RESPONSE TO CONSULTATION TO REFORM THE HUMAN RIGHTS ACT 1998

8 March 2022

HRLA Human Rights Lawyers Association

Contents

The Human Rights Lawyers Association (HRLA)

1. The HRLA is an independent, specialist lawyers' association that deals exclusively with human rights law. Members of the Association include solicitors, barristers, judges, government lawyers, legal academics, legal executives, in-house lawyers, pupils, trainees and law students.

2. Our principal objective is to protect and promote human rights in the United Kingdom. We aim to increase knowledge and understanding of human rights and to aid their effective implementation within the UK legal framework and system of government.

3. This response has been produced by a Working Group comprised of members of the HRLA's Executive Committee. In common with the HRLA's members, the Working Group's members include practising lawyers and other professionals with particular expertise and interest in the field of human rights law.

Introduction

4. We repeat at the outset our firm view, as articulated in our response to the Independent Human Rights Act Review ('IHRAR') Call for Evidence in March 2021,[1] that the Human Rights Act 1998 ('HRA') works well to preserve proper accountability for Convention rights, and accordingly does not require amendment or replacement. The HRA helps the UK guarantee the rule of law. It successfully establishes the judiciary's role as a protector of fundamental rights without undermining the sovereignty of Parliament. There is no need for its overhaul, merely greater political will to further explain its many virtues and practical benefits.

5. We strongly oppose the Government's proposal to *"replace the Human Rights Act with a modern Bill of Rights"*.[2] Not only do we consider the reform proposed in this consultation unnecessary, we firmly believe that it would significantly weaken human rights protection in the UK. Far from realising the Government's purported desire *"to strengthen the UK's long tradition of protecting human rights"*,[3] it would create barriers for individuals accessing the UK courts, and increase the need for individuals to bring a case to Strasbourg to vindicate their rights, leading to a greater number of judgments against the UK in the European Court of Human Rights ('ECtHR'). Nor do we see any valid rationale for introducing a *"British"* Bill of Rights. The United Kingdom was a key participant in the creation of the European Convention on Human

[1] Human Rights Lawyers Association, 'Submission to the Independent Human Rights Act Review' (3 March 2021) <https://www.hrla.org.uk/2021/03/05/hrla-submission-to-the-ihrar/> accessed 5 March 2022.
[2] Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights - consultation' (CP 588, 2021) p. 3 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf> accessed 6 March 2022 (hereinafter 'Consultation').
[3] ibid, p. 28.

Rights ('ECHR'). Domestic courts have made a *"distinctly British contribution"* to the development of Convention jurisprudence, whilst also being prepared to depart from it where necessary.[4]

6. Whilst the consultation asserts that the government *"carefully considered the options examined by the IHRAR Panel in their report and the government has decided to consult on a range of the Panel's recommendations"*,[5] the proposals advanced in this consultation go far beyond the IHRAR's recommendations and include options for reform which the IHRAR explicitly advised against or fell outside the IHRAR's Terms of Reference.

7. For example, the IHRAR rejected the option of repealing section 3 of the HRA, stating that *"repeal would significantly weaken the overall scheme of the HRA by removing one of the key means by which Convention rights are to be given their full effect in UK domestic law"* and *"would raise real concern as to adversely affecting devolution and the Northern Ireland Peace Agreement"*.[6] Yet the consultation now proposes, as one option for reform, *"Repeal section 3 and do not replace it"*.[7] The intention to *"replace the HRA with a modern Bill of Rights"*[8] notably falls outside the remit of the IHRAR Terms of Reference, and is moreover at odds with the *"overwhelming body of support for retaining the HRA"*[9] provided to the IHRAR. That the Government has not sought to consult on *whether* the HRA should be replaced suggests an unwillingness to engage in meaningful consultation on the very foundation of its proposed reform.

8. The overall tone and content of the consultation encourages the UK courts and wider public authorities to pay less consideration to the principles and legal framework of the ECHR, whilst the government formally maintains ratification of the treaty. Examples include the doctrines of proportionality, "living instrument", and "positive obligations", all developed painstakingly by the ECtHR over decades and all significantly weakened by the proposals in the Consultation. At a time when the UK government is calling on the world community not to undermine the post-war rules-based system, staying within the formal terms of a treaty whilst undermining it rhetorically and legally appears to set a very concerning example.

9. In addition to emphasising our firm opposition to this project of reform, we wish to register our objection to the manner in which this consultation has been delivered. Whilst the consultation was first published on 14 December 2021, a *"word-only Easy Read accessible version"* was not published until 24 February 2022, less than two weeks before the deadline for responses on 8 March 2022. The Ministry of Justice itself appeared to recognise that this version is insufficient, stating *"[w]e apologise*

[4] See the sources cited in the HRLA's submission to the IHRAR, op cit, pp.4-7.
[5] Consultation, p. 57 at [188].
[6] *The Independent Human Rights Act Review* (CP 586, 2021) pages 234-5 at [122]-[128] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf> accessed 7 March 2022 (hereinafter 'IHRAR').
[7] Consultation, p. 109.
[8] ibid, p. 3.
[9] IHRAR, p. 30 at [19].

that it is a text-only version and are working with suppliers to update this".[10] Accordingly, the HRLA joined Liberty and numerous other organisations in calling for an extension to the deadline to ensure that disabled people could engage with the consultation.[11] Whilst we are pleased that an Easy Read version and audio version were added on 7 March 2022 and that the deadline to respond for those who would be assisted by these versions has been extended to 19 April 2022, we maintain that these versions should have been provided from the outset. We also note with disappointment that this extension effectively only allows six weeks for those who require an Easy Read or audio version to respond, whereas the Ministry of Justice had deemed the appropriate period for this consultation to be 12 weeks. The Ministry of Justice should ensure that its consultations are accessible and take measures to prevent such a situation arising again in the future.

10. Due to the considerable length of this consultation, we have chosen to concentrate on certain questions in our response and have not sought to answer every question in the consultation questionnaire. Please therefore note that the absence or length of a response to any question should not be interpreted as tacit support on the part of the HRLA for the changes proposed.

Responses to consultation questions

A permission stage for human rights claims

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

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

11. We do not accept the framing of this question, which implies that, under the HRA, court time and resources are being taken up with cases which do not raise *"genuine human rights matters"*. There is no basis for this implication.

12. Chapter 3 of the Government's consultation (and in particular the sub-section titled *"A 'rights culture' that displaces personal responsibility and the public interest"*) purports

[10] Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights' <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights> accessed 6 March 2022.
[11] Liberty, 'Disabled People Excluded from Human Rights Review, MPs and Campaigners Warn' <https://www.libertyhumanrights.org.uk/issue/disabled-people-excluded-from-human-rights-review-mps-and-campaigners-warn/> accessed 6 March 2022.

to set out evidence that spurious human rights claims are regularly made under the HRA. This evidence is meagre in the extreme. The consultation identifies just four claims, brought by three different individuals (all prisoners), which are said to demonstrate the existence of a *"perception that it is worth making human rights claims, even on flimsy grounds"* (paragraphs 127-128). There is no quantitative analysis of the number of purportedly spurious claims, or of the number of human rights claims generally. When pressed on this point by the Joint Committee on Human Rights, the Parliamentary Under-Secretary of State for Justice, Lord Wolfson QC, was not able to point to any further evidence of the supposed mischief that the permission stage is designed to cure.[12]

13. Despite this absence of any meaningful evidence, the consultation nevertheless concludes that *"frivolous and spurious"* claims are coming before the courts, and that there has been *"a proliferation of human rights claims under the [HRA], not all of which merit court time and public resources* (paragraphs 219-220). We reject this conclusion, which is unsubstantiated and directly contrary to our experience as human rights practitioners.

14. Nor do we agree with the Government's proposal to introduce a permission stage in human rights claims. Any such permission stage is per se inappropriate. The right of access to justice is of fundamental importance in our law generally. It is even more essential in relation to human rights claims, which by their very nature raise issues concerning individual liberty, dignity and integrity, as well the protection of individuals from the power of the state. There are already many barriers to justice for human rights claimants. These include, for many individuals, the need to secure legal aid. Many human rights claimants are particularly vulnerable, precisely because of the human rights violation to which they have been subjected, or because they have particular protected characteristics.

15. Additional procedural hurdles such as a permission stage are likely to make it materially harder for individuals to access the courts and enforce their rights. There will be cases in which a human rights breach has been committed, but which are wrongly thrown out at the permission stage because the claimant has, for whatever reason, failed to convince the court that the permission threshold is met.

16. In addition, and although the Government's proposed *"significant disadvantage"* threshold is undefined, it would appear to impose a substantial burden on claimants. As a matter of ordinary language, it would not operate merely to exclude claims

[12] Despite insisting that *"there are plenty of cases that are trivial"*. Lord Wolfson has undertaken to write to the Committee with further evidence. As far as we are aware, any such evidence which may have been provided to the Committee has not been published (Joint Committee on Human Rights evidence session on Human Rights Act reform (2 February 2022) <https://committees.parliament.uk/oralevidence/3395/pdf/> accessed 7 March 2022.)

which are frivolous or fanciful.[13] It is also more stringent than the permission thresholds which apply in other areas of the law.[14] Such a test is manifestly inappropriate given that, for the reasons set out above, many claimants already face significant difficulties in accessing the courts.

17. Furthermore:

    a. There does not appear to be any need whatsoever for a permission stage, whether as proposed or otherwise. If abuse of the HRA to bring entirely frivolous claims were indeed widespread, as the Government alleges, one would expect the Government to put forward evidence demonstrating that phenomenon. Yet, as described above, the Government has signally failed to do so. It is also significant that the IHRAR, which undertook a thorough review of human rights law and practice, did not identify any such widespread abuse of the HRA, nor any need for a permission stage. The extremely flimsy evidence base relied upon by the Government is therefore insufficient to warrant the introduction of a permission stage which will almost certainly have the effect of preventing at least some human rights claimants from vindicating their rights. In any event, to the extent that some sort of filter *is* needed, it already exists: under section 7 of the HRA, claimants must be *"a victim of the unlawful act"*.

    b. The Government's reliance on the purported similarity with Article 35(3)(b) of the European Convention on Human Rights[15] is misconceived. That provision was introduced as a practical tool for dealing with the ever-increasing caseload of the ECtHR, which has resulted in a very large backlog of cases.[16] In addition, as many commentators have pointed out, the Strasbourg court is an international court of last instance, to which claimants may only apply once they have exhausted all domestic remedies. This means that, by the time a case reaches the Strasbourg court, it will have not only been determined at first instance, but also reconsidered by multiple appeal courts. In deciding whether the significant disadvantage threshold is met, the ECtHR is likely to have the benefit of several judgments (often fully reasoned, as they will always be if the case originated in the United Kingdom). In such circumstances, the filtering mechanism used by the ECtHR is entirely different

[13] Contrary to Lord Wolfson's assertion when giving evidence to the Joint Committee on Human Rights (ibid). As barrister Elizabeth Prochaska explained to the same Committee: *"If that is what the Government want to do then they need to phrase the permission stage in those terms. Significant disadvantage is not the same as utterly trivial. That much is obvious to lawyers and non-lawyers alike."* (Joint Committee on Human Rights evidence session on Human Rights Act reform (9 February 2022) <https://committees.parliament.uk/oralevidence/3436/pdf/> accessed 7 March 2022.)

[14] For example, there is no permission stage in relation to claims under the Equality Act 2010. In order to secure permission to apply for judicial review, an applicant must satisfy the court that there is an arguable ground for judicial review which has a real prospect of success (*Simone v Chancellor of the Exchequer* [2019] EWHC 2609 (Admin), at [112]). That is a significantly lower threshold than a claimant being required to show, at permission stage, that both: (i) they suffered a disadvantage as a result of a breach of their human rights; and (ii) such disadvantage was significant.

[15] Consultation, at paragraph 222.

[16] ECtHR, *Practical Guide on Admissibility Criteria*, p. 79 (1 February 2022, <echr.coe.int/documents/admissibility_guide_eng.pdf> accessed 7 March 2022).

from the proposal to introduce a permission stage at first instance, before any court or tribunal has had the opportunity to consider the facts of the case in detail.

c. Finally, the Government also purports to justify the proposed permission stage by reference to the costs that it says will be saved, should public money no longer be spent on defending allegedly frivolous human rights claims. This entirely overlooks the fact that a new procedural stage will undoubtedly increase the costs and complexity of human rights litigation.[17] It is likely that the costs associated with the Government's participation in a permission stage in every human rights case will far exceed the costs associated with the small number of claims which it has identified as frivolous.

18. For all of the above reasons, we disagree strongly with the Government's proposal to introduce a permission stage in human rights claims. The Government's proposal to permit cases of *"overriding public importance"* to proceed even where the significant disadvantage threshold is not met does not sufficiently mitigate the impact on access to justice that a permission stage would have. Whilst many human rights claims will be of overriding public importance, the primary significance of others will be for the victim and their families. This does not make them any less deserving of vindication.

Judicial Remedies: section 8 of the Human Rights Act

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

19. Again, we do not recognise a problem concerning the courts' ability to *"focus on genuine human rights abuses"* and do not accept that a case for change in this respect has been made out.

20. The consultation states: *"Human rights should not be misused to provide a fall-back route to compensation on top of other private law remedies. They should be relied upon when a genuine and serious breach has taken place, and our reforms will aim to clarify this."*[18] It proposes to *"strengthen the rule in section 8(3) of the Human Rights Act requiring other claims to be considered when awarding damages"*, asserting *"[w]e believe that the existing rule does not go far enough, and our proposals would require applicants to pursue any other claims they may have first, either so that rights-based claims would not generally be available where other claims can be made, or in advance of any rights argument being considered, to allow the courts to decide whether the private law claims already provide adequate redress."*[19]

[17] Elizabeth Prochaska (Joint Committee on Human Rights evidence session on Human Rights Act reform (9 February 2022) <https://committees.parliament.uk/oralevidence/3436/pdf/> accessed 7 March 2022.)
[18] Consultation, p. 66 at [225].
[19] ibid, at [226].

21. These proposals are logically incoherent. Section 8(3) already provides that *"[n]o award of damages is to be made 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), [...] the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made."*[20] The making of an award of damages under the HRA where a person has already received a private law remedy is therefore necessarily contingent on the court's determination that such a remedy is needed to provide just satisfaction, and cannot be characterised as involving a misuse of human rights. For example, in determining a claim for damages in *DSD & Anor v The Commissioner of Police for the Metropolis* [2014] EWHC 2493 (QB), the High Court considered *"the relevance of the fact that the Claimants have received payments from Worboys pursuant to a settlement of a civil claim made by them against him; and of awards made by the Criminal Injuries Compensation Authority ("CICA")"*[21] in its decision to award damages to the claimants and in determining quantum thereof. When the case reached the Supreme Court, Lord Kerr, with whom Lady Hale agreed, remarked that he could not *"find any flaw in the judge's decision to award that compensation nor in the Court of Appeal's decision to uphold that decision"*, *"irrespective of the fact that they had received damages from both Worboys and CICA"*, since the police's "*catalogue*" of *"systemic and operational failures"* was *"considered to warrant the award of compensation"* to them.[22]

22. Furthermore, as Lord Kerr stated in *Commissioner of Police of the Metropolis v DSD* [2019] AC 196, [2018] UKSC 11 at [64]: *"[i]t is well settled,* [...] *that the award of compensation for breach of a Convention right serves a purpose which is distinctly different from that of an order for the payment of damages in a civil action*". Indeed, as Lord Bingham observed in *Van Colle, "[w]here[as] civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights"*.[23] The government's focus on compensation obscures the much broader importance of human rights claims, which are just as much about ensuring respect for an individual's rights and dignity.

23. We therefore strongly object to the proposals to *"require applicants to pursue any other claims they may have first, either so that rights-based claims would not generally be available where other claims can be made, or in advance of any rights argument being considered"*, which would form a barrier to access to justice.

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

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

[20] Human Rights Act, s 8(3).
[21] *DSD & Anor v The Commissioner of Police for the Metropolis* [2014] EWHC 2493 (QB) at [42].
[22] *Commissioner of Police of the Metropolis v DSD & Anor* [2019] AC 196, [2018] UKSC 11 at [65].
[23] *Chief Constable of the Hertfordshire Police v Van Colle* [2009] 1 AC 225, [2008] UKHL 50 at [138].

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

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

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

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

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

24. We reject the premise of these questions; namely, that section 3 HRA *"compels the court to expand the scope of its interpretative duty beyond what is appropriate for an unelected body"*, and that a *"less expansive interpretive duty"* is required to provide *"greater legal certainty, a clearer separation of powers, and a more balanced approach to the proper constitutional relationship between Parliament and the courts on human rights issues"* (consultation, paragraphs 235-236).

25. Concerns that section 3 HRA poses a threat to the doctrine of Parliamentary sovereignty are not borne out either by the structure of the provision or its application by the judiciary. Section 3 was carefully crafted to allow the judiciary to play an important role as the protector of fundamental rights, without undermining the sovereignty of Parliament. It requires the courts to read primary and subordinate legislation compatibly with Convention rights *"so far as it is possible to do so"*, but does not permit them to strike it down or reinterpret statutes in a way which is inconsistent with a fundamental feature of the legislation being interpreted.[24] This is an important restriction on the scope of the courts' powers under section 3. There is no indication that section 3 is being operated in a way which transgresses this restriction, or trespasses improperly on Parliament's area of constitutional competence.

26. The Government has not put forward any serious evidence that section 3 is not working in the balanced manner described above. In Chapter 3 of the consultation, the Government argues that section 3 has given rise to *"a significant constitutional shift in the balance between Parliament, the executive and the judiciary - diverting the courts from their normal function in the interpretation of legislation into straightforward judicial amendmentment"* (paragraph 117). The consultation devotes just four paragraphs to the evidence which is said to support this conclusion, which

[24] *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557. For a detailed analysis of the balanced role played by section 3 HRA, see the HRLA's submission to the IHRAR (3 March 2021) <https://www.hrla.org.uk/2021/03/05/hrla-submission-to-the-ihrar/> accessed 5 March 2022.

consist exclusively of cherry-picked cases. Again, there is no quantitative analysis of the number of cases in which section 3 is applied by the courts, or which have supposedly resulted in the undermining of Parliamentary sovereignty.

27. By contrast, recent more rigorous analysis has demonstrated that section 3 is being operated in a restrained and constitutionally appropriate manner. Having carefully considered a wide range of available evidence spanning the entire period since the enactment of the HRA, the IHRAR concluded that there was no empirical case for reforming section 3. It found that *"the reality is that the high-water mark of alarm as to the use of section 3 hinges on a case now 20 years old [R v A (Complainant's Sexual History [2001] UKHL 25; [2002] 1 AC 45]. That does not suggest a pattern, still less an enduring pattern, of misuse of the section. Further, relatively settled, restraining guidance as to the use of section 3 has stood for at least a decade, so that statutory amendment to the section itself risks uncertainty"*.[25] Similarly, recent research conducted by JUSTICE indicates that the application of section 3 is rarely determinative of a case's outcome, and that where it is applied, the courts are vigilant *not* to undermine Parliament's intentions.[26]

28. The consultation does not engage meaningfully with this body of evidence, instead adopting a selective approach which does not reflect the way in which section 3 is actually being used. Indeed, the government's consultation relies on *R v A* itself as a key example of the courts displacing the role of Parliament in deciding difficult questions of public policy (paragraphs 117-118), despite the IHRAR's clear finding that the case is an anomaly in the courts' application of section 3. That is an entirely unsatisfactory way for the Government to approach major policy decisions with far-reaching implications for the effective enforcement of individuals' human rights.

29. The Government's apparent concern with protecting Parliamentary sovereignty is also unconvincing for another, separate reason. There have been numerous recent examples of the Government introducing legislation with far-reaching human rights implications on a highly abridged Parliamentary timetable. This approach severely curtails Parliament's ability effectively to scrutinise the compatibility of legislation with the ECHR, and undermines the Government's appeals to Parliamentary sovereignty as the principal driver for drastic reform to section 3.

30. Further, we do not agree that section 3 should be repealed (Option 1), or amended (Option 2) in the way which the consultation suggests.

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[25] Paragraph 49 (7 December 2021, The Independent Human Rights Act Review - Executive Summary <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040526/ihrar-executive-summary.pdf>, accessed 7 March 2022). See also page 198 of the IHRAR's full report, paragraph 47 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf> accessed 6 March 2022.

[26] F. Powell and S. Needleman, *How radical an instrument is section 3 of the Human Rights Act 1998?*, U.K. Const. L. Blog (24 March 2021 <https://ukconstitutionallaw.org/2021/03/24/florence-powell-and-stephanie-needleman-how-radical-an-instrument-is-section-3-of-the-human-rights-act-1998/> accessed 7 March 2022).

31. In relation to Option 1, removal of the interpretive power altogether would drastically weaken rights protection in the UK. Section 3 is the most important way in which the HRA "brings rights home". It provides the courts with an essential and flexible tool through which the effective enforcement of human rights can be secured by the domestic courts on a case-by-case basis. Similar or equivalent provisions to section 3 can be found in bills of rights around the world: interpretative powers of this nature represent the means by which bills of rights take on the form of what can credibly claim to be a "higher law". Indeed, without any such interpretative provision, it is questionable whether the government's proposed legislation could meaningfully be described as a bill of rights at all.

32. Furthermore, repeal of this power would restrict courts to making a declaration of incompatibility under section 4 HRA - a serious step which is rarely exercised. Whilst this is likely to increase the number of section 4 declarations overall, it is highly improbable that an enforcement model based on section 4 alone would result in an equivalent level of rights protection. In turn, this would lead to increased numbers of claimants being forced to litigate their cases in Strasbourg. Although we welcome the retention of section 4 in the proposed bill of rights, it is essential to understand that such a provision was never meant to "stand alone". Rather, and as was made clear in the Parliamentary debates during the passage of the HRA, section 4 was always intended to operate alongside section 3. This was precisely because it was to be used only when, in deference to Parliamentary sovereignty, section 3 could not be applied.

33. In relation to Option 2, a restriction of the use of the interpretative power to situations where: (i) there is ambiguity in the legislation, and; (ii) any Convention-compliant interpretation is consistent with the wording and purpose of the legislation would seriously undermine the effectiveness of section 3. It would drastically limit both the number of cases in which section 3 can be used, and the effectiveness with which it can be applied. In effect, it would restore the pre-HRA status quo without replacing it, notwithstanding the apparent introduction of a bill of rights. The lack of transparency as to the extent to which it is proposed to repeal fundamental provisions of the HRA, rather than reform or replace them, is itself a cause of serious concern.

34. We consider that both options represent unacceptable responses to a "problem" that, for the reasons set out above, is more illusory than real. Both options may also have unintended consequences for the Government. As Lord Mance explained when giving evidence to the Joint Committee on Human Rights: *"...it is in no way uncommon that…where a question of incompatibility arises, the government lawyers on instruction invite the court to use section 3 rather than make a declaration of incompatibility. It avoids Ministers getting a degree of egg on their face through having stood up in Parliament and certified compatibility"*.[27]

35. In relation to question 13, we agree with the IHRAR's suggestion that greater Parliamentary engagement with human rights issues generally could be secured

[27] (Joint Committee on Human Rights evidence session on Human Rights Act reform (26 January 2022) <https://committees.parliament.uk/oralevidence/3438/pdf/> accessed 7 March 2022.)

through an enhanced role for the Joint Committee on Human Rights.[28] However, as noted above, if the Government really wishes Parliament to play a more active role in engaging with, and scrutinising, human rights issues, then it is essential that sufficient Parliamentary time is scheduled to enable it to do so.

36. Finally, in relation to question 14, we do not object to the creation of a new database for recording judgments which rely on section 3 in interpreting legislation. Such a database would be a useful tool for the purposes of understanding how section 3 is being applied in practice. As explained above, this is precisely the type of rigorous empirical analysis which the Government should have undertaken before formulating any proposals for the repeal or reform of section 3.

Declarations of incompatibility

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

37. The courts already enjoy a broad discretionary power to set aside secondary legislation which is incompatible with the Convention. The evidence reviewed by the IHRAR gave little indication that this power is being exercised inappropriately, and the Panel concluded that *"the overall picture is one of caution and respect for the differing institutional competences of Government and the Courts, telling against any imbalance in the Constitution"*.[29] To the extent that the Government's proposal seeks to replace the courts' existing discretionary power to quash secondary legislation with a more restricted power to grant a declaration of incompatibility (consultation, paragraph 250), we oppose it as unnecessary and likely to weaken rights protection in the UK.

Extraterritorial jurisdiction

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

38. The IHRAR has given much consideration to the issue of extraterritorial jurisdiction, and the panel has concluded that its expansion is 'troublesome', with the living instrument principle not being capable of applying. Their recommended option is public debate and Governmental engagement with Convention States on reforming this issue.[30] This highlights the fact that the UK cannot unilaterally change its approach without creating a dichotomy of approach between the HRA and the

[28] The Independent Human Rights Act Review - Executive Summary, op cit, paragraph 44.
[29] The Independent Human Rights Act Review - Executive Summary, op cit, paragraph 69.
[30] IHRAR, p. 388.

Convention, which the Equalities and Human Rights Commission rightly describes as setting an 'unwelcome precedent', with those seeking remedies for violations committed extraterritorially having to go directly to the ECtHR.[31]

39. It should be noted that the extra-territorial application of the ECHR is not unprecedented, with the Human Rights Committee having interpreted the jurisdiction of the ICCPR as arising when a State exercises 'power' or 'effective control'.

40. Any movement on this issue cannot be viewed in a vacuum, with other notable commentators identifying that any governmental attempts to 'water down the UK's responsibility over people outside their territorial boundaries must also be seen alongside proposals in the Nationality and Borders Bill, currently going through Parliament, to provide for offshore processing of asylum claims.'[32] Furthermore, the Overseas Operations Act enacted a limitation period of six years for those (excluding members of the armed forces) bringing a claim against the UK government for breaches of human rights law overseas. As such, we do not recommend that any changes are made to the current approach.

41. As we stated in our response to the IHRAR, the HRA was designed to "bring rights home" and provide a remedy for people domestically where one would be available at the ECtHR. The judges in *Al-Skeini* decided that it should therefore apply to the acts of public authorities outside the territory of the UK in the same exceptional circumstances in which Article 1 ECHR, which requires that member states secure Convention rights to those within their jurisdiction, has been held to apply beyond member states' territories.[33]

42. The implications of this approach are that, in line with the ECtHR's case law, the HRA primarily applies to UK territory; however, it will *exceptionally* apply to the acts of UK public authorities outside the UK's territory where the state exercises "effective control" over an *area*, and where there is *state agent authority and control* over individuals.

43. Thus, in *Al-Skeini*, where the UK had assumed authority and responsibility for the maintenance of security in Basra and exercised authority and control over individuals through its soldiers engaged in security operations, the ECtHR determined that those killed in the course of those operations were within the Article 1 jurisdiction of the UK.[34]

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[31] ibid, p. 373.
[32] Joint Committee on Human Rights evidence session on Human Rights Act reform (9 February 2022) p. 12 <https://committees.parliament.uk/oralevidence/3436/pdf/> accessed 7 March 2022; Liberty's short guide to responding to the consultation on Human Rights Act Reform, p. 17 <https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-HRA-consultation-tip-sheet-Feb-22.pdf> accessed 7 March 2022.
[33] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 AC 153, at [150].
[34] *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 at [133]-[140]. The Supreme Court recently referenced these two recognised bases of extraterritorial jurisdiction in *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; [2020] 2 WLR 857 at [25].

44. The current approach, whereby the extraterritorial scope of the HRA is coextensive with that of Article 1 ECHR, is beneficial for a number of reasons:

    a. Firstly, as well as protecting the fundamental rights of non-nationals in the exceptional circumstances outlined above, such an approach plays an important role in protecting the rights of British military personnel who are serving abroad. This was demonstrated in the 2013 Supreme Court case of *Smith and Others,*[35] which arose out of the deaths of British soldiers during a military operation in Iraq; the deaths occurred as a result of the soldiers being required to patrol in lightly armoured vehicles, which provided inadequate protection against improvised explosive devices. In determining the extraterritorial scope of the HRA, the Supreme Court interpreted and applied the prevailing Strasbourg case law on the scope of Article 1, and the UK's jurisdiction was found to extend to securing the protection of the soldiers' Article 2 right to life when they were serving outside of UK territory. Thus, by following the current approach, the soldiers' fundamental rights were protected in this case.

    b. Secondly, the current approach allows the UK to make its own unique contribution to the development of fundamental rights in this area. The ECHR has been described as a "living instrument", which is constantly evolving as the ECtHR is confronted with new cases. Whilst our courts do, and should, take stock of these evolutions in human rights protections, they are nevertheless given the latitude to decide how best to interpret and apply ECHR rights and case law in the matters that arise before them domestically. This allows our courts to play a central role in the shaping of human rights norms in relation to the extraterritorial scope of human rights, being guided by the latest developments at the ECtHR without being obliged to blindly adhere to them.

    c. Thirdly, as mentioned above, the current approach is beneficial for the reputation of the UK. As underscored by the Court in *Al-Skeini*, the HRA was designed to bring rights home and provide a domestic remedy where one would be available at the ECtHR. If applicants fail to receive a remedy in UK courts for violations of their human rights by the acts of public authorities outside the UK's territory, they will still have the potential to receive a remedy at the ECtHR, and it could tarnish the UK's strong record of protecting fundamental rights if our domestic law and court rulings on the extraterritorial scope of human rights were persistently found to be in breach of Convention rights.

45. All things considered, the HRLA is of the view that there is not a strong case for seeking to alter how the HRA applies to acts of public authorities beyond the territory of the UK. It is only in exceptional circumstances that the HRA will apply to such acts, and the current approach has been shown to protect the rights of non-nationals within our jurisdiction in those circumstances as well as those of British military

[35] *Smith and Others v The Ministry of Defence* [2013] UKSC 41; [2014] AC 52.

personnel serving abroad. It also permits our courts to make a unique contribution to fundamental rights and protects the global reputation of the UK as a nation which promotes and respects human rights.

Remedies and the wider public interest

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

a. the impact on the provision of public services;

b. the extent to which the statutory obligation had been discharged;

c. the extent of the breach; and

d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

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

46. The IHRAR Terms of Reference did not invite consideration of the current approach to judicial remedies under section 8 of the HRA, nor did the IHRAR make any recommendation to reform section 8. The consultation itself does not make out a case for reform. We do not consider there to be a need to depart from the approach provided by section 8 of the HRA, which permits damages to be awarded as a discretionary remedy only where *"taking account of all the circumstances of the case, [...] the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made".*[36]

47. We believe that the court should continue to have *"wide discretion in respect of the award of damages for breach of human rights"*[37] and its existing power to undertake a flexible and holistic assessment should not be constrained in any way. Where an award of damages is necessary to afford just satisfaction, the court should not be prevented from making such an award by the *"impact on the provision of public services"* or because *"the public authority was trying to give effect to the express provisions, or clear purpose, of legislation"*. We also believe that it would be impractical to require a court to undertake a financial assessment of the effect that an award of damages would have on a public authority's ability to discharge its obligations, and that this would not constitute a good use of judicial resources.

48. Since at present, damages are only awarded where necessary to achieve just satisfaction, the Government's assessment that *"[t]he new factors in determining how*

[36] Human Rights Act 1998, s 8(3)
[37] *Anufrijeva v London Borough of Southwark* [2004] 2 WLR 603, [2003] EWCA Civ 1406 at [56].

damages are awarded may remove or reduce the awarded damages, leading to savings for government departments and other public bodies"[38] implies that the new framework envisaged will no longer provide for just satisfaction, which we consider plainly unacceptable. We are also particularly concerned by the Government's assessment that "*[t]he potential reduction in compensation awards could lead some litigants to decide no longer to pursue their claims, resulting in cost savings for the courts'* and characterisation of this as one of the proposals*' "potential benefits for justice and public authorities"*.[39] While it should be noted, as Schona Jolly QC stated in evidence to the Joint Committee on Human Rights, that damages are *"in general, extremely low in Human Rights Act claims"*,[40] we believe that reform which would disincentivise individuals from vindicating their rights would undermine and not benefit justice.

49. The best way of realising the Government's aspiration *"to make sure that the wider public interest is properly protected alongside individuals' rights"*,[41] which underpins the proposal in Question 26, is for public authorities to act in a way which is compatible with human rights. It is disappointing that the Government has not introduced proposals to act upon the IHRAR recommendation *"that serious consideration is given by Government to developing an effective programme of civic and constitutional education in schools, universities and adult education in this consultation"*,[42] which could contribute to fostering understanding of and respect for human rights in public bodies.

50. As observed by the Court of Appeal, it is already a feature of the existing approach to damages under the Human Rights Act that *"[i]n considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole"*.[43] The White Paper *Rights Brought Home: The Human Rights Bill* explicitly addressed this: *"A public authority which is found to have acted unlawfully by failing to comply with the Convention will not be exposed to criminal penalties. But the court or tribunal will be able to grant the injured person any remedy which is within its normal powers to grant and which it considers appropriate and just in the circumstances. What remedy is appropriate will of course depend both on the facts of the case and on a proper balance between the rights of the individual and the public interest. In some cases, the right course may be for the decision of the public authority in the particular case to be quashed. In other cases, the only appropriate remedy may be an award of damages"* (emphasis added).[44]

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[38] Consultation, p. 103 at [5].
[39] ibid, p. 102 at [5].
[40] Schona Jolly QC, Joint Committee on Human Rights evidence session on Human Rights Act reform (9 February 2022) <https://parliamentlive.tv/Event/Index/80cd5f38-fc2b-4a43-84f3-afdc1645aa5d> accessed 27 February 2022.
[41] Consultation, p. 83 at [299].
[42] IHRAR, p. 21.
[43] *Anufrijeva v London Borough of Southwark* [2004] 2 WLR 603, [2003] EWCA Civ 1406 at [56].
[44] *Rights Brought Home: The Human Rights Bill* (CM 3782, 1997) at [2.6] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf> accessed 7 March 2022.

51. Indeed, the High Court has acknowledged that *"[a]n over-arching principle found in Strasbourg case law (and reflected in section 8 HRA) is that of flexibility which means looking at all of the circumstances and "the overall context""*, which *"includes bearing in mind "moral damage" and the "severity of the damage""*.[45] In line with the Strasbourg approach, the High Court has recognised that *"whether the violation was deliberate and/or in bad faith"*[46] and *"whether the violation was systemic or operational"*[47] may be *"factors of potential relevance"*.[48] Accordingly, there is no need for reform to place potential factors for consideration such as *"the extent to which the statutory obligation had been discharged"*, *"the extent of the breach"*, and *"where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation"* on the face of legislation.

52. Moreover, section 6 of the HRA already addresses the latter by providing that *"[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right*",[49] but that this does not apply if *"as the result of one or more provisions of primary legislation, the authority could not have acted differently"*[50] or "*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"*.[51] Since section 8 of the HRA makes provision for damages to be awarded "*for an unlawful act of a public authority*" and "*unlawful"* is defined as meaning *"unlawful under section 6(1)",*[52] a breach which falls within the scope of section 6(2) does not qualify for damages under section 8.

53. We oppose these proposals and strongly disagree that *"where cases are brought against public authorities, the courts should have a responsibility to consider the impact of the award of a remedy on the public authority's ability to discharge its mandate"*.[53] We urge that the current approach provided by section 8 of the HRA be maintained.

Emphasising the role of responsibilities within the human rights framework

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

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[45] *DSD v The Commissioner of Police for the Metropolis* [2015] 2 All ER 272, [2014] EWHC 2493 (QB) at [36].
[46] ibid, at [40].
[47] ibid.
[48] ibid.
[49] Human Rights Act, s 6(1)
[50] ibid, s 6(2)(a)
[51] ibid, s 6(2)(b)
[52] ibid, s 8(6).
[53] ibid.

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

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

54. We do not see a need for these proposals and strongly object to them. At the outset, we highlight the fundamental principle that all are entitled to human rights protection: the ECHR imposes an obligation on contracting states to secure the rights and freedoms defined in Section I of the Convention—which include the right to an effective remedy[54]—*"to everyone within their jurisdiction"*.[55] We emphasise that human rights law primarily exists to allow individuals to enforce their rights against the state, rather than to govern the behaviour of individuals, although, of course, many of the Articles in the ECHR include limitations on the rights of individuals in so far as they are necessary to protect other individuals or the wider community. This is a fundamental feature of the international human rights law framework.

55. We do not see a need to depart from the current approach to the grant of remedies under section 8 of the HRA to *"re-focus when remedies are provided under the Bill, including by expressly considering the wider behaviour of a claimant in light of their responsibilities to society"*,[56] as the Government proposes to do in the new Bill of Rights. Section 8(1) of the HRA already permits a court to *"grant such relief or remedy, or make such order, within its powers as it considers just and appropriate"*, such that legislative change *"to build an element of responsibility explicitly into the Bill of Rights by permitting UK courts to consider the claimant's conduct in deciding whether or not to award a remedy"*[57] is unnecessary. Moreover, we emphasise again that damages constitute a discretionary remedy under section 8 of the HRA, which provides that *"[n]o award of damages is to be made unless, taking account of all the circumstances of the case, [...] the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made."*[58]

56. Whilst the consultation acknowledges that *"everyone holds human rights whether or not they undertake their responsibilities"*,[59] the stated aim of *"clearly linking the remedies available under the Bill of Rights to how the claimant has lived by its underlying principles"*[60] so that *"courts will be expressly guided to think critically about the redress they offer and avoid rewarding undeserving claimants"*[61] suggests a concerning shift away from a conception of human rights as universal towards a framework in which certain people are presumed to be undeserving of an award of damages as redress for an unlawful act of a public authority. We strongly oppose any

[54] European Convention on Human Rights, Article 13.
[55] ibid, Article 1.
[56] Consultation, p. 84 at [305].
[57] ibid, p. 85 at [307].
[58] Human Rights Act 1998, s 8(3)
[59] Consultation, p. 84 at [302].
[60] ibid, p. 85 at [308].
[61] ibid, p. 7 at [9].

such presumption or principle, which would weaken human rights protection as well as the incentive for public authorities to act lawfully towards all. Whilst the ECtHR has in particular circumstances considered it inappropriate to award damages in light of applicants' conduct,[62] there is rightly no general principle that *"undeserving claimants who may themselves have infringed the rights of others"* should necessarily be precluded from entitlement to damages. The discretion of our courts to make a nuanced determination of what is required on the specific facts of a case should not be circumscribed.

57. The IHRAR Terms of Reference made no reference to reforming UK human rights law by *"emphasising the role of responsibilities within the human rights framework"*[63] and did not invite consideration of whether there is a case for change in this regard. The IHRAR's only recommendation citing the concept of individual responsibility—that *"serious consideration is given by Government to developing an effective programme of civic and constitutional education in schools, universities and adult education'* which '*should, particularly, focus on questions about human rights, the balance to be struck between such rights, and individual responsibilities"*[64]—was made in a context far removed from the determination of remedies for public authorities' unlawful acts. The IHRAR explicitly acknowledged that *"questions about the difficult balances human rights questions often require, and of individual responsibilities"* are *"well outside the scope of IHRAR"*.[65] The IHRAR therefore does not provide any foundation for the proposals outlined in question 27.

58. Notwithstanding the absence of a case for change in the IHRAR, the consultation does not ask *whether* the proposed *'Bill of Rights should include some mention of responsibilities and/or the conduct of claimants'* and if so, *whether* this should pertain to remedies. Instead, it proposes two predetermined options for doing so, narrowly framing the consultation on this matter as a question of which of the two is preferable. We do not see a benefit to either option, object to the notion that courts should be guided to *"avoid rewarding undeserving claimants"*,[66] and strongly oppose these proposals.

[62] *McCann v United Kingdom* [1995] 21 EHRR 1997.
[63] ibid, p. 56.
[64] IHRAR, p. 21.
[65] ibid, p. 20.
[66] ibid, page 7 at [9].

Details requested in consultation paper

I request that the Government keeps my submission anonymous, and does not reveal my personal information in any published materials about the consultation and its future work on this issue.	☐
Full Name:	Human Rights Lawyers Association
Type of organisation or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.) Delete where appropriate	- Associations - Human Rights Organisation
Date:	8 March 2022
What region are you in? Delete where appropriate	- Other - We are UK-based and our membership and Executive Committee are drawn from around the UK.
Company name / organisation: **(If applicable)**	Human Rights Lawyers Association
Address: **Including postcode**	[Post Only] 4-7 Salisbury Court London, EC4Y 8AA
If you would like us to acknowledge receipt of your response, please state yes: (Delete if you do not wish to have your response acknowledged)	☑ **YES** – I would like the Ministry of Justice to send a receipt of acknowledgement of this response.
Address to which the acknowledgement should be sent, if different from above: (We recommend using an email address)	administrator@hrla.org.uk
If you are a representative of a group, please tell us the name of the group and	The HRLA is an independent, specialist lawyers' association that deals exclusively with human rights law. Members of the

give a summary of the people or organisations that you represent.	Association include solicitors, barristers, judges, government lawyers, legal academics, legal executives, in-house lawyers, pupils, trainees and law students.

Should you wish to discuss any aspect of this submission with a member of the HRLA, we can be contacted by emailing: administrator@hrla.org.uk.