hand human rights judgments to a single Minister to pick and choose as he likes.[385]

330. We believe a true Bill of Rights should set out the most important rights for those within the UK's jurisdiction and serve the purpose of protecting those rights against infringement by public authorities and private individuals. This so-called Bill of Rights is not what a Bill of Rights should be. The full effects of the Bill in practice will be to reduce the protections currently provided by the HRA, to place restrictions on the interpretation and application of the Convention rights in our domestic system, to limit the powers of the courts accordingly, and to divorce ourselves from Strasbourg as far as possible.

331. ***If this Bill is to proceed, the short title should be amended in clause 41 to better describe the purpose and contents of the Bill (see Annex, Amendment 26). We suggest the title of the Bill should be the 'European Convention on Human Rights (Domestic Application) Act', as the Bill seeks primarily to determine how the Convention is interpreted and applied in domestic law.***

Ownership of human rights

332. The Government consultation stated that "our human rights framework … needs to command broader public confidence".[386] Whilst we agree that public confidence in the human rights framework is important, we think the Government has failed to both provide evidence that there is a lack of public confidence in the HRA, and to conduct the consultation and legislative process in a way that will command public confidence in reform.

333. The Government consultation proceeds on the assumption that there is a lack of public confidence in the HRA. However, no evidence is provided to back-up this assertion. In fact, there are strong indicators that the opposite is true and that there is strong public support for the HRA, particularly from those who have experience of working with the HRA.[387] As the IHRAR Panel noted, the evidence they received was "overwhelmingly in support" of retaining the HRA, and those negative perceptions that do exist are "disproportionately fuelled and ventilated by negative media and political coverage."[388]

384 Q21
385 Liberty (BOR0021)
386 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, CP 588, December 2021, para 178.
387 Q1
388 The Independent Human Rights Act Review, CP 586, December 2021, Chapter One, para 48

Our own online survey publicised on Twitter, whilst clearly answered by a self-selecting group of people,showed 96.2% of those who responded did not believe the HRA should be replaced with a Bill of Rights.

334. We also have concerns that the Government has failed to undertake a process that will instil public confidence in the Bill of Rights Bill. There has certainly been no national conversation about our rights framework, nor any real attempt to learn from the difficulties that have afflicted the HRA at times in terms of public understanding and ownership. In a 2007 report the JUSTICE Constitution Committee highlighted that in drafting a Bill of Rights it was important to start with a community-based process "in which people have a real say and which ensure that the public can feel a sense of ownership over the eventual outcome". It continued:

> This may require an independent panel as well as a parliamentary inquiry in order to dispel concerns about the motivation for change being a self-serving one on the part of politicians. Such reform cannot and should not be imposed on the community. It must gain wide support before moving forward.[389]

335. Whilst the Government did set up the independent IHRAR Panel, it failed to respond in detail to its recommendations. The Government also failed to adequately respond to the concerns raised by consultees who responded to its own consultation. There is also some evidence to suggest that the public has a patchy understanding of the impacts of the Bill, including amongst those who will be impacted by the Bill. In their evidence POhWER, a charity which provides advocacy, information and advice services to people with disabilities, illnesses or who are facing social exclusion, told us it had conducted a poll of over 1,000 adults and of those "only 42% understood the impact the bill would have on their own rights." They said:

> We believe that the government's plans are not well understood, and are concerned that extensive engagement, pre-legislative scrutiny, and equality impact assessments have not been thoroughly conducted. If the British public understood that it was allowing government to remove/reduce/recall their human rights would they agree or support?[390]

336. We think that the Government could have pursued reforms within the HRA framework that would have improved public confidence in human rights, rather than the large-scale repeal and replacement of the HRA with the Bill of Rights. For example, the IHRAR Panel recommended that to improve public confidence the Government could have made moderate changes to the HRA to place a greater focus on common law rights and given "serious consideration … to developing an effective programme of civic and constitutional education in schools, universities and adult education."[391]

389 JUSTICE Constitution Committee, A British Bill of Rights: Informing the Debate, 2007, page 115.
390 POhWER (BOR0029)
391 The Independent Human Rights Act Review, CP 586, December 2021, Chapter One, para 48

Overwhelming lack of support for reforms

337. There is significant opposition to the Bill. Many stakeholders have expressed the view that the repeal of the HRA is unnecessary. There is also significant opposition to the specific clauses in the Bill for varied reasons, including that they would create uncertainty, weaken the enforcement of human rights, leave individuals to take their cases to the ECtHR (thereby increasing costs) and result in more adverse findings against the UK in the ECtHR.

338. The IHRAR report did not support repeal of the HRA. The Government's own consultation analysis, the written evidence we received and the respondents to our online poll overwhelmingly did not support the changes proposed in the Bill. The Truss administration paused the Bill's progress to review it. The former President of the ECtHR, Robert Spano, has expressed his concerns about the Bill. Speaking to legal journalist Joshua Rozenberg, Spano said the current system works well and that he found it "difficult to understand" the legal case for reforming the HRA.[392] Former Supreme Court judges Lord Carnwath,[393] Lord Mance,[394] Lord Dyson[395] and Lord Sumption have all criticised the Bill.[396] Lord Dyson summarised his concerns as follows:

> Over the past two decades, the HRA has given individuals an effective mechanism for enforcing their Convention rights. Some of the central provisions of the Bill would weaken these rights and make their enforcement more difficult. The case for the Bill is not based on compelling evidence and it has not been subject to appropriate scrutiny. If enacted, it would risk giving rise to years of uncertainty for little or no gain. It would risk destabilising the UK's devolved settlements and the Good Friday Agreement; and putting the UK in breach of longstanding international legal obligations.
>
> In my view, the case for a Bill of Rights Act along the lines of the Bill of Rights Bill is simply not made out.

339. We agree. Furthermore, we cannot see how the Bill will achieve its own stated aims of strengthening rights protection, the role of Parliament, or increasing legal certainty. **The Government should not progress the Bill in its current form through Parliament.**

392 Law in Action - The UK and the European Court of Human Rights - BBC Sounds

393 Constitutional Law Matters, 'Lord Carnwath lecture on Human Rights Act reform – is it time for a new British Bill of Rights?', accessed 14 December 2022.

394 Text available at Joshua Rozenberg, The Protection of Rights, This Way, That Way, Forwards, Backwards, accessed 14 December 2022,

395 Text available at Joshua Rozenberg, Human Rights Act Reform: a Dangerous or Welcome Change, accessed 14 December 2022.

396 Q10.

Conclusions and recommendations

"Ships that pass in the night"—the story so far

1. We have hardly heard any support for the Bill of Rights Bill. The Government-commissioned Independent Review did not support repeal or reform of the Human Rights Act 1998; the Government's consultation analysis showed very little support for a Bill of Rights; the evidence we have received in this inquiry is overwhelmingly against the Bill; and there is significant opposition to the Bill from the Governments of Scotland, Wales, and in relation to its potential impact in Northern Ireland. The previous administration also took the decision to halt and reconsider the Bill. *Given the significant opposition, we urge the Government to reconsider its decision to proceed with the Bill.* (Paragraph 29)

2. We welcome the various statements made by the Government that affirm its commitment to remaining party to the ECHR. However, the Secretary of State cast doubt over those commitments when he refused to rule out the possibility of the UK leaving the Convention in the future. Leaving the Convention would be a deplorable and regressive step, which would see the UK become an outlier in Europe alongside Russia and Belarus. The Government must be unequivocal in its commitment to the Convention and must continue to comply with its obligations under it. (Paragraph 32)

Approach to interpretation: Convention rights

3. Any suggestion of an 'originalist' approach to the interpretation of Convention rights would be damaging to human rights in the UK. The living instrument doctrine ensures protection for the human rights we recognise now, rather than those accepted in 1950. It is central to the operation of the Convention. (Paragraph 46)

4. Clause 3 of the Bill of Rights would replace the sensible, balanced approach to interpretation of the Convention set out in section 2 HRA with a more complex and less effective alternative. Emphasis on the original text of the Convention, and the absence of direct reference to the case law of the European Court of Human Rights, puts at risk the development of domestic human rights protection consistent with that provided by the Strasbourg Court. Restricting UK courts' ability to go further than the European Court of Human Rights in protecting Convention rights obstructs the creation of domestic human rights case law and damages the current positive judicial dialogue between our courts and Strasbourg. This could reduce the 'margin of appreciation' currently afforded to the United Kingdom by the European Court of Human Rights. (Paragraph 59)

5. Clause 3 increases the likelihood that domestic claimants will need to take their claims to the Strasbourg court to obtain an effective remedy for violations of their human rights and increases the likelihood of the UK being found in breach of its human rights obligations in international law. (Paragraph 60)

6. *Section 2 of the HRA is not in need of amendment. Clause 3 should be replaced with a clause mirroring the current law (see Annex, Amendments 1 and 2).* (Paragraph 61)

7. The suggestion that positive obligations can be severed from negative obligations and either ignored or applied in a restricted manner is untenable. The positive duties arising from the Convention are expressly or impliedly contained within the Convention rights and are an important mechanism for securing rights protection for all persons within the jurisdiction of the State. (Paragraph 83)

8. The evidence we have received makes clear that positive obligations have been vital for securing the protection of some of the most vulnerable people in society, such as women and girls experiencing domestic violence, 'honour-based' violence, or stalking. Positive obligations upon public authorities can save lives. We are therefore extremely concerned by the restrictive approach to positive obligations contained in clause 5 of the Bill. (Paragraph 84)

9. The prohibition on the application of new positive obligations in the domestic courts, and the restrictions placed upon the application of existing positive obligations, is likely to put the UK at odds with the jurisprudence of the European Court of Human Rights (ECtHR). It is not clear to us how the courts can simultaneously be expected to comply with Convention rights (clause 12) and yet ignore or restrict their application. As a result of clause 5, it is highly likely that there will be a divergence between domestic and ECtHR interpretations of Convention rights. If an individual is unable to rely on their full Convention rights under domestic law, the individual would need to take their case to Strasbourg to seek a remedy, potentially leading to an adverse judgment against the UK. The Government is bound in international law to comply with final adverse judgments as required under Article 46 ECHR. Clause 5 cannot remove our obligations under international law—it will simply introduce barriers to the enforcement of rights in the domestic courts, increase the time and costs of litigation for both individuals and public authorities, and create a long road to enforcement in Strasbourg. (Paragraph 85)

10. Far from giving greater certainty to public authorities, clause 5 will inevitably lead to uncertainty and litigation as questions will arise as to what constitutes an "interpretation", how to decide whether an obligation should be cast as "positive" or "negative", and whether an interpretation is new or already in existence. This undermines the Government's objective to increase certainty for public authorities and reduce the burdens on their resources. (Paragraph 86)

11. *Unless the Government is prepared to reconsider Clause 5, we would like to see this clause removed from the Bill (Annex, Amendment 3).* (Paragraph 87)

Approach to interpretation - domestic legislation

12. We agree with the overwhelming majority of those that responded to the Government consultation and those who submitted evidence to our Committee that section 3 HRA does not undermine parliamentary sovereignty and that it should not be repealed. Repealing section 3 HRA will leave more victims with no effective remedy, having to take claims to the European Court of Human Rights to enforce their rights. It will also result in more legislation that is incompatible with Convention rights remaining in force, affecting more people while Government decides whether and how to remedy the incompatibility. It weakens the obligation on public authorities to act compatibly with Convention rights under clause 12. Furthermore,

as recognised in our previous report on the Government's consultation proposals, the section 3 HRA obligation has a key role to play in the development of a human rights culture in the public sector. Its removal will hinder and potentially undo any such development. (Paragraph 105)

13. *Section 3 HRA should not be repealed. If the Bill of Rights is to replace the Human Rights Act, it should be amended to include a provision equivalent to section 3 HRA (see Annex, Amendment 4). Clause 12 of the Bill must also be amended to take this provision into account, recognising that it will only be lawful for public authorities to act incompatibly with Convention rights when they are required to do so by legislation that cannot be read compatibly with the Convention (see Annex, Amendments 5 and 6).* (Paragraph 106)

14. In the absence of any record of which judgments have relied on section 3, there are likely to be substantial disagreements, and therefore substantial litigation, over whether some cases did or did not involve the use of section 3 and whether the interpretation adopted has or has not been undone by the repeal of that section. It would be helpful if the courts were in future to indicate clearly when they are relying on section 3 HRA, or on an equivalent replacement provision in the Bill of Rights, and for a record of those instances to be kept. (Paragraph 117)

15. Should section 3 HRA be repealed, it will result in significant legal uncertainty over the status of statutory interpretations made prior to the Bill of Rights coming into force. Whilst some uncertainty may be justified in the interests of positive reform, the repeal of section 3 is unnecessary and harmful to human rights. Clause 40 would do little to resolve the uncertainty and harm caused. It would also run counter to the Government's intention to enhance parliamentary sovereignty, placing too much power in the hands of the Secretary of State to decide which laws should and should not remain compliant with human rights. (Paragraph 118)

16. *We have recommended that a clause equivalent to section 3 HRA is added to the Bill. Quite apart from our concerns about its appropriateness and its impact, clause 40 would serve no purpose if section 3 HRA is not repealed. We therefore recommend clause 40 is removed from the Bill (see Annex, Amendment 7).* (Paragraph 119)

17. A declaration of incompatibility does not provide victims with a prompt and effective remedy for human rights violations. It nevertheless represents a reasonable compromise between the protection of human rights and respect for parliamentary sovereignty. Without this strong constitutional justification there is no need for resort to a declaration of incompatibility, and no such justification applies to giving the courts the power to making declarations of incompatibility in respect of all subordinate legislation. Particularly given the remedial flexibility recently confirmed for the courts in the Judicial Review and Courts Act 2022, there is no justification for extending declarations of incompatibility beyond their current application under the HRA. (Paragraph 126)

18. *Clause 10 of the Bill should be amended to reinstate the position under the Human Rights Act: restricting the availability of declarations of incompatibility to circumstances in which the courts have identified an incompatibility with Convention rights in either*

a provision of primary legislation, or in a provision of subordinate legislation that cannot be removed as a result of primary legislation (see Annex, Amendment 8). (Paragraph 127)

The relationship between the Executive, the Legislature, and the Judiciary

19. In most circumstances, clause 7 will make little difference to the approach taken by the courts as they already show significant respect for the decisions reached by Parliament. However, in those circumstances where Parliament has not considered particular implications of its legislation, and where individual rights rather than broad policy issues are at stake, clause 7 could tie the courts' hands when they are attempting to engage in an effective assessment of compatibility. Ultimately, legislation that a court acting freely may consider to be incompatible with the Convention could instead be given a clean bill of health. This is inconsistent with the UK's obligations under the ECHR. It is likely to put the UK courts out of step with the ECtHR, resulting in victims within the UK needing to take their cases to Strasbourg directly rather than domestic courts in order to enforce their rights, and in Parliament eventually having to legislate to remedy the incompatibility years later. (Paragraph 145)

20. *Clause 7 is largely unnecessary and, where it would have effect, would be inconsistent with the UK's obligations under the ECHR. Unless the Government is prepared to reconsider clause 7, we would like to see it removed from the Bill (see Annex, Amendment 9).* (Paragraph 146)

21. Section 19 of the Human Rights Act has its value in requiring the Minister to consider the impact of their legislation on Convention rights, which are protected under UK law. The Minister then confirms to Parliament that this process has taken place, and notifies Parliamentarians as to whether they are being asked to pass legislation that cannot be clearly stated to comply with our international obligations under the Convention. This should not be problematic. Ministers should want their legislation to be compatible with our Convention obligations and should take these obligations seriously. They must be open and clear with Parliament about the likely compatibility of their proposals with the ECHR. (Paragraph 156)

22. *Section 19 of the Human Rights Act must not be repealed. Its provisions should instead be strengthened to require statements of compatibility to be provided upon introduction of a Bill rather than before second reading. The Bill should be amended to this effect (see Annex, Amendment 10).* (Paragraph 157)

23. The quality of information provided to Parliament to enable it to perform its constitutional role is vital. Some ECHR memoranda are not of a sufficient quality to assist our scrutiny. *The Government must improve the timeliness and quality of the information it provides to Parliament about the human rights implications of its legislation. The Government should also put its commitment to publishing human rights reasonings and justification for all Government Bills, which we welcome, on a statutory footing. The Bill of Rights should be amended to this effect (see Annex, Amendment 10).* (Paragraph 165)

24. *Parliament should be informed of adverse judgements by the European Court of Human Rights. This could occur by convention rather than statute. The Government should also provide Parliament in such cases with an action plan, setting out how the Government intends to resolve the issue that led to the judgement, and its proposed timeframe for doing so.* (Paragraph 171)

25. The Government should also inform Parliament when declarations of incompatibility are made by domestic courts in the same way as for adverse ECtHR judgments. Again, such information would be helpfully accompanied by an action plan setting out the issues in the case alongside the proposed timescale for addressing the incompatibility. (Paragraph 172)

26. *We ask the Government to engage with us on agreeing a process for informing Parliament where there are declarations of incompatibility made by domestic courts.* (Paragraph 173)

27. *Clause 26 should be amended to ensure that the remedial power is available in respect of existing incompatibilities as well as those that arise in future (see Annex, Amendments 11 and 12).* (Paragraph 176)

28. *The Government should amend the remedial regulations provisions to ensure that there is no risk of the procedure being unavailable where declarations of incompatibility occur before the Bill becomes law. We ask the Government to consider shortening the time frames for remedial regulations as we have previously proposed. The remedial order process seems to cause difficulties for some Government departments. The drafting of the schedule should be updated to make the remedial process and its requirements easier to follow.* (Paragraph 180)

Restrictions on enforcement and remedies

29. While the proposal to introduce a new permission stage will only have an impact on human rights claims in which no significant disadvantage has been suffered, it will still prevent meritorious claims, potentially affecting many individuals, being heard. Legislating to establish a class of permissible human rights violations, and restricting human rights claims in a manner that does not apply to legal claims brought on other grounds, undermines the UK's commitment to uphold human rights. *The Government should reconsider whether introducing the permission stage will achieve its aims, and whether it would leave the UK in breach of its international obligations. Unless the Government is prepared to reconsider clause 15, we would like to see it removed from the Bill (see Annex, Amendment 13).* (Paragraph 197)

30. There is no need for domestic courts to be prohibited from, exceptionally, making a damages award that is more generous than that which would be made by the ECtHR. *This prohibition should be removed from the Bill in favour of the existing general obligation to take into account the principles applied by the European Court of Human Rights in relation to the award of compensation (see Annex, Amendments 14 and 15).* (Paragraph 199)

31. Human rights by their nature are universal—they are inherent in the human condition and not dependent on good conduct. Any efforts to categorise certain

groups of people as being less deserving of human rights protection is contrary to the very concept of human rights. *Directly legislating for previous conduct to be taken into account when awarding damages encourages the courts to make judgments on whether a victim deserves an effective remedy for a violation of their rights. Clause 18(5)(a) poses a risk to the universal nature of human rights and should be removed from the Bill (see Annex, Amendment 14 and 15).* (Paragraph 209)

32. The focus of any assessment of damages in a human rights claim should be the need to provide the victim with an effective remedy. Requiring the courts to give "great weight" to the importance of minimising the effect an award of damages might have on a public authority's ability to perform its functions distracts from this focus, prioritising instead the interests of the body responsible for the human rights violation. *We recommend that clause 18(6) is removed from the Bill. The existing obligation to take into account the principles applied by the ECtHR in relation to the award of compensation should be reinstated (see Annex, Amendments 14 and 15).* (Paragraph 215)

33. Whether or not it is deliberate, clause 13 of the Bill unnecessarily risks narrowing the circumstances in which individuals can rely on their Convention rights. *The Bill should be amended to make clear that Convention rights can be relied on in any legal proceedings (see Annex, Amendments 16 and 17).* (Paragraph 219)

34. The ability of the Equality and Human Rights Commission and the Northern Ireland Human Rights Commission to bring cases under the Human Rights Act of their own motion is an important part of their function as human rights champions. It is possible that the omission of the retention of this ability from Schedule 5 of the Bill is inadvertent. In any event, it needs to be rectified. *We recommend that Schedule 5 of Bill is amended to make clear that the Equality and Human Rights Commission and the Northern Ireland Human Rights Commission retain their ability to bring own motion cases (see Annex, Amendments 18 and 19).* (Paragraph 221)

35. We welcome the Government's response in clause 19 to the judgment of the European Court of Human Rights in S.W. v United Kingdom. It would correct section 9 of the Human Rights Act, which is currently inconsistent with the European Convention on Human Rights to the extent that it prohibits damages being awarded for judicial acts done in good faith that violate the right to a fair procedure guaranteed by Article 8 (the right to respect for private and family life). (Paragraph 223)

Approach to international legal obligations

36. Clause 14, together with clause 39, paves the way for future legislation to limit the extraterritorial application of the Convention by excluding acts done in the course of overseas military operations. At present, service personnel, veterans, and affected civilians will continue to have the right to bring claims, or rely on Convention rights in domestic law, as provided for by the Bill of Rights. Provided it is not brought into force, clause 14 does not breach the Convention, given its deferred commencement. It merely signals the Government's intention. (Paragraph 237)

37. Unless the UK successfully renegotiates the scope of extraterritorial jurisdiction under the Convention to exclude overseas military operations, if the Government

wants to bring clause 14 into force it will have to ensure that effective remedies are still available in domestic law for breaches of Convention rights which occur in the course of overseas military operations. If the UK enacts alternative remedies to 'fill the gap' left by clause 14, these must be effective within the meaning of Article 13 ECHR (i.e., the remedy must be effective in practice and its exercise must not be unjustifiably hindered by the state). These alternative remedies must be considered by Parliament and subject to proper scrutiny to assess Convention-compliance. Any failure to provide for effective remedies for breaches of Convention rights in domestic law will result in increased litigation in Strasbourg. (Paragraph 238)

38. *Unless the Government is prepared to reconsider clause 14, we would like to see it removed from the Bill (see Annex, Amendment 20). Such a provision should only be included if and when alternative remedies are available that have been subject to parliamentary scrutiny such that Parliament (and not just the Secretary of State) is satisfied that excluding overseas military operations from the scope of the Bill of Rights would be compatible with the Convention.* (Paragraph 239)

39. The UK is bound under Article 34 of the Convention to comply with interim measures issued by the European Court of Human Rights. Clause 24 appears to signal to the European Court of Human Rights the current Government's dislike for the Court's recent interim decision regarding Rwanda. Clause 24(1) appears to have no legal effect in domestic law, but arguably shows a disregard for our international legal obligations. However, clause 24(2) and (3) gives the express instruction to public authorities, courts, or any other person to disregard our international legal obligations. This is concerning and undermines the principle that the UK will act in good faith with its international legal obligations. (Paragraph 248)

40. *Unless the Government is prepared to reconsider clause 24, we would like to see it removed from the Bill (see Annex, Amendment 21). In its place express provision should be made in the Bill to incorporate into domestic law our existing obligation to comply with interim measures as an essential means to secure the right to individual petition and the full enjoyment of Convention rights within our jurisdiction (see Annex, Amendment 2).* (Paragraph 249)

Tipping the balance and future reforms

41. It is not clear how the courts will interpret and apply the need to give "great weight" to free speech contained within clause 4. This is a similar requirement to the existing obligation in section 12 HRA to give particular regard to freedom of expression, which does not appear to have had any material impact on the balancing of Convention rights where Article 10 (freedom of expression) is engaged. The impact of clause 4(1) is therefore uncertain. (Paragraph 262)

42. Clause 4(2) excludes from the "great weight" provision some of the most important scenarios in which the State may wish to restrict free speech: criminal proceedings and compatibility of criminal offences, certain immigration decisions, and decisions concerning national security. These are areas in which decisions taken by the State are likely to interfere with the right to free speech. The strengthened right to free speech will therefore only apply selectively. (Paragraph 263)

43. In our view, the rights contained in Article 10 should not be severed—the right to receive information is equally as important as the right to impart information. Nor should free speech be placed on a pedestal over and above other potentially competing rights. The fundamental principle underlying qualified Convention rights is that they are equal and must be weighed against each other. We do not believe that a case has been made out that freedom of speech should prevail over other rights in a selective manner. *Unless the Government is prepared to reconsider clause 4, we would like to see it removed from the Bill (see Annex, Amendment 22).* (Paragraph 264)

44. It does not appear that the practical impact of clause 6 is likely to be significant. However, in those rare cases where the courts may currently consider that there is an individual right at stake which is so important that it outweighs the importance of reducing risk to the public, this clause could prevent the court reaching a decision which it considers consistent with the Convention. A clause that seeks to bind the hands of the courts when assessing whether an individual's rights have been violated is inherently problematic. The courts need to be able to conduct a genuine proportionality assessment or they risk being unable to adequately enforce human rights. *Unless the Government is prepared to reconsider clause 6, we would like to see it removed from the Bill (see Annex, Amendment 23).* (Paragraph 272)

45. Clause 8 is an attempt to restrain the courts from finding that deportation legislation is incompatible with Article 8. The scope is narrow, as it does not apply to challenges to individual deportation decisions. It is designed to make it difficult for the courts to find that deportation legislation is incompatible with Article 8 in all but the rarest of cases. This clause may signal the Government's intention to amend the deportation regime in a way which is highly restrictive of Article 8 rights. (Paragraph 284)

46. If the Government legislates to restrict the application of Article 8 rights even further than the current regime, clause 8 will make it extremely difficult for an individual to successfully challenge deportation laws in the domestic courts based on incompatibility with Article 8. This is because the threshold for finding that a deportation provision is incompatible is extraordinarily high, requiring that the provision would result in "manifest" and "extreme" harm to a limited category of persons. Although states are given a wide margin of appreciation in relation to deportation laws and the balance between the public interest and individual rights to private and family life, the extreme restrictions placed on the courts by clause 8 would almost extinguish Article 8 rights entirely. (Paragraph 285)

47. *As clause 8 precludes any proper balancing exercise to be undertaken by the courts, this clause is likely to be incompatible with the procedural requirements of Article 8. Unless the Government is prepared to give serious consideration to changing its approach to clause 8, we would like to see it removed from the Bill (see Annex, Amendment 24).* (Paragraph 286)

48. The effect of clause 20(3) would be to preclude the domestic courts from applying the factors set out by the European Court of Human Rights in case of Othman, which ensures that deportation assurances are not taken at face value but rather are subject to a rigorous assessment of sufficiency by the courts. However, the prohibition on the courts would only apply in relation to fair trial challenges to deportation. It is

not clear why the Government has decided to prohibit the assessment of deportation assurances only in the case of Article 6, particularly given that most deportation with assurances cases appear to concern the risk of treatment contrary to Article 3. It is likely that the practical effect of clause 20(3) will therefore be very limited. However, in the rare cases where clause 20(3) applies, any failure to adequately assess the sufficiency of deportation assurances may amount to a violation of Article 6 and Article 13, as the deportee is effectively stripped of the right of effective access to a court and the right to a remedy that a court would otherwise be able to provide. The removal of this judicial safeguard may also lead to an enhanced risk of breaches of the rights of persons deported to face trial upon return. *Clause 20 should be amended to restore judicial safeguards (see Annex, Amendment 25).* (Paragraph 295)

49. Clause 9 has no obvious legal significance. Its inclusion appears to be largely symbolic and arguably a signal to Strasbourg of the importance of jury trials within our system. It is unlikely that jury trials in the UK would fall foul of Article 6 as long as procedural safeguards remain in place. We consider clause 9 to be unnecessary. (Paragraph 301)

Human rights in the devolved nations

50. The HRA plays an important role in the constitutional arrangements of the devolved nations and has contributed to the embedding of a human rights culture. We have heard that there is strong support for the HRA in the devolved nations and an appetite for the strengthening of human rights. *Given the significant impacts on the devolved settlements, the Government should not pursue reform of the HRA without the consent of the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly.* (Paragraph 317)

Our Concluding Views

51. *If this Bill is to proceed, the short title should be amended in clause 41 to better describe the purpose and contents of the Bill (see Annex, Amendment 26). We suggest the title of the Bill should be the 'European Convention on Human Rights (Domestic Application) Act', as the Bill seeks primarily to determine how the Convention is interpreted and applied in domestic law.* (Paragraph 331)

52. The Government should not progress the Bill in its current form through Parliament. (Paragraph 339)

Annex: Amendments

1. Amendment to Clause 3 (The interpretation of Convention rights)

Clause 3, page 2, line 12, leave out clause 3

Explanatory statement: This amendment, together with amendment 2 below, give effect to the JCHR's recommendation to replace clause 3.

2. New clause (Interpretation of Convention rights)

To move the following clause:

"2 Interpretation of Convention rights

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

> (a) judgment, decision, interim decision, declaration or advisory opinion of the European Court of Human Rights,
>
> (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
>
> (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
>
> (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules."

Explanatory statement: This amendment gives effect to the JCHR's recommendation that the approach to interpretation of Convention rights in section 2 HRA be retained. It also gives effect to the JCHR's recommendation that interim decisions of the European Court of Human Rights are binding in international law and should be taken into account by the courts.

3. Amendment to Clause 5 (Positive Obligations)

Page 3, line 21, leave out clause 5.

Explanatory statement: This amendment would remove clause 5 from the Bill as proposed by the JCHR in its report on the Bill.

4. New Clause (Obligation to interpret legislation compatibly)

"(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

Explanatory statement: This amendment gives effect to the JCHR's recommendation that section 3 HRA should be retained, requiring all legislation to be read and given effect to in a way which is compatible with Convention rights, so far as it is possible to do so [to be read with amendment 5, 6 and 7]

5. Clause 12: Acts of public authorities

Clause 12, page 8, line 22, leave out subsection (2) and insert the following:

"(2) Subsection (1) does not apply to an act if—

> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

6. Clause 12: Acts of public authorities (ii)

Clause 12, page 9, line 1, leave out clause 12(5)

Explanatory statement: Amendments 5 and 6 give effect to the JCHR's recommendation that the position on liability of public authorities in the HRA should be reinstated, altering the exceptions to the general obligation to act compatibly with Convention rights, so as to take into account the obligation to read legislation compatibly (see amendment 4).

7. Amendment to Clause 40: Power to make transitional or saving provision

Clause 40, page 27, line 11, leave out clause 40

Explanatory statement: This amendment is consequential on amendment 4, which gives effect to the JCHR recommendation to reinstate the interpretative obligation under section 3 HRA. If section 3 HRA is replaced by an identical provision there is no need for clause 40.

8. Amendment to Clause 10 (Declaration of incompatibility)

Clause 10, page 7, line 10, leave out subsection (1) and insert:

"(1) Subsection (2) applies in any proceedings in which:

> a court is satisfied that a provision of primary legislation is incompatible with a Convention right; or a court is satisfied:
>
> that a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is incompatible with a Convention right, and that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility."

Explanatory statement This amendment gives effect to the JCHR recommendation to reinstate the effect of s.4 HRA and confine the power of a court to grant a declaration of incompatibility to when primary legislation is found to be incompatible with Convention rights or when subordinate legislation is found to be incompatible and, as a result of primary legislation, that incompatibility cannot be removed.

9. Amendment to Clause 7 (Decisions that are properly made by Parliament)

Clause 7, page 5, line 10, leave out clause 7

Explanatory statement: This amendment would remove clause 7 from the Bill, as raised by the JCHR, to ensure that the courts are not prevented from carrying out an effective assessment of whether legislation is or is not compatible with Convention rights.

10. New Clause (Statement of compatibility)

To move the following clause:

"(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, at First Reading of the Bill—

> (a) make a statement to the effect that in the Minister's view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or
>
> (b) make a statement to the effect that although the Minister is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

(3) The statement must be accompanied by published explanations setting out:

> (a) the extent to which the UK's human rights obligations are engaged by the Bill;
>
> (b) whether or not the provisions of the Bill interfere with those rights; and,

(c) if the provisions of the Bill do interfere with those rights, whether and how the interference is justified in law.

Explanatory statement: This amendment gives effect to the JCHR's recommendation that section 19 of the Human Rights Act must not be repealed. Its provisions should instead be strengthened to require statements of compatibility to be provided upon introduction of a Bill rather than before second reading. Further, the Government should put its commitment to publishing human rights reasonings and justification for all Government Bills, which we welcome, on a statutory footing.

11. Amendment to Clause 26 (Power to take remedial action): Continuity

Clause 26, page 17, line 10, after "section 10" insert "of this Act or section 4 of the Human Rights Act".

12. Amendment to Clause 26 (Power to take remedial action): Continuity

Clause 26, page 17, line 20, leave out "after the coming into force of this section".

Explanatory statement: Amendments 11 and 12 would give effect to the JCHR recommendation that it should be ensured that the remedial power could continue to be used to address existing incompatibilities identified by the UK Courts and the ECtHR.

13. Amendment to Clause 15 (Permission required to bring proceedings)

Clause 15, page 10, line 40, leave out clause 15

Explanatory statement: This amendment would remove from the Bill the requirement to obtain permission before bringing a claim alleging a violation of human rights, as proposed by the JCHR.

14. Amendment to Clause 18 (Judicial remedies: damages)

Clause 18, page 12, line 37, leave out clause 18

Explanatory statement: Amendments 14 and 15 would together give effect to the JCHR's recommendation to reinsert the provisions of section 8 HRA on the award of damages, removing clause 18 and the specific matters which it requires the courts to take into account when considering damages and replacing them with the principles of the European Court of Human Rights.

15. New clause (Judicial remedies: damages)

To move the following clause:

"Judicial remedies: damages

(1) No award of damages is to be made under clause 17 unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(2) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

Explanatory statement: Amendments 14 and 15 would together give effect to the JCHR's recommendation to reinsert the provisions of section 8 HRA on the award of damages, removing clause 18 and the specific matters which it requires the courts to take into account when considering damages and replacing them with the principles of the European Court of Human Rights.

16. Amendment to Clause 13 (Proceedings)

Clause 13, page 9, line 10, after "concerned" insert "in any legal proceedings"

Explanation: Amendments 16 and 17 would give effect to the JCHR's recommendation that no limit is placed on the proceedings in which an individual who claims to be a victim of a human rights violation can rely on their Convention rights.

17. Amendment to Clause 13 (Proceedings)

Clause 13, page 9, line 11, leave out paragraphs (i) and (ii).

Explanation: Amendments 16 and 17 would give effect to the JCHR's recommendation that no limit is placed on the proceedings in which an individual who claims to be a victim of a human rights violation can rely on their Convention rights.

18. New clause in Schedule 5 (Consequential and minor amendments)

To move the following new paragraph in schedule 5:

"The Equality Act 2006

1 (1) The Equality Act 2006 is amended as follows.

(2) In section 30 (Judicial review and other legal proceedings)–

(a) In subsection (3), for "section 7(1)(b) of the Human Rights Act 1998" substitute "section 13(2) of the Bill of Rights";

(b) In subsection (3)(c), for "section 7(3) and (4) of that Act" substitute "section 16 of the Bill of Rights";

(c) In subsection (3)(d), for "the exception in section 8(3) of that Act applies" substitute "the conditions in section 18(1) of the Bill of Rights are met"

(d) In the final paragraph of subsection (3), for "section 7 of the Human Rights Act 1998" substitute "section 13 of the Bill of Rights".

Explanatory statement: Amendment 18 gives effect to the JCHR's recommendation that the power of the Equalities and Human Rights Commission to bring human rights proceedings in its own name should expressly be retained. The new paragraph should be inserted after paragraph 15.

19. Amendment to Schedule 5 (Consequential and minor amendments)

Schedule 5, page 38, line 28, at end insert-

"(1A) In subsection (2B)–

(a) for "section 7(1)(b) of the Human Rights Act 1998" substitute "section 13(2) of the Bill of Rights";

(b) for "section 7(3) and (4) of that Act" substitute "section 16 of the Bill of Rights";

(c) for "the exception in section 8(3) of that Act applies" substitute "the conditions in section 18(1) of the Bill of Rights are met"

(1B) In subsection (2C), for "section 7 of the Human Rights Act 1998" substitute "section 13 of the Bill of Rights".

Explanatory statement: Amendment 19 gives effect to the JCHR's recommendation that the power of the Northern Ireland Human Rights Commission to bring human rights proceedings in its own name expressly be retained.

20. Amendment to Clause 14

Clause 14, page 10, line 1, leave out clause 14

Explanatory statement: This amendment would remove clause 14 from the Bill, as proposed by the JCHR in its report on the Bill, as it does not comply with our international legal obligations under the European Convention on Human Rights, to ensure Convention rights apply extraterritorially in overseas military operations.

21. Amendment to Clause 24 (Interim measures of the ECtHR)

Clause 24, page 16, line 25, leave out clause 24

Explanatory statement: This amendment would remove clause 24 from the Bill to avoid incompatibility with the UK's obligations under the European Convention on Human Rights should it be enacted, as proposed by the JCHR.

22.Amendment to Clause 4 (Free speech)

Clause 4, page 2, line 36, leave out clause 4

Explanatory statement: This amendment would remove clause 4 from the Bill, as proposed by the JCHR, to ensure that the UK courts are not obliged to take an approach to free speech which departs from the requirements of the European Convention on Human Rights.

23. Amendment to Clause 6 (Public protection)

Page 4, line 20, leave out clause 6

Explanatory statement: This amendment would remove clause 6 from the Bill, as proposed by the JCHR in its report on the Bill, so that, in cases brought by a person serving a custodial sentence there is no interference with the courts assessment of whether rights have been infringed.

24. Amendment to Clause 8 (Article 8 of the Convention: deportation)

Page 5, line 29, leave out clause 8.

Explanatory statement: This would remove clause 8 from the Bill, as proposed by the JCHR in its report on the Bill, to ensure the courts can properly assess the Article 8 rights of individuals subject to deportation.

25. Amendment to Clause 20

Clause 20, page 14, line 26, leave out clause 20(3)

Explanatory statement: This amendment would remove clause 20(3) from the Bill to restore judicial safeguards in cases concerning deportation with assurances, as proposed by the JCHR in its report on the Bill.

26. Amendment to Clause 41

Clause 41, page 27, line 33, leave out "the Bill of Rights 2022" and insert "European Convention on Human Rights (Domestic Application) Act 2023"

Explanatory statement: This amendment gives effect to the JCHR's recommendation that the short title of the Bill should be amended to reflect the true purpose and content of the Bill.

Formal minutes

Tuesday 17 January 2023

Hybrid Meeting

Members present:

Joanna Cherry KC MP, in the Chair

Lord Henley

Baroness Ludford

Baroness Massey of Darwen

Bell Ribeiro-Addy MP

Legislative Scrutiny: Bill of Rights Bill

Draft Report (*Legislative Scrutiny: Bill of Rights Bill*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 339 read and agreed to.

Summary agreed to.

Annex agreed to.

Resolved, That the Report be the Ninth Report of the Committee to both Houses.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Adjournment

[Adjourned till 18 January at 3.00pm

Declaration of interests

Lord Dubs

- Former Chair of Liberty

Lord Henley

- No relevant interests to declare

Baroness Chisholm of Owlpen (from 18 May 2022 to 26 October 2022)

- No relevant interests to declare

Baroness Ludford

- Vice-President of Justice

Baroness Massey of Darwen

- No relevant interests to declare

Lord Singh of Wimbledon

- No relevant interests to declare

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Wednesday 7 September 2022

Sir Peter Gross QC, Chair, Independent Human Rights Act Review Panel — Q1–8

Lord Sumption, Former Judge, Supreme Court; **Professor Tom Hickman QC**, Barrister, Blackstone Chambers, Professor of Public Law, University College London; **Professor Kate O'Regan**, Professor of Human Rights Law, The University of Oxford, Director, The Bonavero Institute of Human Rights — Q9–15

Wednesday 14 December 2022

Rt Hon Dominic Raab MP, Deputy Prime Minister and Lord Chancellor and Secretary of State for Justice, Ministry of Justice — Q16–41

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

BOR numbers are generated by the evidence processing system and so may not be complete.

1 Age UK (BOR0020)

2 All Wales People First (BOR0035)

3 Amnesty International UK (BOR0033)

4 Amnesty International UK (BOR0053)

5 Article 11 Trust (BOR0070)

6 Article 39 (BOR0076)

7 Association of Personal Injury Lawyers (APIL) (BOR0024)

8 Bail for Immigration Detainees (BOR0031)

9 British Association of Social Workers (BOR0037)

10 British Institute of Human Rights: The RITES Committee (BOR0027)

11 CEMVO Scotland (BOR0040)

12 Centre for Women's Justice (BOR0055)

13 Child Poverty Action Group (BOR0012)

14 Children and Young People's Commissioner Scotland (BOR0057)

15 Colm, (Professor of Constitutional and Human Rights Law, UCL Faculty of Laws) (BOR0072)

16 Community Policy Forum (BOR0016)

17 Coventry Citizens Advice (BOR0054)

18 Creswell-Plant, John (BOR0079)

19 English PEN; ARTICLE19; and Index on Censorship (BOR0067)

20 Equality Commission for Northern Ireland (BOR0048)

21 Equality and Human Rights Commission (BOR0080)

22 Evangelical Alliance UK (BOR0047)

23 Free Speech Union (BOR0043)

24 Gearty, Professor Conor (Professor of Human Rights Law, London School of Economics); and Gentile, Dr Giulia (Fellow in Law, London School of Economics) (BOR0009)

25 Glasgow Loves EU (an affiliate group of the European Movement in Scotland) (BOR0065)

26 Graham, Dr Lewis (Fellow in Law, Wadham College, University of Oxford) (BOR0010)

27 Greene, Dr Alan (Reader in Constitutional Law and Human Rights, Birmingham Law School) (BOR0006)

28 Hartmann, Professor Jacques (Professor of International Law, University of Dundee); and White, Dr Samuel (Lecturer in Law, University of the West of Scotland) (BOR0015)

29 Helen Bamber Foundation; and Asylum Aid (BOR0017)

30 Hogan Lovells International LLP (BOR0045)

31 Human Rights Consortium (BOR0058)

32 Human Rights Consortium Scotland (BOR0050)

33 Human Rights Watch (BOR0078)

34 Humanists UK (BOR0059)

35 Justice (BOR0071)

36 Just for Kids Law/Children's Rights Alliance for England (BOR0042)

37 Kaye, Jenny (BOR0002)

38 Lane, Mr Michael (Doctoral Researcher & Visiting Lecturer, Birmingham City University (School of Law)) (BOR0013)

39 Latham-Gambi, Dr Alex (Lecturer in Law, Swansea University) (BOR0008)

40 Learning Disability Wales (BOR0038)

41 Liberty (BOR0021)

42 Lind, S (BOR0049)

43 MSI Reproductive Choices (BOR0064)

44 Mencap; and Challenging Behaviour Foundation (BOR0034)

45 Murray, Dr Kyle (Lecturer in Law, City Law School, City, University of London) (BOR0051)

46 Newcastle Forum for Human Rights and Social Justice (BOR0062)

47 News Media Association (BOR0036)

48 Northern Ireland Human Rights Commission (BOR0075)

49 POhWER (BOR0029)

50 Price, Mr. Nigel Stewart (Retired, None) (BOR0023)

51 Prison Reform Trust (BOR0056)

52 Reach plc (BOR0044)

53 Reeves, Mr Malcolm (Director, Full Circuit Ltd) (BOR0011)

54 Relatives and Residents Association (BOR0025)

55 Rights & Security International (BOR0030)

56 Rory, Prof (Professor of Human Rights and Constitutional Law, Ulster University) (BOR0041)

57 Ryan, Dr Mark (Assistant Professor of law , Coventry University) (BOR0028)

58 Scottish Human Rights Commission (BOR0074)

59 Spalding, Dr Amanda (Lecturer in Law, University of Sheffield) (BOR0014)

60 The British Institute of Human Rights (BOR0039)

61 The Children's Society (BOR0073)

62 The Law Society (BOR0046)

63 The Scottish Government (BOR0052)

64 Trades Union Congress (BOR0063)

65 Trispiotis, Dr Ilias (Associate Professor in Human Rights Law, University of Leeds); James, Clare (PhD candidate, University of Leeds); Rebecca Moosavian (Associate Professor in Law, University of Leeds); Sandro, Dr Paolo (Lecturer in Law, University of Leeds); and Wallace, Dr Stuart (Associate Professor, University of Leeds) (BOR0022)

66 UNISON (BOR0026)

67 Unlock (BOR0077)

68 Waller, Angela (Retired tutor and local government officer, now an upaid carer to a family member with severe ME, Previously at Cambridge City Council and MPW Cambridge) (BOR0003)

69 Women's Equality Network Wales (BOR0018)

70 Woodland, Miss Katie (Psychologist, Katie Woodland) (BOR0032)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

Session 2022–23

Number	Title	Reference
1st	Legislative Scrutiny: Public Order Bill	HC 351 HL 16
2nd	Proposal for a draft State Immunity Act 1978 (Remedial) Order	HC 280 HL 42
3rd	The Violation of Family Life: Adoption of Children of Unmarried Women 1949–1976	HC 270 HL 43
4th	Protecting human rights in care settings	HC 216 HL 51
5th	Legislative Scrutiny: National Security Bill	HC 297 HL 73
6th	Legislative Scrutiny: Northern Ireland Troubles (Legacy and Reconciliation) Bill	HC 311 HC 79
7th	Draft State Immunity Act 1978 (Remedial) Order 2022	HC 895 HL 103
8th	Draft Bereavement Benefits (Remedial) Order 2022: Second Report	HC 834 HL 108
1st Special Report	Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22	HC 608
2nd Special Report	Legislative Scrutiny: Public Order Bill: Government Response to the Committee's First Report	HC 649
3rd Special Report	Protecting Human Rights in Care Settings: Government Response to the Committee's Fourth Report	HC 955

Session 2021–22

Number	Title	Reference
1st	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill	HC 90 HL 5
2nd	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)	HC 331 HL 23
3rd	The Government's Independent Review of the Human Rights Act	HC 89 HL 31

Number	Title	Reference
4th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Part 4): The criminalisation of unauthorised encampments	HC 478 HL 37
5th	Legislative Scrutiny: Elections Bill	HC 233 HL 58
6th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People	HC 451 HL 73
7th	Legislative Scrutiny: Nationality and Borders Bill (Part 1) – Nationality	HC 764 HL 90
8th	Proposal for a draft Bereavement Benefits (Remedial) Order 2021: discrimination against cohabiting partners	HC 594 HL 91
9th	Legislative Scrutiny: Nationality and Borders Bill (Part 3) – Immigration offences and enforcement	HC 885 HL 112
10th	Legislative Scrutiny: Judicial Review and Courts Bill	HC 884 HL 120
11th	Legislative Scrutiny: Nationality and Borders Bill (Part 5)— Modern slavery	HC 964 HL 135
12th	Legislative Scrutiny: Nationality and Borders Bill (Parts 1, 2 and 4) – Asylum, Home Office DecisionMaking, Age Assessments, and Deprivation of Citizenship Orders	HC 1007 HL 143
13th	Human Rights Act Reform	HC 1033 HL 191
1st Special Report	The Government response to covid-19: fixed penalty notices: Government Response to the Committee's Fourteenth Report of Session 2019–21	HC 545
2nd Special Report	Care homes: Visiting restrictions during the covid-19 pandemic: Government Response to the Committee's Fifteenth Report of Session 2019–21	HC 553
3rd Special Report	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill: Government Response to the Committee's First Report	HC 585
4th Special Report	The Government response to covid-19: freedom of assembly and the right to protest: Government Response to the Committee's Thirteenth Report of Session 2019–21	HC 586
5th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order): Government Response to the Committee's Second Report	HC 724
6th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4 (Unauthorised Encampments): Government Response to the Committee's Fourth Report	HC 765
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911

Number	Title	Reference
8th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People: Government Response to the Committee's Sixth Report	HC 983
9th Special Report	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing: Government Response to the Committee's Third Report of Session 2019–21	HC 1198
10th Special Report	Legislative Scrutiny: Nationality and Borders Bill: Government Responses to the Committee's Seventh, Ninth, Eleventh and Twelfth Reports	HC 1208

Session 2019–21

Number	Title	Reference
1st	Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 146 HL 37
2nd	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148 HL 41
3rd	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 HL 59
4th	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256 HL 62
5th	Human Rights and the Government's response to COVID-19: the detention of young people who are autistic and/or have learning disabilities	HC 395 (CP 309) HL 72
6th	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 HL 90
7th	The Government's response to COVID-19: human rights implications	HC 265 (CP 335) HL 125
8th	Legislative Scrutiny: The United Kingdom Internal Market Bill	HC 901 HL 154
9th	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill	HC 665 (HC 1120) HL 155
10th	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill	HC 847 (HC 1127) HL 164
11th	Black people, racism and human rights	HC 559 (HC 1210) HL 165
12th	Appointment of the Chair of the Equality and Human Rights Commission	HC 1022 HL 180
13th	The Government response to covid-19: freedom of assembly and the right to protest	HC 1328 HL 252

Number	Title	Reference
14th	The Government response to covid-19: fixed penalty notices	HC 1364 HL 272
15th	Care homes: Visiting restrictions during the covid-19 pandemic	HC 1375 HL 278
1st Special Report	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313
2nd Special Report	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill: Government Response to the Committee's Tenth Report of Session 2019–21	HC 1127
3rd Special Report	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill: Government Response to the Committee's Ninth Report of Session 2019–21	HC 1120
4th Special Report	Black people, racism and human rights: Government Response to the Committee's Eleventh Report of Session 2019–21	HC 1210
5th Special Report	Democracy, freedom of expression and freedom of association: Threats to MPs: Government Response to the Committee's Third Report of Session 2019	HC 1317
6th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4 (Unauthorised Encampments): Government Response to the Committee's Fourth Report	HC 765
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911